

**STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION**

GREGORY L. WILSON, SR., in his official
capacity as EXECUTIVE DIRECTOR of the
INDIANA CIVIL RIGHTS COMMISSION,
Complainant,

vs.

MAX WINCHELL,

Respondent.

ICRC NO.: HOha17071158

HUD NO.: 05-17-8734-8

DATE FILED

MAY 02 2018

**OFFICE OF THE
ADMINISTRATIVE JUDGE**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On February 28, 2018, the presiding Administrative Law Judge (“ALJ”) for the Indiana Civil Rights Commission (“ICRC”), Hon. John F. Burkhardt, conducted pursuant to his February 6, 2018 Notice of Initial Prehearing Conference an initial prehearing conference telephone call with Gregory L. Wilson in his official capacity as Executive Director of the ICRC (“Complainant”) by ICRC Staff Counsel Michael C. Healy and Max Winchell (“Respondent”) by counsel Joleen V. Klotz (collectively referred to as “the Parties”).

On March 9, 2018, Respondent filed Respondent’s Brief In Support Of Dismissal; on March 19, 2018, Complainant filed Complainant’s Reply In Opposition To Respondent’s Brief In Support of Dismissal.

Having carefully considered the foregoing and being duly advised in the premises, the presiding Administrative Law Judge HEREBY FINDS AND ORDERS AS FOLLOWS:

FINDINGS OF FACT

1. Ashley Wilkey and Fair Housing Advocate Amy Nelson, Executive Director of the Fair Housing Center of Central Indiana filed the subject complaint of discrimination (“Complaint”) on July 10, 2017, naming the Respondent and alleging unlawful discrimination based on disability.
2. On January 17, 2018, the ICRC’s Director issued his Notice of Finding and Issuance of Charge, finding reasonable cause to believe an unlawful discriminatory practice occurred.

3. On February 2, 2018, Respondent filed Respondent's Election to Have Claims decided in Civil Action under Indiana Code 22-9.5-6-12 and/or Indiana Code 22-9.5-6-13 ("Election").
4. As agreed by all Parties, the Election was filed within 20 days of Respondent's receipt of the ICRC's January 17, 2018 Notice of Finding and Issuance of Charge.
5. At a February 28, 2018 Prehearing Conference, Respondent raised the question as to whether a failure on the part of the ICRC to complete its investigation within one hundred (100) days of the complaint's file date – and a failure to notify the parties of the reasons for the delay – renders the Notice of Finding and Issuance of Charge fatally noncompliant with the Indiana Administrative Code governing Fair Housing Complaints so as to render dismissal – other than on the grounds of the election of forum – proper. The Administrative Law Judge advised that briefs would be accepted on the matter.
6. On March 5, 2018, Complainant filed a complaint in the Vigo Superior Court under Cause Number 84D06-1803-PL-001486; no hearing has yet begun.
7. On March 9, 2018, Respondent filed with the ICRC Respondent's Brief In Support Of Dismissal seeking dismissal "for lack of subject matter jurisdiction."
8. On March 19, 2018, Complainant filed Complainant's Reply in Opposition to Respondent's Brief in Support of Dismissal.
9. Any Conclusion of Law that should have been deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. Article 2 of Title 910 of the Indiana Administrative Code "provides the ICRC's interpretation of the coverage and application of IC 22-9.5..." and contains rules applying to "election of a civil action" pursuant to Ind. Code § 22-9.5-6-12, particularly at 910 Ind. Admin. Code 2-6-6.
2. "A complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed may elect to have the claims asserted in a finding of reasonable cause decided in a civil action. . ." Ind. Code § 22-9.5-6-12. According to the January 17, 2018 Notice of Finding in this matter, "reasonable cause" was found; therefore, an opportunity to elect out of the administrative forum existed.

3. Respondent's Election was effective and timely filed under the Indiana Fair Housing Act, Ind. Code §§ 22-9.5-1-1 *et seq.*
4. "If the complainant, the respondent, or the aggrieved person on whose behalf a complaint was filed makes a timely election to have the claims asserted in the charge decided in a civil action under IC 22-9.5-6-12, the administrative law judge shall dismiss the administrative proceeding." 910 IAC 2-7-9. The Administrative Law Judge shall dismiss this administrative proceeding.
5. After Respondent filed the Election but before the proceedings were formally dismissed, Respondent interposed to preclude dismissal on account of the election of forum, stating rather that the proceedings were already dead on arrival; Respondent claims that the ICRC's Notice of Finding was "fatally noncompliant" with the Indiana Fair Housing Act because "the commission failed to issue a Notice of Findings and Issuance of Charge against Respondent within one hundred (100) days after the Complaint was filed on July 10, 2017, and failed to notify the complainant and respondent in writing of the reasons for the delay." Respondent claims that such noncompliance demands dismissal of the complaint for lack of subject matter jurisdiction instead of dismissal of the proceedings on account of Respondent's Election.
6. In implementing the Indiana Fair Housing Act, it is significant that it "borrows heavily from the [federal] FHA, with many parallel provisions and similar language. In fact, the first section of the Act declares that its purpose is 'to provide rights and remedies substantially equivalent to those granted under federal law.' Ind. Code § 22-9.5-1-1." *State, Civil Rights Comm'n v. Cty. Line Park, Inc.*, 738 N.E.2d 1044, 1048 (Ind. 2000). Accordingly, it is appropriate when in implementing the Indiana Fair Housing Act to "look to federal case law for guidance." *State, Civil Rights Comm'n v. Cty. Line Park, Inc.*, 738 N.E.2d 1044, 1048 (Ind. 2000) (citing *Indiana Civil Rights Comm'n v. Alder*, 714 N.E.2d 632, 636 (Ind.1999)).
7. Respondent's claims do not support the requested dismissal and such a result would be "patently inconsistent" with the intent of the Indiana Fair Housing Act. See *United States v. Beethoven Associates Ltd. P'ship*, 843 F. Supp. 1257, 1262 (N.D. Ill. 1994). ("Congress intended, in enacting the 100-day provision, to hasten, not foreclose, complainants' access to a forum." *United States v. Curlee*, 792 F.Supp. 699, 700

