Before the
STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 07 PPD 310

In the matter of

Patrick Banyaniye
Complainant

v. DECISION AND ORDER

Mi Sueno, Inc. and Jesus M. Titin
Respondents

INTRODUCTION

On June 26, 2007, Patrick Banyaniye (hereafter referred to as the complainant) filed a charge against Mi Sueno, Inc. and Jesus M. Titin (hereafter referred to as the respondents) with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission). The charge alleged that the respondents discriminated against the complainant with respect to securing access to and/or the services of a public accommodation because of his need to use assistive walking devices due to his physical disability. The charge was investigated. On November 29, 2007, Preliminary Investigating Commissioner Nancy Kolman Ventrone assessed the information gathered by a staff investigator and ruled that there was probable cause to believe that the respondents violated the Hotels and Public Places Act, Title 11, Chapter 24 of the General Laws of Rhode Island (hereafter referred to as the HPPA), the Civil Rights of People with Disabilities Act, Title 42, Chapter 87 of the General Laws of Rhode Island (hereafter referred to as the PDA) and the Equal Rights of Blind and Deaf Persons to Public Facilities Act, Title 40, Chapter 9.1 of the General Laws of Rhode Island (hereafter referred to as the ERFA) with respect to the allegations in the charge. On April 11, 2008, a complaint and notice of hearing issued. The complaint alleged that the respondents had denied the complainant access to and/or the services of a public accommodation because of his disability in violation of the HPPA, the PDA and the ERFA.

A hearing was held on the complaint on August 14, 2008 before Commissioner Camille Vella-Wilkinson. All parties were in attendance at the hearing and represented by counsel.

At the commencement of the hearing, the complainant filed a Motion for Default Judgement on the grounds that the respondents had not filed an answer to the Complaint or a request for

extension of time to file an answer. The respondents objected to the Motion. The parties made oral arguments to Commissioner Vella-Wilkinson. At the close of the arguments, Commissioner Vella-Wilkinson ruled that: "… the motion has been denied, however, … since [the respondents] did not provide any information with regards to additional defenses other than factual, [the respondents] will not be able to present anything other than factual defenses during the course of this hearing". Trans. p. 15.

On August 20, 2008, the respondents filed a proposed Order and Answer to the Complaint. On August 29, 2008, the complainant filed an Objection to Proposed Order and submitted his own proposed Order. On September 11, 2008, the respondents filed an Objection. On October 1, 2008, the Commission issued a Decision on Proposed Order and Answer to Complaint. The Commission determined that it would not adopt either of the proposed Orders submitted by the parties; the Commission's ruling was noted in the record. The Commission further ruled that it would not accept into the record a proposed Answer filed by the respondents after the hearing concluded.

On October 31, 2008, the complainant filed the Complainant's Memorandum of Law. On October 31, 2008, the respondents filed a Closing Statement. On December 2, 2008, the complainant filed Complainant's Reply to Respondent's Post-Hearing Memorandum.

JURISDICTION

The respondent, Mi Sueno, Inc. is a corporation which operates a public accommodation as defined in R.I.G.L. Section 11-23-3 and therefore it is subject to the jurisdiction of the Commission under the HPPA, the PDA and the ERFA. Jesus Titin, at the time in question, was the President of Mi Sueno, Inc. and the manager of the restaurant/nightclub, Mi Sueno, and therefore he is subject to the jurisdiction of the Commission under the HPPA, the PDA and the ERFA.

FINDINGS OF FACT

1. Mi Sueno, Inc. operates a restaurant/nightclub which provides entertainment and is open to the public. The restaurant/nightclub, which operates under the name of Mi Sueno, is located at 1070 Broad Street, Providence, Rhode Island. (The restaurant/nightclub will be referred to as Mi Sueno in this Decision.) Mi Sueno is a dance venue. Mr. Titin is the President of Mi Sueno, Inc. He testified that he is the owner and manager of Mi Sueno. Trans. p. 60.

2. Mi Sueno was a public accommodation at the time of the events in question.

3. The complainant has a physical impairment of his leg which significantly limits his ability to walk. He has had this impairment for over sixteen (16) years. Without his crutches, he cannot walk. The complainant has a physical disability.

