

STATE OF INDIANA
CIVIL RIGHTS COMMISSION

DOCKET NO. EMra10010044
EEOC NO. 24FA10-00130

FABIAN NILES,
Complainant,

v.

FINNER 'N FINNER, LLC
dba JIMMY JOHNS,
Respondent.

FILE DATED

APR 20 2012

INDIANA CIVIL RIGHTS COMMISSION

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On March 29, 2012, Robert D. Lange, Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC"), entered his Proposed Findings Of Fact, Conclusions Of Law, And Order ("the proposed decision").

No objections have been filed to the ICRC's adoption of the proposed decision.

Having carefully considered the foregoing and being duly advised in the premises, the ICRC hereby adopts as its own the findings of fact, conclusions of law, and order proposed by the ALJ in the proposed decision, a copy of which is attached hereto and incorporated herein by reference.

INDIANA CIVIL RIGHTS COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER


COMMISSIONER

Dated: 20 April 2012

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

Fabian Niles
3360 North Meridian Street, Apt B-6
Indianapolis, IN 46208

ROBERTS & BISHOP
BY: Adam Lenkowsky, Esq. and Blair Wheat, Esq.
Attorneys for Complainant Fabian Niles
118 North Delaware Street
Indianapolis, IN 46204

Finner N Finner, LLC dba Jimmy Johns
c/o Scott M. Finner
6070 East 82nd Street
Indianapolis, IN 46250

HUME SMITH GEDDES GREEN & SIMMONS, LLP
BY: Andrew P. Wirick, Esq.
Attorneys for Respondent Finner N Finner, LLC dba Jimmy Johns
54 Monument Circle, Fourth Floor
Indianapolis, IN 46204-2996

STATE OF INDIANA
CIVIL RIGHTS COMMISSION

DOCKET NO. EMra10010044
EEOC NO. 24FA10-00130

FABIAN NILES,
Complainant,

v.

FINNER 'N FINNER, LLC
dba JIMMY JOHNS,
Respondent.

FILE DATED

MAR 29 2012

INDIANA CIVIL RIGHTS COMMISSION

**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

A Hearing was held before the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") on April 13, 2011. Complainant, Fabian Niles ("Niles"), was present and was represented by counsel, Blair Wheat, Esq., of the Indianapolis firm of ROBERTS & BISHOP. Respondent – Finner 'N Finner, LLC dba Jimmy John's ("Finner") – was represented by counsel, Andrew P. Wirick, Esq., of the Indianapolis firm of HUME SMITH GEDDES GREEN & SIMMONS, LLP. Also present on behalf of Finner was Scott Michael Finner ("Scott"), a co-owner of Finner.

Niles' motion to separate witnesses was granted and separated witnesses were instructed not to discuss the case or their testimony until the Hearing was complete. Niles and Scott were permitted to remain. Joint Exhibit 1 ("JX_"), JX2, JX3, JX4, JX5, JX6, JX7, and JX8 were all admitted into evidence without objection.

Opening statements were made and Niles testified on his own behalf. After Niles rested his case, Finner called the following witnesses: Samuel E. Epperson ("Epperson"); Paul F. Crutcher II ("Crutcher"); Christopher James Meyerrose ("Meyerrose"), Gavin Baugh ("Baugh"), Ben Howard Townsend ("Townsend"), and Scott. Niles testified in rebuttal and Finner elected not to present any evidence in surrebuttal.

Closing arguments were waived. The ALJ ordered that the parties file what they suggest that the ALJ enter as proposed findings of fact, conclusions of law, and order on or before May 2, 2011 and that they could file briefs on or before the same date and the cause was taken under advisement. The deadline was later extended to May 9, 2011.

On May 9, 2011, Niles filed [Complainant's Suggested Proposed] Findings Of Fact And Conclusions Of Law and his Brief In Support Of Conclusions Of Law. Also on May 9, 2011, Finner filed Respondent's [Suggested] Proposed Findings Of Fact And Conclusions Of Law and its Trial (*sic*). Brief Of Respondent Finner 'N Finner, LLC d/b/a Jimmy John's.

