

STATE OF INDIANA
CIVIL RIGHTS COMMISSION

DOCKET NO. EMra04030127
EEOC NO. 24FA00148

R.C. CHAMBERLIN,
Complainant,

vs.

TIMMY DALE HICKERSON
d/b/a HICKERSON
TRANSPORT,

Respondent.

FILE DATED

JAN 26 2007

Indiana State Civil Rights Commission

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A Hearing was held before **Robert D. Lange**, the assigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") on September 28 and 29, 2005. Complainant, R.C. Chamberlin ("Chamberlin"), was present and was represented by counsel, Frederick S. Bremer, Esq.; Staff Attorney with the ICRC. Respondent Timmy Dale Hickerson d/b/a Hickerson Transport ("Hickerson" when referring to the individual and "HT" when referring to the business) was present and were represented by counsel, Frederick D. Payne, Esq. of the Indianapolis office of the firm of WESSELS & PAUTSCH, P.C.

After an opening statement was made on behalf of Chamberlin, HT reserved its opening statement until the opening of its case. Witnesses were sequestered and instructed not to discuss the case or their testimony until the Hearing was over. Chamberlin called the following witnesses: Michelle Milton ("Michelle"), Leon Milton ("Leon"), himself, and Hickerson. During the presentation of Chamberlin's case, Respondent's Exhibit 1 ("RX_"), RX2, Complainant's Exhibit B ("CX_"), CXC, CXD, CXE, CXF, RX3, and RX4 were admitted into evidence without objection and CXA was

admitted into evidence over objection. After Chamberlin rested his case, HT called Ron Dice and Cynthia Wood to testify on its behalf. Chamberlin testified in rebuttal and HT elected not to present any evidence in surrebuttal. Chamberlin waived closing argument and HT made a closing argument. The ALJ took the cause under advisement and ordered the parties to file what they suggested that the ALJ enter as proposed findings of fact, conclusions of law, and order on or before November 21, 2005 and that briefs could be filed by the same date. This deadline was extended twice, eventually to January 23, 2006.

On January 23, 2006, HT filed its [Suggested] Proposed Findings Of Fact And Conclusions Of Law. Also on January 23, 2006, Chamberlin filed his Tender Of Findings Of Fact, Conclusions Of Law And Order As Proposed By Complainant.

On September 6, 2006, the ALJ entered his Proposed Findings Of Fact, Conclusions Of Law, And Order ("the proposed decision"). On September 21, 2006, Chamberlin filed Complainant's Objections To Proposed Findings Of Fact, Conclusions Of Law, And Order. On December 1, 2006, Chamberlin filed his Brief In Support Of Complainant's Objections To Proposed Findings Of Fact, Conclusions Of Law, And Order.

Alpha Blackburn, the Chairperson of the ICRC, presided over oral argument on Chamberlin's Objections on December 15, 2006. Other Commissioners present were David C. Carter (the Vice-Chairperson), Barry Baynard, Charles D. Gidney, and Steven A. Ramos. Commissioners Tehiji Crenshaw and John E. Garcia were absent. Chamberlin was present and was represented by counsel, Frederick S. Bremer, Esq., ICRC Staff Attorney. HT was represented by counsel, Frederick D. Payne, Esq. of the Indianapolis office of the firm of WESSEL & PAUTSCH, P.C. Arguments of counsel were heard, questions were asked by members of the ICRC, and the cause was taken under advisement.

Having carefully considered the foregoing and being duly advised in the premises, the ICRC finds and rules as follows.

1. The ALJ erred by awarding back pay for only 12 months. The award should have been for 20 months, or to the date of the Hearing.

2. The ALJ also erred by awarding Chamberlin back pay for only 19 days upon which he was not called by HT. The award should have been for 48 days.

3. In all other respects, Chamberlin has failed to meet the burden of an objecting party to demonstrate an error that affected the result.

IT IS, THEREFORE, ORDERED

1. Complainant's Objections To Proposed Findings Of Fact, Conclusions Of Law, And Order are, to the extent that they object to being awarded back pay for 12 months and to the extent that they object to being awarded back pay for 19 days upon which he was not called by HT, **SUSTAINED**

2. Complainant's Objections To Proposed Findings Of Fact, Conclusions Of Law, And Order are, in all other respects, **OVERRULED**.

