

March 5, 2001

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION ON APPEAL OF CIVIL RIGHTS ENFORCEMENT ORDER

SUBJECT: King County Office of Civil Rights Enforcement File No. KCPA **98-06-01**

FALL CITY GRILL

Appeal of Civil Rights Enforcement Order

Location: 4050 Fall City-Carnation Road Southeast

Appellants: Fall City Grill/Maki Enterprises
Richard Maki, Marianne Nordlund, and Connie Dye
Represented by **James E. Macpherson**, Attorney At Law
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Department: Office of Civil Rights Enforcement
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EXAMINER PROCEEDINGS:

Hearing Opened: February 27, 2001
Hearing Closed: March 5, 2001

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes.
A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES/TOPICS ADDRESSED:

- Burden of proof
- Sex discrimination
- Witness credibility

SUMMARY:

The Respondents appeal is granted.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. Following a complaint filed regarding an incident alleged to have occurred on May 5, 1998, the King County Office of Civil Rights Enforcement (OCRE) issued an order on May 19, 2000 citing Richard R. Maki and Maki Enterprises, Inc., doing business as Fall City Grill, and restaurant employees Marianne Nordlund and Connie Dye for violation of KCC 12.22.030. This code provision prohibits acts of discrimination in places of public accommodation located in unincorporated King County based on race, color, religion, national origin, age, sex, marital status, parental status, sexual orientation and mental or physical handicaps. The order alleged that the Respondents discriminated against Walter Ipsen based on his sex, and against his wife, Josephine Ipsen, based on her association with her husband. It is uncontested that the Fall City Grill is a place of public accommodation located in unincorporated King County.
2. The OCRE order seeks to permanently enjoin Respondents from discriminating with respect to provision of public accommodations against the Complainants based on gender and association due to gender. It also assesses each Respondent with damages in the amount of \$1,000 apiece and requires the Respondents to each attend a one hour class in providing public accommodations in a non-discriminatory manner. On May 25, 2000, Attorney James Macpherson filed a timely appeal of the OCRE order issued to Respondents. Mr. Macpherson's appeal statement asserts that the Respondents did not discriminate against the Ipsens but rather took action in response to inappropriate behavior by Mr. Ipsen and as a consequence of Mr. Maki's need to protect his employees from a hostile work environment. A pre-hearing conference was held by the King County Hearing Examiner's Office on August 15, 2000, at which time issues were defined and briefing and discovery deadlines set.
3. A public hearing was held on the appeal on February 27 and 28, 2001. At the outset the Examiner considered an OCRE motion to exclude evidence of events occurring after Mr. Ipsen's ejection from the Fall City Grill on May 5, 1998. Respondents opposed this motion on the basis that consideration of the issue of damages required presentation of testimony describing events occurring after May 5, 1998. In the interest of economy and to avoid introduction of potentially prejudicial hearsay testimony, the motion was granted subject to the proviso that if a finding of

violation of KCC Chapter 12.22 were found, a subsequent hearing session would be convened to receive evidence relating to damages and remedies.