Having carefully considered all of the foregoing and being duly advised in the premises, the ALJ proposes that the ICRC enter the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The issues to be resolved are (a) whether Niles was terminated by Finner because he filed a complaint with the ICRC; and (b) if so, what relief should be awarded.

SECOND PRE-HEARING ORDER ¶1 (March 23, 2011).

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

3. Finner is a limited liability company doing business in the state of Indiana that has employed, at all material times, 6 or more persons for wages and salary. At the time of the incidents giving rise to this complaint, Finner operated in the neighborhood of 12 Jimmy John's restaurants in the city of Indianapolis and 1 in Kokomo.

4. Niles was hired by Finner on November 28, 2007 in a job classification Finner called "In Shop". At the time of his hiring, Niles worked at the IUPUI store located on West 11th Street at a pay rate of \$7 per hour. Niles' pay was increased to \$7.50 per hour on October 1, 2008. On October 29, 2008, Niles was promoted to Person In Charge ("PIC") and his pay rate increased to \$8.50 per hour. On July 31, 2009, Niles was moved to the Lake Circle store, where he worked until the termination at issue in this complaint.

5. In January of 2010, Niles perceived that he was not getting as many hours as he should and he filed the complaint that initiated this proceeding, alleging that his hours had been reduced because of race. COMPLAINT OF DISCRIMINATION (January 28, 2010).
6. During the entire period that Niles was employed by Finner, Niles was responsible for the care of his daughter during evenings and weekends. Early in his tenure, this was not much of a problem. Later on, it was a problem since the essence of the job of a PIC was to be in charge of the store in the manager's absence and Niles' managers followed the usual practice of working mostly weekdays. Niles worked fewer hours during this period, in large part because he turned down a lot of evenings and weekends that were offered. Based upon the facts that (1) Niles received fewer hours because he turned down offered shifts, (2) there had been a reduction in business at the store, and (3) a similarly situated Caucasian had also experienced a reduction in hours, the ICRC's Deputy Director found that there was not probable cause to believe that Niles was being denied hours because of race. NOTICE OF FINDING (June 3, 2010). In that same NOTICE, though, probable cause was found to believe that Niles' termination occurred because he had filed this complaint. *Id.*
7. Shortly after the filing of the complaint, Niles had a number of meetings with members of management during which he openly tape recorded the conversation. After one of those meetings, Niles bragged to an employee while displaying the recorder that he had more material for his case.
8. One of those meetings was with Scott and Baugh, the latter being an Area Manager having responsibility for the store at which Niles was assigned. It is evident that Scott and Baugh thought that this meeting resulted in agreement that Finner would offer Niles more hours and Niles would withdraw his complaint.
9. Scott and Baugh at the least thought Finner was offering more hours to Niles but since many were evenings and weekends, Niles refused a lot of the offers for the same reason. He did not withdraw his complaint.
10. Not long after the meeting with Scott and Baugh, the incident occurred in which Niles bragged about having more material for his case. That incident was reported to Scott and Baugh, after which they decided that Niles should be terminated.

11. Niles was terminated on February 11, 2010, his last day of work having been February 7.

12. Finner's Notice Of Termination/ Resignation form lists 14 possible reasons for an involuntary termination. The one marked was number 05 which read "Misconduct such as dishonesty; conduct which violates common decency or morality". JX5. Handwritten by Baugh after "Explanation:" is

Fabian was terminated for misconduct. He was taping conversations to add to his "case" against company. *Id.*

13. That termination notice is both direct and credible evidence that the fact Niles had filed the complaint was a major factor, if not the sole factor, causing his termination

14. After his termination, Niles applied for unemployment compensation at the Indiana Department of Workforce Development ("DWDALJ"). A deputy denied Niles' claim and Niles appealed. After a telephonic hearing, an ALJ determined that Niles was not entitled to unemployment compensation because he had been terminated for good cause. The basis for that determination is set out below:

The employer established that the claimant was disloyal and that the claimant demonstrated a willful or wanton disregard to (*sic*) the employer's interest. Claimant was within his rights to pursue his claim but once he put his personal interests in front of those of the Employer then the Claimant breached a duty to the Employer. JX5.