(C.D.Cal.1992) (construing section 3610's 100-day limit). If the 100-day limit is construed as a jurisdictional provision, the effect of that construction will be to bar those with potentially valid claims from recovery because of HUD's delays. Such a result is patently inconsistent with the intent of the Fair Housing Act.”)

8. Dismissal is not mandated for any such failure by the ICRC to complete the investigation in 100 days or to notify parties when that period is extended; there is no language in the Indiana Fair Housing Act that imposes a sanction on the ICRC for failure to notify the parties when it requires more than 100 days to investigate a claim. See *United States v. Beethoven Associates Ltd. P'ship*, 843 F. Supp. 1257, 1262 (N.D. Ill. 1994). This is sharply contrasted by the law's explicit mandate that “the administrative law judge shall dismiss the administrative proceeding” upon compliant election of forum. 910 IAC 2-7-9.
9. The ICRC's “inability to complete its investigation or notify [the parties] within 100 days does not deprive [the ICRC] of subject matter jurisdiction” for the purposes of dismissing proceedings properly elected – by Respondent – out of the administrative forum. *United States v. Curlee*, 792 F. Supp. 699, 700 (C.D. Cal. 1992).

“[W]ith the exception of a vacated district court decision, precedent has unanimously concluded that failure to comply with the 100-day investigation provision is not a jurisdictional bar to litigation. See, e.g., *United States v. Hillman Housing Corp.*, 212 F. Supp. 2d 252 (S.D.N.Y. 2002); *United States v. Sea Winds of Marco, Inc.*, 893 F. Supp. 1051 (M.D. Fla. 1995); *United States v. Nally*, 867 F. Supp. 1446 (N.D.al.1994); *United States v. Curlee*, 792 F. Supp. 699 (C.D. Cal. 1992).

United States v. Coldwell Banker Bullard Realty Co., Inc., 2009 WL 10664941, at *4 (N.D. Ga. Nov. 16, 2009)

10. The subject time period is not administered as a jurisdictional prerequisite but rather as a directive to promote the prompt and expeditious resolution of the administrative complaint process. The ICRC possesses the jurisdiction necessary to dismiss the proceedings as required by Respondent's Election.
11. Rather than prejudice any party, honoring Respondent's Election and dismissing the administrative proceedings as required allows both parties “to have the claims asserted in the charge decided in [their ongoing] civil action.” 910 IAC 2-6-6(h)(1).
12. Administrative review of these Findings of Fact, Conclusions of Law, and Order may be obtained by parties not in default by the filing of a writing identifying with reasonable

particularity each basis of each objection within fifteen (15) days after service of this decision. IC 4-21.5-3-29(d). Subject to IC 4-21.5-3-1, the filing of a document in proceedings before the ICRC can be completed by mail, personal service, fax, or electronic mail to:

Docket Clerk
c/o Indiana Civil Rights Commission
100 North Senate Avenue, N300
Indianapolis, IN 46204
Fax: 317-232-6580
Email: aneromosele@icrc.in.gov

A party shall serve copies of any filed item on all parties. IC 4-21.5-3-17(c).

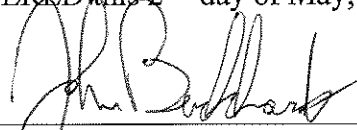
13. Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

ORDER

IT IS HEREBY ORDERED:

1. ICRC proceedings on the Complaint are **DISMISSED**, without prejudice, on account of Respondent's Election.
2. This order becomes the final order disposing of the proceedings immediately upon affirmation under IC 4-21.5-3-29. IC 4-21.5-3-27(a).

SO ORDERED this 2ND day of May,



Hon. John F. Burkhardt
Administrative Law Judge
Indiana Civil Rights Commission
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255
Anehitia Eromosele, Admin Asst.
317/234-6358

Certificate of Service

Served this 3 day of May by United States Mail on the following:

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with courtesy copies emailed to the attorneys of record.



Administrative Assistant to the Administrative Law Judge,
Anehit Eromosele