4. Fall City is an unincorporated rural town located in the Snoqualmie Valley near the intersection of State Route 202 with State Route 203. The Fall City Grill is a casual family restaurant, featuring a sports décor and serving a widely varied menu. It was founded in 1991 by Richard Maki and Diane Lind. Since 1995 Mr. Maki has been the sole owner. While the Grill gets a fair share of seasonal tourist traffic, its mainstay business is based on local repeat clientele. Afternoon business is slow during the winter but picks up in warm weather when nearby golf courses are busy and other sports and recreational activities are available. The Grill's business has steadily increased since its founding, including the period during which Mr. Ipsen was a regular customer.
5. Walter Ipsen lives near Fall City in the Lake Alice neighborhood and was a regular customer of the Grill from just after its opening until his expulsion on May 5, 1998. As he presented himself at the hearing, Mr. Ipsen is a thin, subdued, elderly gentleman who is unexceptional in appearance. His initial visits to Fall City Grill were also in this guise. He patronized the restaurant on Friday evenings with his wife, Josephine, as well as a few times a week in the mid-afternoon.
6. Some three or four years prior to his expulsion from the restaurant, Mr. Ipsen's mid-afternoon appearances at that venue started to change. He began to show up in male clothing with minor touches of feminine adornment, such as jewelry or makeup. Later, apparently with encouragement from co-owner Diane Lind, Mr. Ipsen took the further step of visiting the restaurant on weekday afternoons dressed entirely in women's clothing, adorned with a brown wig, nylon stockings, makeup and padded brassiere. At first his outfits were extremely conservative, perhaps even dowdy and old-fashioned, but over time Mr. Ipsen's female attire became more fashionable and colorful. According to the Respondents and their customer witnesses, Mr. Ipsen (who preferred to be called Lucille when cross-dressing) began to wear skirts above the knees, high-heeled shoes, more makeup, lower cut blouses and generally more youthful and festive apparel. At the same time, according to these witnesses, as Lucille became more comfortable in the Fall City Grill environment, his behavior became more confident, more social and more assertive.
7. Nonetheless, certain aspects of Mr. Ipsen's behavior remained consistent to the point of having an almost ritual quality to them. Unless it was unavailable, Lucille always sat on the same stool located at the corner of the horseshoe counter nearest the bussing station and facing out toward the main part of the restaurant. He always came in on a Tuesday, Wednesday or Thursday about 2:00 p.m. after the lunch hour crowd had subsided, ordered coffee and two glasses of Chardonnay, and departed at about 4:00 prior to the dinner hour rush. Lucille's visits to the Grill were communicated to the remainder of the tight-knit Fall City community by the presence in the parking lot of his rather distinctive gold Mercedes Benz coupe.
8. Lucille was described by the Respondents and their supporting witnesses as a high-maintenance customer at the Fall City Grill. By this they meant to suggest that he required an unusual degree of attention, mostly involving his desire to engage the waitresses in conversation about cross-

dressings, to show them photographs taken at cross-dressing parties and events, and to discuss women's clothing. Former waitress Connie Dye also testified that these conversations sometimes resulted in Lucille getting up from his stool and following her into the bussing station. Overall, the wait staff testified that Lucille's interaction sometimes slowed them down in the performance of their other duties, but as it was a quiet time of day, it never was raised as an issue.

9. It is evident that Lucille developed a degree of rapport with Respondent Connie Dye, who regularly worked the lunch shift, and she eventually became his favorite waitress. It also appears that Ms. Dye felt some genuine fondness for Lucille, discussed her personal life with him to some extent, and gave him her home telephone number. At some point, however, Ms. Dye became less comfortable with the relationship. In particular, she was concerned that Lucille showed too much interest in meeting her adolescent son Billy, and she also came to feel that at times his behavior at the restaurant bordered on the inappropriate. In this latter regard, she spoke about her perception that Lucille's attire was becoming more sexually suggestive, his conversations more intimate, and an awkward familiarity was beginning to develop. One incident that Ms. Dye dwelled upon occurred about 8 months prior to Lucille's exclusion from the restaurant. Lucille came to the restaurant that day wearing a black skirt, high heels and some rather unusual seamed stockings held up by a garter belt. A conversation about the stockings ensued, and Lucille followed Ms. Dye into the bussing station where he lifted his skirt to show her the top of the stocking where it connected to the garter belt. Ms. Dye testified that this incident made her feel uncomfortable, but Mr. Ipsen dismissed the incident as innocent behavior inspired entirely by the nature of the clothing.
10. Also bearing on the question of Mr. Ipsen's behavioral patterns in the role of Lucille is the testimony of the Respondents and their witnesses that Lucille boasted of taking pleasure at shocking people with his cross-dressing behavior and observing their reactions. One story describes Mr. Ipsen fishing on his dock at Lake Alice when a new neighbor showed up and asked him how he was doing. He told the neighbor that he wasn't doing well and needed to change his luck. Then he went back into his house, changed into female clothing and returned to the dock to his fishing. Though denying any intent to shock, Mr. Ipsen in his testimony confirmed the essential facts of this story.
11. As related by the Respondents, the incident precipitating the exclusion of Mr. Ipsen from the Fall City Grill occurred during the week prior to May 5, 1998, which was the day that he was actually informed he was no longer welcome at the restaurant. As described by Connie Dye, on that day Lucille came into the restaurant wearing short shorts with pantyhose and a blouse. He seated himself at the counter on his customary corner stool, but at some point turned around to face outward toward a booth located six to eight feet away. In that booth were seated two small boys and their father. The father, visibly upset, gestured to Ms. Dye to come over. When she did, he then pointed to Lucille seated on the stool and said something to the effect that he did not appreciate the view. When Ms. Dye looked over toward the stool, she saw Lucille seated there, legs apart, feet hooked onto the stool rungs, with the shape of his genitals visible through the underwear outside the pantyhose. Not wishing to create a scene, Ms. Dye simply asked Lucille to turn around and then continued with her work. According to her testimony, shortly thereafter both the offended family and Lucille departed the Fall City Grill.