4. The complainant does not attempt to move around by utilizing the physical assistance of others, instead of his crutches, as it is his opinion that this is unsafe. The complainant has moved with the assistance of others, without his crutches, only on a few occasions when he was ill.

5. The complainant went to Mi Sueno on April 7, 2007 to go dancing with friends. Mi Sueno was relatively close to their homes. When they arrived at Mi Sueno, the complainant and other patrons were searched, including a search of their shoes. Mi Sueno employees conducted two searches of the patrons. The complainant passed both searches and paid for entrance.

6. As the complainant was entering Mi Sueno, Mr. Titin stopped him and told him that he could not come into the club with crutches. Mr. Titin said that the complainant's crutches could be used as weapons. The complainant said that he had been there before without issues. There were other patrons in the vicinity, waiting to enter Mi Sueno when Mr. Titin was speaking to the complainant. The complainant left the club without his friends. The complainant told one of his friends that he was leaving and urged his friend not to leave with him.

7. If the complainant did not have his crutches with him in Mi Sueno, he would not be able to walk, dance, obtain refreshment or exit by himself. Being without his crutches makes the complainant feel unsafe.

8. The respondents' actions made the complainant upset. After his conversation with Mr. Titin, the complainant felt embarrassed. He felt that he had been discriminated against, the first time that he had been in a situation like that. Before that, he had always had access to public places with his crutches. He no longer feels the same confidence when he goes out with his friends. Sometimes this lack of confidence causes him to refuse to go out to clubs with his friends. Sometimes, he travels to clubs in Connecticut because he is concerned that the same sort of incident might happen in clubs in Rhode Island.

9. Mi Sueno is open as a restaurant during the day and as a nightclub on Friday, Saturday and Sunday nights. On April 7, 2007, the club was playing Reggaeton music. Mr. Titin testified that the people who come to hear Reggaeton music "party hard" and "sometimes they go out of control". Trans. pp. 77-78. On April 7, 2007, Mr. Titin removed pool cues, pool balls and chairs from the club. Mi Sueno does not allow patrons to bring knives into the club. He does not restrict purses, regardless of weight. On April 7, 2007, Mr. Titin paid the cost of having two police officers detailed outside the club. On that night, he also had ten bouncers. Two of the bouncers conducted searches of the patrons before they entered. One checked identification and ensured that patrons paid the entrance fee. Two bouncers were stationed at inside exit doors. Five bouncers moved around the club to check the operation.

10. On prior occasions, when the complainant was allowed access to Mi Sueno with his crutches, he did not cause problems.

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CONCLUSIONS OF LAW

The respondents discriminated against the complainant because of his physical disability with respect to the access to and the services and facilities of a public accommodation.

DISCUSSION

I. THE STATUTES IN QUESTION APPLY IN THESE CIRCUMSTANCES

The complaint alleges violations of three laws, the HPPA, the PDA and the ERFA. The Commission finds that all three laws apply to the circumstances presented.

A. THE PROVISIONS OF THE HPPA APPLY IN THESE CIRCUMSTANCES

The HPPA provides in relevant part that:

> No person, being the owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation, resort, or amusement shall directly or indirectly refuse, withhold from, or deny to any person on account of … disability …, any of the accommodations, advantages, facilities, or privileges of that public place….

R.I.G.L. Section 11-24-2.

A public accommodation is defined in the HPPA, in relevant part, as follows:

> A "Place of public accommodation, resort, or amusement" within the meaning of §§ 11-24-1 – 11-24-3 includes, but is not limited to: … (2) restaurants, eating houses or any place where food is sold for consumption on the premises; (3) buffets, saloons, barrooms, or any stores, parks, or enclosures where spirituous or malt liquors are sold; (4) … all stores where … beverages of any kind are retailed for consumption on the premises; (5) … music halls …. Nothing in this section shall be construed to include any place of accommodation, resort, or amusement which is in its nature distinctly private.

R.I.G.L. Section 11-24-3.

Mi Sueno is a restaurant, a place where spirituous liquors are sold, a place where beverages are sold for consumption on the premises and a music hall. It is open to the public. The respondents operate a public accommodation. Mr. Titin is the manager of the public accommodation.