15. The DWDALJ reached this decision after quoting at length from a decision from the Indiana Court of Appeals – *Cheatem v. Indiana Dep't of Employment & Training Servs.*, 553 N.E.2d 588 (Ind. Ct. App. 1990).-which did use the phrase "willful or wanton disregard of the employer's interest ". The Court , unlike the DWDALJ, went on to give examples of that disregard. The DWDALJ's decision merely states a conclusion, without explaining what interest of the employer was disregarded and is not persuasive that there was a reason, other than the filing of the complaint, that would have led to Niles' termination.

16. There was some testimony suggesting that Niles was terminated because of concern that he might taint the food. The basis for this, if one could call it that, was expressly acknowledged to be employee gossip around the store. Finner does not even

identify anyone who had mentioned this possibility and it is unworthy of credence that Niles was terminated on the basis of gossip, particularly when there is no mention in Finner's termination document of any concern about the tainting of food.

17. Finner has not proven by a preponderance of the evidence that it would have terminated Niles absent consideration of his filing of the complaint.

18. Niles was discharged by Finner because he filed the complaint.

19. At the time of his termination on February 11, 2011, Niles was earning \$8.50 per hour. His working hours were variable, but since the first of the year in 2010, he had averaged 25.8 hours per week. JX5.

20. Niles' next job was at an entity known as QBM. The record does not reflect his pay rate or hours but it is reasonable to deduce that he earned no less than what he was paid at Finner. Niles was terminated from the job at QBM as a result because he had left open some doors that were supposed to be secured. For that reason, lost wages attributable to Niles' termination by Finner ended on April 26, 2010, the date he started employment at QBM.

21. Niles lost a total of \$2,412.30, gross, as a result of being discharged by Finner because he filed the complaint. This is a result of the following calculations:

\$8.50 per hour
X 28.5 hours per week
\$242.25 per week
X 11 weeks
\$2,412.30 TOTAL

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

CONCLUSIONS OF LAW

1. The ICRC has jurisdiction over the subject matter and the parties.
2. Niles and Finner are each a "person", as that term is defined in section 3(a) of the Indiana Civil Rights Law ("the ICRL"). IC 22-9-1-3(a).

3. Section 6(h) of the ICRL prohibits what is commonly referred to as "retaliation" and grants the ICRC the following power and duty:

(h) The commission shall prevent any person from ... expelling ... any other person because he filed a complaint....
IC 22-9-1-6(h).

4. Generally, cases decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.* ("Title VII") are entitled to great weight in the interpretation of the ICRL. *Indiana Civil Rights Commission v. Culver Educational Foundation*, 535 N.E.2d 112 (Ind. 1989).

5. The most obvious method of establishing intentional discriminatory intent in the employment setting is to introduce evidence that can be interpreted as an acknowledgment of discriminatory intent on the part of the employer or its agents. *Indiana Civil Rights Commission v. Southern Indiana Gas & Electricity Company*, 648 N.E.2d 676 (Ind. Ct. App. 1994).

6. Where, as here, the complainant proves by a preponderance of the evidence that an impermissible consideration, such as having filed a complaint, was a factor in a materially adverse action, the complainant will prevail unless the employer shows by a preponderance of the evidence that it would have made the same decision regardless of the complainant's protected status. *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835 (Ind. 2009).

7. Niles met his burden of proving by a preponderance of the evidence that his filing of the complaint was a factor in the decision by Finner to terminate Niles.

8. Finner did not meet its burden of proving by a preponderance of the evidence that it would have made the same decision without consideration of the filing of the complaint.

9. Finner's discharge of Niles occurred because he filed the complaint.

10. Finner argues that the case of *Argyropoulos v. City of Alton*, 539 F.3d 724 (7th Cir. 2008), requires a decision in its favor. In that case, the Court held that the employer did not commit unlawful retaliation under Title VII when it dismissed plaintiff because she had secretly taped a conversation with her supervisors in hopes of obtaining evidence for a pending sexual harassment claim. This case is not controlling for 2 reasons: (1) under

the law in Illinois, where the events in *Argyropoulos* occurred, secret taping of conversations was a crime, which is not the case in Indiana; and (2) the taping by Niles was not surreptitious.