12. Ms. Dye also described this incident in her March 21, 2000 sworn declaration and at her September 18, 2000 deposition. In her declaration Ms. Dye stated that “Lucille’s ‘maleness’ was obviously apparent by the tightness and shortness of his shorts and by the typically masculine position he assumed on the stool”. In the deposition she stated that “...basically because of the way his pants fit his genitals were forced to the side and on the pant leg, and so when you’re wearing shorts they have to go somewhere and it chose to come out the left, you know, pant leg. So it was just bulging there through the underwear.”
13. No one has been able to identify the young family that was allegedly offended by the May, 1998 incident, and the only testimony corroborating this occurrence came from long-time area resident Marti Starns. Mrs. Starns testified that she was in the Fall City Grill in May, 1998 during a period when her mother was receiving cancer treatments. She observed Lucille sitting at the counter on his regular stool, facing outward with legs apart. She said she saw a small boy trying to get the attention of his father, then the father looking up angrily at Lucille. She stated that there was another small boy in the group and the family left soon after her observation of them. Mrs. Starns testified that she was clear about the timing of the incident because it was during her mother’s last illness, and her mother died soon thereafter.
14. Walter Ipsen denies that this earlier event ever occurred. He testified that on May 5, 1998 he went at the usual time to the Fall City Grill, dressed in a lime green blouse with dark green shorts and tennis shoes. He stated that, to the best of his recollection, he had never previously worn shorts to the restaurant. Mr. Ipsen avers that when he entered as Lucille and sat at his normal place, he was approached by Connie Dye who wanted to talk to him. He says that Dye told him that Rich Maki wanted him to stop coming to the restaurant because his presence was hurting lunch business. Ms. Dye told him that his gold Mercedes was a red flag to the community, notifying it of his presence in the restaurant. A distraught Mr. Ipsen also later made telephone calls to both Rich Maki and Connie Dye, seeking clarification or reversal of the exclusion decision. Mr. Maki informed him that he would not be welcome back in the restaurant either as Lucille or in male attire.
15. The question of whether the incident identified by Respondents as the basis for the exclusion of Walter Ipsen from the Fall City Grill actually occurred as described ultimately requires an evaluation of witness credibility. Connie Dye says that Lucille engaged in indecent behavior that caused him to be excluded from the restaurant, and Walter Ipsen denies categorically that such an incident ever occurred. While there is room for argument, our view is that the testimony of Connie Dye appears overall to be the more credible regarding this key incident. Our reasons for preferring Ms. Dye’s testimony include the facts that her descriptions are supported by other witnesses, not only Mrs. Starns as to the actual event but also numerous others as to the increasing flamboyance of Lucille’s behavior; that Ms. Dye was personally friendly toward Mr. Ipsen as Lucille and had no obvious personal agenda impelling her toward a confrontation; and in her hearing testimony, that Ms. Dye expressed genuine emotion over the incident as she recalled it, both shock at what she had seen and sadness over its consequences.
16. Moreover, Ms. Dye does a better job than Mr. Ipsen in explaining the pattern of known events. While Lucille’s need for attention may have been an annoyance, his overall relationship to the restaurant staff was generally harmonious over a three or four year period. In that context, it is difficult to understand why a sudden decision would have been made by Mr. Maki to remove Mr.