Having carefully considered all of the foregoing and being duly advised in the premises, the ICRC enters the following findings of fact, conclusions of law, and order. Differences between the ICRC's decision and the ALJ's proposed decision are identified by being in bold type.

FINDINGS OF FACT

1. The issues to be resolved are; (1) whether Chamberlin was constructively discharged by HT as a result of racial harassment; (2) whether Chamberlin was denied opportunities to work and, therefore, lost wages because of race; and (3) what relief, if any, should be awarded. **SECOND PRE-HEARING ORDER ¶1** (September 20, 2005).

2. Chamberlin is an adult African-American male who has, at all material times, resided in the state of Indiana.

3. Hickerson is an adult Caucasian male who has, at all material times, resided in the state of Indiana and owned and operated HT, a trucking company organized as a sole proprietorship and headquartered in or near Greenfield, Indiana that hauled different

commodities for different shippers throughout the Midwest, although HT occasionally hauled as far as Colorado or the east coast. HT has, at all material times, employed 6 or more persons within the state for wages or salary.

4. Some time in May of 2002, Chamberlin saw a newspaper ad that had been placed by HT seeking truck drivers. Chamberlin held a Commercial Driver's License ("CDL") and needed regular employment, so he called to inquire. At that time, he was told that the job had been filled.

5. Approximately 2 weeks later, Hickerson called Chamberlin back and asked if he was still interested. Chamberlin said that he was and Hickerson suggested that he come to the office and fill out an application. Chamberlin agreed to do so.

6. At some point after Chamberlin arrived, Hickerson commented that he (Chamberlin) was only the second Black person that his dog had ever seen. Hickerson asked Chamberlin a few questions about his driving experience and told him that he would have to check with the guys to see what they thought. This can only be understood as an indication that Hickerson would not hire Chamberlin if the guys thought that they did not want to work with an African-American driver.

7. Two or three days later, Chamberlin was hired and he began work on June 7 of 2002. His first few months at HT went by without any major incidents. Throughout his employment with HT, Chamberlin was the only African-American employee.

8. In early September of 2002, Chamberlin was injured in a work-related incident. He received workers' compensation and was off work, as recommended by the treating physician, until sometime in November of 2002.

9. While Chamberlin was off work, Hickerson had at least 2 conversations with Leon in which he referred to Chamberlin as a "nigger". In one of those conversations, Hickerson told Leon that he couldn't wait to get rid of Chamberlin because "all he was was a dumbass nigger". In the other, Hickerson complained that "the dumb nigger needed to come back to work".

10. After Chamberlin returned to work from his hand injury, things got much more eventful. Hickerson would yell at him and otherwise make a big deal of things that were

either minor or no problem at all. Chamberlin referred to this as “bitching” and it happened a couple of times per week for the remainder of Chamberlin’s employment.

11. Additionally, when Chamberlin returned from his hand injury, he was assigned a different truck than the one he had been assigned earlier. This truck, though drivable, had a number of problems that made it undesirable – the steering was difficult, the tires were cut and weakened as a result of some problem with the way the trailer hung, and one of its fuel tanks had been removed.¹ Chamberlin complained to Hickerson about this truck on numerous occasions, but the truck was never repaired and Chamberlin was never assigned a different truck.

12. Hickerson testified that trucks were assigned on the basis of seniority, a potentially neutral explanation that, on this record, is unpersuasive.

A. It is unclear, at best, how Chamberlin became less senior after his return from the hand injury than he had been before the injury.

B. Drivers were hired after Chamberlin returned (see CXE) and Chamberlin was not assigned a different truck then, either.

13. At some point shortly after Chamberlin had returned to work after his hand injury, Leon and Chamberlin were at the same delivery site, and Leon told Chamberlin that Hickerson had said that he couldn’t wait to get rid of Chamberlin because he was just a dumbass nigger.

14. In November or December of 2002, Hickerson contacted Michelle, who operated an insurance agency for American Family Insurance in nearby Fortville, hoping to find cheaper insurance on his trucks and workers compensation insurance. The former required reviewing the driving records of all of the drivers for HT. When they got to Chamberlin’s record, Hickerson said that he was just looking for a reason to get rid of that nigger but that he had to be careful because he didn’t want the NAACP on him.