The HPPA defines disability as follows:

> ….
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> (b) "Disability" means any person who: (1) has a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment; and (4) is otherwise qualified; provided, that whether a person has a disability shall be determined without regard to the availability or use of mitigating measures, such as reasonable accommodations, prosthetic devices, medications or auxiliary aids.
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> (c) "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; ….
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> (d) "Major life activities" means functions such as … walking, ….
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> ….
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> (f) "Regarded as having an impairment" means has a physical or mental impairment that does not substantially limit major life activities but that is treated as constituting a limitation, has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of those toward the impairment, or has none of the impairments but is treated as having an impairment.
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> (g) "Otherwise qualified" means a disabled person who meets the essential eligibility requirements for participation in or receipt of benefits from the program or activity.

R.I.G.L. Section 11-24-2.1.

The complainant presented credible evidence that he has a long-term physical impairment of his leg which substantially limited him in walking. The complainant proved that he had a disability as defined under the HPPA.

The HPPA prohibits the respondents from discriminating against the complainant on the basis of disability with respect to the facilities and accommodations of Mi Sueno and therefore applies in the circumstances of this case.

B. THE PROVISIONS OF THE ERFA APPLY IN THESE CIRCUMSTANCES

The ERFA provides in pertinent part that:

> (a) Persons who are blind, … and otherwise disabled have the same rights as the able-bodied to the full and free use of the streets, highways, walkways, public buildings, public facilities and other public places.
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> (b) Persons who are blind, … and otherwise disabled are entitled to full and equal accommodations, advantages, facilities and privileges … in places of public resort, accommodation, assemblage or amusement, not limited to … restaurants … and in all other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons.
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> …

R.I.G.L. Section 40-9.1-1

The ERFA provides that charges may be made at the Commission alleging that: " any person, agency, bureau, corporation or association, hereinafter referred to as "the respondent", has violated or is violating any of the provisions of this chapter". R.I.G.L. Section 40-9.1-4. It further provides that the Commission is directed "to prevent any person from violating any of the provisions of this chapter…". *Id.*

The ERFA is a concise statute. For example, it does not have its own definition of "disability". The Commission will construe it to follow the provisions of the HPPA with respect to the definition of disability. *See* Such v. State, 950 A.2d 1150, 1156 (R.I. 2008):

> It is an equally well-settled principle that "statutes relating to the same subject matter should be considered together so that they will harmonize with each other and be consistent" with their general objective scope. State ex rel. Webb v. Cianci, 591 A.2d 1193, 1203 (R.I. 1991); *see also* Horn v. Southern Union Co., 927 A.2d 292, 295 (R.I. 2007). Such statutes are considered to be *in pari materia,* which stands for the simple proposition that "statutes on the same subject * * * are, when enacted by the same jurisdiction, to be read in relation to each other." Horn, 927 A.2d at 294 n.

5 (quoting Reed Dickerson, *The Interpretation and Application of Statutes* 233 (1975)).

See also Horn v. Southern Union Co., 927 A.2d 292, 294-295 (R.I. 2007), which held that: "Since both the FEPA and the RICRA expressly deal with the subject of employment discrimination, in our view it is entirely appropriate to read the two statutes as being *in pari materia*- i.e. as necessitating that they "be read in relation to each other." [Footnote omitted.]

Therefore, since the Commission has found that the complainant proved that he had a disability as defined in the HPPA, the Commission finds that the complainant has proved that he is "otherwise disabled" under ERFA.

The respondents are prohibited by ERFA from discriminating against the complainant with respect to the facilities and accommodations of Mi Sueno on the basis of the complainant's disability. The ERFA, therefore, applies in this case.

C. THE PROVISIONS OF THE PDA APPLY IN THESE CIRCUMSTANCES

The PDA provides that: "No otherwise qualified person with a disability shall, solely by reason of his or her disability, be subject to discrimination by any person or entity doing business in the state; …". R.I.G.L. Section 42-87-2.

R.I.G.L. Section 42-87-1 defines "disability" and "otherwise qualified person" as follows:

> As used in this chapter:
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> (1) "Disability" means any impairment as defined in subdivision (8); provided, however, that whether a person has a disability shall be determined without regard to the availability or use of mitigating measures, such as reasonable accommodations, prosthetic devices, medications or auxiliary aids.
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> …
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> (4) "Is regarded as having an impairment" means:
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> (i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated as constituting a limitation; or
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> (ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward the impairment; or

(iii) Has none of the impairments defined in subdivision (8) of this section but is treated as having an impairment.