Ipsen. The plausible hypothesis most favorable to Mr. Ipsen's position is that as his cross-dressing behavior became more flamboyant and assertive, the restaurant began to get more complaints from its local customer base and decided to take pre-emptive action based on the alleged complaint of a fictitious family. This would explain the late spring timing of the exclusion, with the approach of warm summer weather and larger afternoon crowds impending. While certainly plausible, the problem with this alternative is that OCRE has introduced no objective evidence to support it, and it requires Ms. Dye, who had befriended Mr. Ipsen and had no financial stake in the restaurant, to play a devious and treacherous role.

17. Finally, certain loose ends need to be discussed. First, Respondent Marianne Nordlund was not present at the restaurant either on the day that Mr. Ipsen was excluded or on the earlier afternoon when the alleged incident with the family occurred. She testified that she was not involved in the decision to exclude Mr. Ipsen, a position that both Mr. Maki and Ms. Dye support. Mr. Maki has accepted full responsibility for the exclusion decision.

Second, although it is clear that Josephine Ipsen, Walter's wife, did not customarily go to the Fall City Grill except in the company of her husband, there is no evidence that she ever was actually excluded from the restaurant. She never discussed the exclusion incident with restaurant staff and has never attempted to enter the restaurant on her own. Mrs. Ipsen refuses to patronize the Fall City Grill as an act of solidarity with her husband.

CONCLUSIONS:

1. The unlawful discrimination prohibited by KCC 12.22.030 includes acts based both on sex and sexual orientation. The OCRE order cites the Respondents for discrimination based on sex. The Respondents have contended that if any issue of discriminatory behavior exists, it falls within the category of discrimination based on sexual orientation. Both OCRE and the Respondents have briefed this question.
2. The term "sex" is not defined within KCC Chapter 12.22. The term "sexual orientation" is defined at KCC 12.22.020.G as meaning "male or female heterosexuality, bisexuality or homosexuality, and includes a person's attitudes, preferences, beliefs and practices pertaining to sex, but shall not include overt conduct which is a public or private nuisance or is unlawful under county, state or federal law". OCRE argues that the term "sexual orientation" should be limited to overt sexual activity, and that cross-dressing or opposite gender role-playing relates to discrimination based on "sex". OCRE has cited on this issue federal cases interpreting Title VII that include within the category of sex discrimination failure to conform to socially constructed gender expectations and discrimination against a male based on attire not in accord with his gender. See *Price Waterhouse v. Hopkins* 490 US 228 (1989) and *Rosa v. Park West Bank and Trust*, 214 F 3rd 213 (2000).
3. We agree with OCRE on this question of ordinance interpretation. The term "sexual orientation" is defined in the ordinance primarily in terms of heterosexuality, bisexuality and homosexuality, and the phrase referring to "attitudes, preferences, beliefs and practices pertaining to sex" merely elaborates the sexuality-based definition. While cross-dressing may raise questions of sexual identity, it is not, *per se*, sexual activity. Admittedly, the line between sex and sexual

orientation may be a fine one, particularly (as here) where there is a question as to whether a cross-dresser has also engaged in offensive sexual behavior. We accept, however, OCRE's position that discrimination based simply on cross-dressing should be regarded as sex discrimination involving failure to conform to socially-constructed gender expectations.