15. Some time after March of 2003, the Miltons saw Chamberlin at a local Burger King when all 3 happened to be there. At this time, Michelle reported to Chamberlin the

1. The missing fuel tank caused a particular problem one time when several drivers, including Chamberlin, went to Kansas. Hickerson gave each of those drivers \$100. Chamberlin had to use most, if not all, of that, for fuel, while the other drivers, having 2 tanks, were able to use the money for incidental expenses. While it is unclear whether, in the long run, this cost Chamberlin any money, it was inconvenient.

comment that Hickerson had made to her.

16. Hickerson argues that the Miltons should not be credited because both are biased, Leon because of the circumstances of his termination from HT, and Michelle because HT did not purchase insurance from her. This argument, though feasible, is not, on this record, persuasive.

A. Although Leon was terminated after an accident that he did not believe was his fault, he had been seeking employment with his current employer before that and commenced employment there within a matter of days. HT did deduct an amount for damage to its truck from his final check, but there is no reason to believe that this amount was sufficient to justify the level of anger that would warrant the time and trouble of being a witness, let alone the risk of perjury charges.

B. Michelle's bias is even less likely than Leon's. There is no reason to doubt her testimony that HT would not have qualified for any insurance policy she was able to offer. Thus, she did not really lose any business.

17. With the information from the Miltons, Chamberlin began to view his interactions with Hickerson more suspiciously and it may well be true that he saw some events that were not race-related as being such. On the other hand, it must be noted that Hickerson was being careful, as he told Michelle,

18. Importantly, Hickerson does not deny, but merely does not recall, referring to Chamberlin as a nigger. His testimony, taken as a whole, is that he did not call him that to his face. The fact that Hickerson might have used that word makes it more likely that he could have the racially based intention to get rid of Chamberlin that is a primary issue in this case.

19. The discussions between Chamberlin and Hickerson often got heated, with Chamberlin sometimes claiming that Hickerson was picking on him because he was Black.

20. Eventually, on February 2 of 2004, a discussion occurred at the end of a day in which Hickerson told Chamberlin that he needed to go home and think about whether he wanted to work there because Hickerson could not have Chamberlin complaining to the

customers about his job. Apparently, that morning, while at the site of CSR/Rinker (an entity variously named in the exhibits because of its legal name changes and the primary customer of HT during good weather, for whom HT hauled pipe, or "conduit"), Chamberlin's trailer, which had been left at CSR overnight, had a flat tire. This fact required Chamberlin to borrow an air hose, move it outside the plant, air up the tire, and be delayed in his departure for the delivery site. Because HT drivers were paid by the load, rather than by the hour, there was clearly a potential effect on Chamberlin's income. According to Chamberlin, he reported the situation to Ron Dice, another truck driver for HT, to whom he had been instructed to report problems at CSR. It is not unlikely that one or more CSR employees overheard Chamberlin's complaint, and something was reported to Hickerson.

21. Chamberlin considered Hickerson's approach to be an overreaction and, more importantly, had difficulty confining his response to Hickerson to a verbal one. He told Hickerson that he was considering himself fired and left, never to return.

22. While this is a resignation, it is a resignation that a reasonable person would have felt was the only reasonable alternative. Facing periodic, if brief, emotional confrontations with a boss who has expressed a determination to get rid of the dumbass nigger, it was reasonable for Chamberlin, the only African-American employee of HT, to conclude that, if he remained at HT, one of these inevitable confrontations would turn violent, a circumstance which would be good for nobody.

23. HT argues that Chamberlin could not have reacted so extremely to the use of the word "nigger" because he and his Black friends call themselves by that term. Clearly, however, Chamberlin considers the term to have different significance when used by a Caucasian who is not his friend. It is academic whether it is illogical, unwise, or hypocritical to accept the term in some circumstances while rejecting it in others.

24. Chamberlin has proven by a preponderance of the evidence that he was constructively discharged because of race.

25. In HT's records, it appears that a note was made of the reason Chamberlin was off due to injury, car trouble, or a trip to the dentist or other personal matters. The exception appears that the reason is not always repeated when the absence is consecutive days for

the same reason. Sometimes, there is a notation that Chamberlin was called and either could not be reached or declined the offered work. Discounting all those days leaves **48** days in the last 4 months of Chamberlin's employment when it appears that he could have been, but was not, offered work. On this record, the preponderance of this evidence supports Chamberlin's claim that the reason he did not get work these days is race.