(5) "Major life activities" means functions such as caring for one's self, … walking, …..

(6) "Otherwise qualified" means:

(i) With respect to employment, a person with a disability who, with reasonable accommodations, can perform the essential functions of the job in question;

(ii) With respect to the rental of property, a person with a disability who, personally or with assistance arranged by the person with a disability, is capable of performing all of the responsibilities of a tenant as contained in § 34-18-24;

(iii) With respect to any other program or activity, a person with a disability who meets the essential eligibility requirements for participation in, or receipt of, benefits from the program or activity; and

…

(7) "Person with a disability" means any person who:

(i) Has a physical or mental impairment which substantially limits one or more major life activities; or

(ii) Has a record of an impairment; or

(iii) Is regarded as having an impairment.

(8) "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; ….

The definition of disability in the PDA is virtually identical to the definition in the HPPA. The complainant has proved that he has a disability according to both definitions. The complainant is "otherwise qualified" as a patron of Mi Sueno in that he passed two security screenings and paid for entrance. Mr. Titin did not have any problems with the complainant when the complainant had previously been a patron of Mi Sueno.

The respondents are doing business in Rhode Island, the complainant is an otherwise qualified person with a disability and therefore the respondents are prohibited by the PDA from discriminating against the complainant because of his disability.

II. THE RESPONDENTS DISCRIMINATED AGAINST THE COMPLAINANT BECAUSE OF HIS DISABILITY IN VIOLATION OF THE APPLICABLE CIVIL RIGHTS LAWS

Having concluded that the statutes cited in the complaint are applicable to the facts of this case, the Commission now turns to the central question of whether the respondents violated those statutes as alleged.

A. THE RESPONDENTS DENIED THE COMPLAINANT ACCESS TO MI SUENO ON THE BASIS OF HIS DISABILITY

The respondents refused to allow the complainant to enter Mi Sueno with his crutches. Since the complainant had no reasonable method for entering Mi Sueno without his crutches, the respondents denied him reasonable means of access to their public accommodation.

The respondents' actions violate the HPPA, which provides that:

> No person, being the owner, … proprietor, manager, …. agent, or employee of any place of public accommodation, resort, or amusement shall directly **or indirectly** refuse, withhold from, or deny to any person on account of … disability …, any of the accommodations, advantages, facilities, or privileges of that public place ….

R.I.G.L. Section 11-24-2. [Emphasis added.] Forbidding the complainant from utilizing his crutches was directly and indirectly withholding the accommodations, advantages, facilities and privileges of Mi Sueno from the complainant.

The respondents' actions violated the ERFA, which provides in relevant part that:

> Persons who are blind, … and otherwise disabled are entitled to full and equal accommodations, advantages, facilities and privileges … in places of public resort, accommodation, assemblage or amusement, not limited to … restaurants … and in all other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons.

R.I.G.L. Section 40-9.1-1(b).

There was no condition or limitation established by law which prohibited people from entering places of public accommodation with crutches. The respondents denied the complainant, a person who is "otherwise disabled", equal accommodations, advantages, facilities and privileges of a public accommodation, in violation of the ERFA.

The respondents' actions violated the PDA which provides in relevant part that:

> The discriminatory acts prohibited by § 42-87-2 include, but are not limited to, the following activities:
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> (1) Notwithstanding any law to the contrary, no person or entity licensed or regulated by the state, or … doing business within the state, shall:
>
> (i) Deny an otherwise qualified person with a disability the opportunity to participate in or benefit from any aid, benefit or service;
>
> (ii) Afford an otherwise qualified person with a disability an opportunity to participate in or benefit from any aid, benefit, or service that is not equal to that afforded others;
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> (iii) Provide an otherwise qualified person with a disability with an aid, benefit, or service that is not as effective as that provided to others;
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> (iv) Provide different or separate aid, benefits, or services to otherwise qualified persons with a disability or to any class of otherwise qualified persons with a disability unless that action is necessary to provide otherwise qualified persons with a disability with aid, benefits, or services that are as effective as those provided to others;
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> …
>
> (vii) Otherwise limit an otherwise qualified person with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.
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> …
>
> (5) No qualified individual with a disability, as defined in the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., nor any individual or entity because of a known relationship or association with an individual with a disability shall be:
>
> (i) Discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation or commercial facilities covered by the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.;
>
> …

> (6) The application, exemptions, definitions, requirements, standards, and deadlines for compliance with subdivision (5) shall be in accordance with the requirements of the Americans with Disabilities Act, 42 U.S.C., § 12101 et seq. and the federal regulations pertaining to the Act, 28 CFR 36, 28 CFR 35, and 29 CFR 1630.