4. Where there is a conflict in testimony over a critical issue, questions concerning the burden of proof are vital. As described by OCRE's attorney, in federal civil rights cases the normal procedure is for the agency to carry the burden of presenting a *prima facie* case that an act of discrimination occurred, at which point a respondent has the burden to show a legitimate business reason for the discriminatory act. If this respondent burden is met, then the burden shifts back to the agency to demonstrate that the basis offered by the respondent is a pretext.
5. The format described by OCRE appears consistent with County requirements and will be adopted for this proceeding. KCC 12.22.070 provides on appeal by an aggrieved respondent a *de novo* hearing in which the "director's order shall not be accorded the presumption of correctness". This provision is consistent with the placement of a burden of proof upon OCRE to present a *prima facie* case demonstrating the existence of a discriminatory act in violation of the ordinance. It is also consistent with Hearing Examiner Rule XI.B 8.b, which states that "in a proceeding to consider an appeal or challenge to a King County agency's imposition of a penalty or burden on a party or his/her property, the agency shall be required to present a *prima facie* case based on competent evidence demonstrating that the legal standard for imposing such burden or penalty has been met".
6. OCRE has presented a *prima facie* case for sex discrimination by Respondents Fall City Grill, Richard Maki and Connie Dye. Fall City Grill is a place of public accommodation, and Walter Ipsen was excluded therefrom by Dye on Maki's order while cross-dressing in women's clothing.
7. Likewise, the Respondents have sustained their burden of proof to provide a legitimate business reason for the exclusion of Mr. Ipsen. They have described behavior of an offensive sexual nature that constitutes, if believed, a valid business reason for exclusion of Mr. Ipsen from the premises.
8. OCRE has not met its burden of proof to demonstrate that Respondents' explanation of the reasons for excluding Mr. Ipsen from Fall City Grill was merely a pretext. As described in the findings above, this question comes down to deciding whether one finds Connie Dye or Walter Ipsen to be the more credible witness. Our view based on demeanor and consistency with other testimony was that Ms. Dye's story was the more credible of the two, but even if one regarded the conflicting stories to be equally believable, OCRE's burden still would not have been met.
9. OCRE did not provide a *prima facie* case against Marianne Nordlund. Even if one assumes that the other Respondents discriminated against Mr. Ipsen in excluding him from the restaurant, there is no substantial evidence associating Ms. Nordlund with that decision.
10. The Respondents did not commit any acts of discrimination against Josephine Ipsen. The message of exclusion directed to Walter Ipsen was couched exclusively in terms of his being unwelcome at the restaurant. Josephine Ipsen never attempted to patronize Fall City Grill after her husband's exclusion, and any conclusion that she would have been unwelcome is speculative.

11. Because the Respondents' appeal is being granted, no further proceedings are required for receipt of evidence on remedy issues, and the hearing record will be deemed closed as of the date of this decision.

DECISION:

The Respondents appeal is GRANTED.

ORDERED this 5th day of March, 2001.

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 5th day of March, 2001, to the following parties and interested persons:

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Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding civil rights enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision.

MINUTES OF THE FEBRUARY 27 AND 28, 2001 PUBLIC HEARING ON KING COUNTY OFFICE OF CIVIL RIGHTS ENFORCEMENT FILE NO. 98-06-01 – FALL CITY GRILL:

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing and representing the County was Margaret Pahl and Mary Beth Short. Participating in the hearing and representing the Appellant was James MacPherson. Other participants in this hearing were John Macdonald, Bailey de Iongh, Josephine Ipsen, Walter L. Ipsen, Kristen Tucker, Richard Maki, Connie Dye, Marianne Nordlund, Andy Hernden, Justin Paine, Marti Starns and Michael Benjamin.

The following exhibits were offered and entered into the record:

- Exhibit No. 1 Office of Civil Rights Enforcement Second Amended Complaint, dated August 23, 1999
- Exhibit No. 2 Response to OCRE complaint by MacPherson, dated July 9, 1998
- Exhibit No. 3 Rebuttal statement of Walter Ipsen, dated August 3, 1998
- Exhibit No. 4 OCRE Findings and Determination, dated October 11, 1999
- Exhibit No. 5 OCRE Order, dated May 19, 2000
- Exhibit No. 6 MacPherson Request for Hearing, dated May 24, 2000
- Exhibit No. 7 OCRE Request for Hearing, dated July 21, 2000
- Exhibit No. 8 Hand drawn diagram done by Richard Maki of Fall City Grill floor plan/seating arrangement
- Exhibit No. 9 Color copy photos (2) of Mr. Ipsen dressed as Lucille
- Exhibit No. 10 OCRE deposition excerpts
- Exhibit No. 11 Advertisement photo of a Frederick's of Hollywood brand girdle from the FOH website
- Exhibit No. 12 Declaration of Richard Maki
- Exhibit No. 13 Declaration of Connie Dye
- Exhibit No. 14 Declaration of Marianne Nordlund

SLS:sje
Misc/98-06-01 RPT