11. Finner also argues that the DWD decision has collateral estoppel effect, which would mean that the ICRC is obligated to find that Niles was terminated for good cause. In support of this argument, Finner cites *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390 (Ind. 1988). This argument is unpersuasive for 2 reasons.

A. *McClanahan* did acknowledge that an administrative decision can be used as collateral estoppel but declined to do so with respect to a decision about unemployment compensation by a predecessor of DWD because of the nature of unemployment compensation proceedings.

B. The statutes governing DWD proceedings have since been amended to expressly state that findings shall not be conclusive. IC 22-4-17-12.

12. Finner committed an unlawful discriminatory practice when it discharged Niles because of the filing of the complaint.

13. If the ICRC finds that a person has committed an unlawful discriminatory practice it shall issue an order requiring the person to cease and desist from that practice, and to take further affirmative action as will effectuate the purpose of the ICRL, which may include restoring Complainant's losses incurred as a result of the discriminatory treatment. IC 22-9-1-6(k)(A). In employment case, "losses" are limited to wages, salary, or commissions. *Id.*

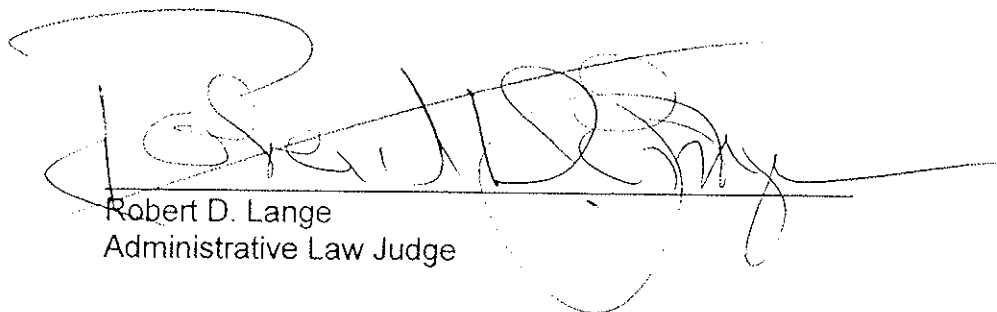
14. Administrative review of this proposed decision may be obtained by an interested and affected person who is not in default by the filing of a writing specifying with reasonable particularity each basis for each objection within 15 days after service of this proposed decision. IC 4-21.5-5-23-29(d).

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

ORDER

1. Finner shall cease and desist from discharging or otherwise discriminating against persons because those persons filed a complaint with the ICRC.
2. Finner shall deliver to Niles' attorney a check payable to Niles in the amount of \$2,412.30 minus deductions required by law and/or agreement, within 30 days of the effective date of this Order.
3. Finner shall deliver a copy of the check to the ICRC within 30 days of the effective date of this Order.
4. 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 pursuant to IC 4-21.5-3-31(b), or stayed by a court of competent jurisdiction.

Dated: 29 March 2012



Robert D. Lange
Administrative Law Judge

To be served by first class mail this 29th day of March, 2012 on the following parties and attorneys of record:

Fabian Niles
3360 North Meridian Street, Apt B-6
Indianapolis, IN 46208

ROBERTS & BISHOP
BY: Adam Lenkowsky, Esq. and Blair Wheat, Esq.
Attorneys for Complainant Fabian Niles
118 North Delaware Street
Indianapolis, IN 46204

Finner N Finner, LLC dba Jimmy Johns
c/o Scott M. Finner
6070 East 82nd Street
Indianapolis, IN 46250

HUME SMITH GEDDES, GREEN & SIMMONS, LLP
BY: Andrew P. Wirick, Esq.
Attorneys for Respondent Finner N Finner, LLC dba Jimmy Johns
54 Monument Circle, Fourth Floor
Indianapolis, IN 46204-2996

and to be served this 29th day of March, 2012 by electronic mail on the following:

Indiana Civil Rights Commission
c/o Jamal L. Smith, Executive Director