R.I.G.L. Section 42-87-3.

The respondents denied the complainant the opportunity to participate in their services and they limited him in his ability to access and fully enjoy their services, actions prohibited by R.I.G.L. Section 42-87-3.

As cited in R.I.G.L. Section 42-87-3(5) and (6), the prohibitions against discrimination in public accommodations contained in the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (hereafter referred to as the ADA) are integrated into the PDA. The complainant provided credible evidence of a violation of the ADA. *See* Marques v. Harvard Pilgrim Healthcare of New England, Inc., 883 A.2d 742, 748 (R.I. 2005) which holds that a plaintiff makes a prima facie case of a violation of the public accommodations portion of the Americans with Disabilities Act by proving:

> "1) that he or she is an individual with a disability; 2) that defendant is a place of public accommodation; and 3) that defendant denied him or her full and equal enjoyment of the goods, services, facilities or privileges offered by defendant on the basis of his or her disability." Larsen v. Carnival Corp., 242 F.Supp.2d 1333, 1342 (S.D.Fla.2003); *see also* Schiavo ex. rel. Schindler v. Schiavo, 358 F.Supp.2d 1161, 1165 (M.D.Fla.), *affd*, 403 F.3d 1289 (11th Cir.2005).

The complainant has proved that he has a disability, that the respondents own and manage a public accommodation and that the respondents denied him the full and equal enjoyment of the goods, services, facilities and privileges of that public accommodation on the basis of his disability. The complainant established a prima facie case of public accommodations discrimination under the ADA and therefore established a prima facie case of a violation of the PDA.

As will be discussed more fully below, the respondents did not establish a viable defense to the complainant's allegations. The complainant proved violations of the HPPA, the ERFA and the PDA.

B. THE RESPONDENTS' EVIDENCE, EVEN IF IT WERE CREDITED, DOES NOT JUSTIFY THEIR UNLAWFUL TREATMENT OF THE COMPLAINANT

The Commission found the complainant to be a credible witness. The testimony of respondents' witnesses appeared contrived. Even if the testimony of respondents' witnesses were credited, it would not justify the respondents' disparate treatment of the complainant.

Mr. Titin and the detail officer who is often assigned to Mi Sueno testified that Mr. Titin told the complainant that he could come into the club, that he would be placed in a special section at a table with a chair along with a patron in a wheelchair, that a bouncer would be present to hold the complainant's crutches when the complainant was not using them and that the bouncer would shadow the complainant. Trans. pp. 49, 50, 72, 74-76, 84, 85. Mr. Titin testified that he informed the complainant of this because "the kind of event that I had that night I want to make sure that they didn't have anything laying around for the public safety". Trans. p. 73.

1. Segregation of people with disabilities is prohibited

The PDA specifically provides that it is unlawful to:

> (iv) Provide different or separate aid, benefits, or services to otherwise qualified persons with a disability or to any class of otherwise qualified persons with a disability unless that action is necessary to provide otherwise qualified persons with a disability with aid, benefits, or services that are as effective as those provided to others.…

R.I.G.L. Section 42-87-3(1)(iv). The respondents' purported offer to create a special section for the complainant and another patron in a wheelchair would amount to separate services for those with assistive devices. This separation would not be necessary to give the complainant effective services. Providing a special section for the complainant would be unlawful in these circumstances. *See* 28 CFR 36[1], Section 36.203(a), U.S. Department of Justice Regulations on the ADA, which provides that a public accommodation shall "afford … services, facilities, … and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual". The respondents would discriminate against the complainant if they forced him to sit in a separate section of the club with other individuals with mobility impairments.