26. Chamberlin earned \$6,923.46 in the last quarter of 2003. CXD. This is an average of \$150.51 per day on the 46 days that he did work in that quarter. As a result, he lost a total of **\$7,224.48**, gross, because he did not get offered available work because of race.

27. Based upon a 5 day week, he lost \$65,020.32, gross, from his constructive discharge to the Hearing.

28. As of the Hearing, Chamberlin had earned \$11,000 from odd jobs and short term employment.

29. Chamberlin lost, then, a total of **\$61,244.80** Calculations are shown below.

A.	Work not offered	\$ 7,224.48
B.	+ wages that would have been earned	<u>65,020.32</u>
	Subtotal	\$72,244.80
C.	Minus interim earnings	<u>11,000.00</u>
	TOTAL	\$61,244.80

30. Chamberlin has also lost the use of the income he would have earned from HT. Awarding interest is the way to compensate someone for the loss of use of money to which the person was entitled. Calculated as simple interest at the rate of 8%, compounded annually, Chamberlin is entitled to interest, up to the date of the Hearing, in the amount of **\$8,449.69**, calculated as follows:

2004	\$61,244.80 x .08 x 47/52 (47 weeks)	\$4,428.47
2005	\$65,673.27 x .08 x 39.8/52 (39.8 weeks)	<u>4,021.22</u>
	TOTAL	\$8,449.69

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

unlawful discriminatory practice and provides that, among its powers and duties, the ICRC

... shall state its findings of fact after a hearing and, if the commission finds the person has engaged in an unlawful discriminatory practice, shall cause to be served on this person an order requiring the person to cease and desist from the unlawful discriminatory practice and requiring the person to take further affirmative action as will effectuate the purposes of his chapter, including but not limited to the power:

(A) to restore complainant's losses incurred as a result of discriminatory treatment, as the commission may deem necessary to assure justice

IC 22-9-1-6(k).

14. Chamberlin has proven out of pocket losses that were the proximate result of the proven unlawful discriminatory practices.
15. The loss of the use of wages is a part of the loss that a discriminatee incurs when the wages are lost. Thus, the awarding of interest to compensate for the loss of the ability of the victim to use the wages wrongfully denied is within the authority of the ICRC.
16. Interest should be awarded at an annual rate of 8%, compounded annually. This is the rate provided for in IC 24-4.6-1-103, a statute that is appropriate to consult in the absence of a more specifically applicable statute. *Indiana Insurance Company v. Sentry Insurance Company* 437 N.E.2d 1381 (Ind. App. 1982).
17. The burden of proof on the issue of mitigation of damages is on the wrongdoer. *Colonial Discount Corp. v. Berkhardt* 435 N.E.2d 65 (Ind. App. 1982). HT has met its burden of showing that there is a reasonable chance that Chamberlin might have found a comparable position within a year. *Sheehan v. Dohlen Corporation*, 173 F.3d 1039, 79 FEP Cases 540 (7th Cir. 1999).
18. Administrative review of this proposed decision may be obtained by the filing of a writing identifying with reasonable particularity each basis of each objection within 15 days after service of this proposed decision. IC 4-21.5-3-29(d).
19. Any Finding Of Fact that should have been deemed a Conclusion Of Law is hereby adopted as such.

ORDER

1. HT shall cease and desist from subjecting employees to a hostile environment because of race.
2. HT shall cease and desist from denying employees available work because of race.
3. HT shall deliver to Chamberlin one or more cashier's checks payable to Chamberlin in amounts totaling **\$69,694.49**. Of this total, **\$61,244.80** shall be subject to deductions required by law and/or agreement. Copies of all such checks shall be delivered to the ICRC.
4. The proprietor of HT and supervisory personnel shall attend a professionally developed seminar in cultural diversity approved by the ICRC's Director. HT shall obtain the Director's approval of the seminar no later than 180 days after the effective date of this Order and shall have attended the seminar no later than 300 days after the effective date of this Order. Proof of attendance shall be filed with the ICRC.
5. This Order shall take effect immediately after it is approved and signed by a majority of the members of the ICRC, unless it is modified by the ICRC pursuant to IC 4-21.5-3-31(a), stayed by the ICRC under 4-21.5-3-31(b), or stayed by a court of competent jurisdiction.

INDIANA CIVIL RIGHTS COMMISSION



COMMISSIONER



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COMMISSIONER



COMMISSIONER

Dated: 26 January 2007

To be served by first class mail on the following parties and attorneys of record:

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