2. The respondents' purported arrangement would not accomplish their purpose

The arrangement purportedly offered by the respondents is not logical. It would be safer, as well as less discriminatory, to allow the complainant to proceed as the other patrons did. If the complainant were not offered a chair, he would need to use his crutches at all

[1] R.I.G.L. Section 42-87-3(6) states that the R.I.G.L. Section 42-87-5 of the PDA shall be interpreted in accordance with 28 CFR 36.

times as the respondents represented that they had removed all chairs. Since he would be using his crutches at all times, the crutches would not be lying about to be used by rowdy patrons. If the respondents' scenario were followed, the bouncer would need to keep track of either the complainant's crutches (when he was seated) or the chair (when he was not seated).

Additionally, as is discussed below, the respondents did not have an articulated policy on what objects, other than actual weapons, were taken from patrons. Heavy purses, for example, were not taken. To take the complainant's crutches and leave other objects which could be used in a fight would cause great harm to the complainant without ensuring the safety of the patrons.

The purported arrangement would also leave the complainant to the mercy of the bouncer in the event of an emergency that would require the complainant to exit rapidly. In an emergency, even the most helpful bouncer might find him or herself caught in a tide of people rushing to the exits and be unable to deliver the crutches to the complainant.

The respondents' purported policy would not protect the safety of the patrons or the complainant better than allowing the complainant to move about with his crutches in the same manner as the other patrons.

3. The application of respondents' policy to the complainant's crutches was disparate treatment

As discussed above, the respondents did not have an articulated policy on what objects were taken from patrons upon entry or while they were in the club, other than actual weapons such as knives. Heavy purses were not taken from customers. ("We don't confiscate nothing except if it's a weapon like a knife …". Testimony of Mr. Titin, Trans. p. 85.) Mr. Titin did not cite anything taken from patrons other than actual weapons. Trans. pp. 87. By making the complainant's crutches inaccessible, while allowing other patrons to bring in heavy purses and other objects that are not actual weapons but could be used in a fight, the respondents applied their policy to a person with a disability in a disparate fashion.

4. The respondents' failure to file an answer precludes them from raising a defense of direct threat or a defense that they could not provide a modification of their policy without fundamentally altering the nature of the public accommodation

The respondents did not file an answer to the Complaint by the commencement of the hearing. While the Commission did not grant the complainant's Motion to Default, the Commission confined the respondents to factual defenses, defenses that would not be affirmative defenses. If a respondent wishes to raise the defense that they had a policy and that the requested modification of that policy would fundamentally alter the nature of the public accommodation, the respondent must raise that in its Answer. Johnson v. Gambrinus Company/Spoetzl Brewery, 116 F.3d 1052, 1059 (5th Cir. 1997). Similarly, the defense of direct threat is an affirmative defense. EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561 (8th Cir. 2007) (the employer had the burden to prove that an applicant who had cerebral palsy and used crutches for mobility would pose a direct threat to the safety of himself or others). Not having filed an answer by the time of the hearing, the respondents are precluded from raising those defenses.

The Commission also concludes, after review of the evidence, that such defenses would have been unavailing.

CONCLUSION

Based on all of the evidence, the Commission finds that the complainant proved that he was denied, directly and indirectly, the services of the public accommodation, Mi Sueno, because of his disability. Even if the Commission had credited the testimony of respondents' witnesses on an alleged offer to accommodate the complainant, such an offer would have been unlawful segregation of persons with disabilities and would have been less, not more, safe for the complainant and the other customers. The respondents' failure to file an answer as of the day of the hearing precluded them from raising the defense of direct threat or the defense that their policy could not be modified without fundamentally altering the nature of Mi Sueno. The complainant proved that the respondents unlawfully discriminated against him.

DAMAGES

R.I.G.L. Section 28-5-24 sets forth the remedies that the Commission can award after finding that a respondent has committed an unlawful practice.[2] R.I.G.L. Section 28-5-24(a)(1) provides as follows:

[2] R.I.G.L. Section 42-87-5(a) provides that: "the provisions of §§ 28-5-13 and 28-5-16 – 28-5-36, as to the powers, duties and rights of the commission, its members, hearing examiners, the complainant, respondent, interviewer, and the court shall apply in any

> **§ 28-5-24 Injunctive and other remedies – Compliance. –** (a) If upon all the testimony taken the commission determines that the respondent has engaged in or is engaging in unlawful employment practices, the commission shall state its findings of fact and shall issue and cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful employment practices, and to take any further affirmative or other action that will effectuate the purposes of this chapter, including, but not limited to, hiring, reinstatement, or upgrading of employees with or without back pay, or admission or restoration to union membership, including a requirement for reports of the manner of compliance. Back pay shall include the economic value of all benefits and raises to which an employee would have been entitled had an unfair employment practice not been committed, plus interest on those amounts.

The Commission therefore orders the respondents to develop and post a policy that complies with the applicable anti-discrimination laws. The respondents must train all staff, including Mr. Titin, on the requirements of the PDA, ERFA, HPPA and Title III of the ADA.

The Commission has awarded compensatory damages for pain and suffering in previous cases. The Commission has indicated that it will be guided by federal cases interpreting federal civil rights laws and the state case law on damages for pain and suffering. R.I.G.L. Section 28-5-24(b) provides that:

> (b) If the commission finds that the respondent has engaged in intentional discrimination in violation of this chapter, the commission in addition may award compensatory damages. The complainant shall not be required to prove that he or she has suffered physical harm or physical manifestation of injury in order to be awarded compensatory damages. As used in this section, the term "compensatory damages" does not include back pay or interest on back pay, and the term "intentional discrimination in violation of this chapter" means any unlawful employment practice except one that is solely based on a demonstration of disparate impact.

A good guide to evaluation of compensatory damages in discrimination cases is found in the U.S. Equal Employment Opportunity Commission (EEOC) Enforcement Guidance on "Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991", 1992 WL 1364354 (EEOC Guidance 1992) (hereafter referred to as the Enforcement Guidance). The Enforcement Guidance provides that it is EEOC's

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proceedings under this section". Similar language is contained within the HPPA (R.I.G.L. Section 11-24-4) and the ERFA (R.I.G.L. Section 40-9.1-4).

interpretation that compensatory damages are available for pecuniary and non-pecuniary losses caused by discriminatory acts. Non-pecuniary losses include damages for pain and suffering, inconvenience and loss of enjoyment in life. "Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown." Enforcement Guidance, p. 5. While "there are no definitive rules governing the amounts to be awarded," the severity of the harm and the time that the harm has been suffered are factors to be considered. Enforcement Guidance, pp. 7, 8.

In Rhode Island, the determination of the appropriate amount of compensatory damages should not be influenced by sympathy for the injured party nor should the damages be punitive. Soares v. Ann & Hope of R.I., Inc., 637 A.2d 339 (1994). The decision makers should determine the damages for pain and suffering by the exercise of judgment, the application of experience in the affairs of life and the knowledge of social and economic matters. Quince v. State, 94 R.I. 200, 179 A.2d 485 (1962). There is no particular formula to calculate damages for pain and suffering, although lawyers are free to argue that the damages should be calculated at a certain amount per day. Worsley v. Corcelli, 119 R.I. 260, 377 A.2d 215 (1977).

Damages for the pain and suffering which result from discrimination fall within a wide range. *See, e.g.*, Quiles-Quiles v. Henderson, 439 F.3d 1 (1st Cir. 2006) (reinstating a jury award of $950,000 (reduced to the statutory cap of $300,000) when there was evidence that the plaintiff was subjected to such constant ridicule about his mental impairment that it required him to be hospitalized and eventually to leave the workforce); O'Rourke v. City of Providence, 235 F.3d 713 (1st Cir. 2001) (reinstating a jury award of $275,000 where the plaintiff had endured years of sexual harassment causing insomnia, severe weight gain, depression, panic attacks and likely permanent disability); Howard v. Burns Bros., 149 F.3d 835, 843 (8th Cir. 1998) (upheld the propriety of an award of $1,000 compensatory damages to a plaintiff who proved that a co-worker "brushed" her on several occasions and made sexual remarks; the plaintiff and her husband had testified as to her emotional distress); D.B. v. Bloom, 896 F. Supp. 166 (D. N.J. 1995) (violations of the ADA and the New Jersey Law Against Discrimination found when a dentist's office, a public accommodation, denied treatment to a patient based on his disability, being HIV positive; $25,000 in compensatory damages awarded under New Jersey law as the plaintiff was subjected to delay in treatment and experienced humiliation, shame, anger, helplessness, rejection and depression).

In the circumstances of the instant case, the Commission finds that $5,000 compensates the complainant for his pain and suffering. The respondents' actions made the complainant upset. (See the testimony of the respondents' witnesses, Trans. pp. 51, 65, 75.) The complainant testified that he felt that he had been discriminated against, the first time that he had been in a situation like that. He credibly testified that he felt embarrassed and has had a lack of confidence as a result of the discrimination. At times, he travels to clubs in Connecticut because he is concerned that the same sort of incident might happen in clubs in Rhode Island. Trans. pp. 24, 26. It is evident that the complainant has suffered emotional distress at being publicly rejected and humiliated.

While his first encounter with discrimination did not destroy him, it has caused him to have a loss of confidence that has lasted a significant period of time. Based on its evaluation of the testimony relating to the complainant's emotional harm, the Commission finds that $5,000 is an appropriate award for the complainant's pain and suffering.

The Commission awards interest consistently with the method used for tort judgments. *See* R.I.G.L. Section 9-21-10(a):

> In any civil action in which a verdict is rendered or a decision made for pecuniary damages, there shall be added by the clerk of the court to the amount of damages interest at the rate of twelve percent (12%) per annum thereon **from the date the cause of action accrued**, which shall be included in the judgment entered therein….
> [Emphasis added.]

Both of the respondents participated in the unlawful acts and therefore the Commission determines that the respondents are jointly and severally liable for the damages awarded.

ORDER

I. Violations of R.I.G.L. Sections 11-24-2, 40-9.1-1, 42-87-2 and 42-87-3 having been found, the Commission hereby orders that:

A. The respondents cease and desist from all practices that violate the HPPA, the ERFA and the PDA;

B. The respondents create a written policy, to be posted prominently at Mi Sueno in a place accessible to entering patrons and distributed to all staff, within forty-five (45) days of the date of this Order, that:

1. cites the provisions of the HPPA, ERFA and PDA;
2. states that retaliation against any individual for reporting a violation of the HPPA, ERFA and PDA or assisting in an investigation of a violation is unlawful;
3. identifies at least two (2) individuals at Mi Sueno who can receive and address complaints;
4. gives the name, address, telephone number and website address of the Commission;

C. The respondents give training to Mr. Titin and all staff of Mi Sueno on the provisions of the HPPA, the ERFA, the PDA and Title III of the ADA, and provide a certification to the Commission within six (6) months of the date of this Order that the training has been completed, a

list of the people who were trained, the name and résumé of the trainer and an outline of the training provided;

D. The respondents provide the training, as described in I(C) above, annually for four additional years and, by the anniversary date of the first training, provide a certification to the Commission each year that the training has been completed, a list of the people trained, the name and résumé of the trainer and an outline of the training provided;

E. The respondents pay the complainant $5,000.00 in compensatory damages for pain and suffering together with statutory annual interest of 12% from the date the cause of action accrued, April 7, 2007, to the date the full amount is paid to the complainant;

F. The respondents are jointly and severally liable for the amounts awarded in Paragraphs I(E);

G. The respondents submit proof of payment to the complainant in accordance with the Paragraph I(E) within forty-five (45) days of the date of this Decision and Order;

II. The attorney for the complainant may file with the Commission a Motion and Memorandum for Award of Attorney's Fees no later than forty-five (45) days from the date of this Order. The respondents may file a Memorandum in Opposition no later than forty-five (45) days after receipt of the complainant's Motion. The parties' attention is directed to Morro v. Rhode Island Department of Corrections, Commission File No. 81 EAG 104-22/02 (Decision on Attorney's Fees 1982) for factors that will be generally considered by the Commission in an award of attorney's fees. If any party would like a hearing on the Motion for Award of Attorney's Fees, the party should request it in the memorandum.

Entered this [4th] day of [June], 2009.

/S/

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Camille Vella-Wilkinson
Hearing Officer

I have read the record and concur in the judgment.

/S/	/S/
_____	_____
Rochelle B. Lee Commissioner	Alton W. Wiley, Jr. Commissioner