

FILE DATED

AUG 28 2009

STATE OF INDIANA
CIVIL RIGHTS COMMISSION

Indiana State Civil Rights Commission

MICHELLE WEDDLE-VAN SICKLE,

Complainant,

v.

FRANKLIN GARDENS FAMILY
RESTAURANT, INC.;

Respondent.

DOCKET NO. EMsh03010004

EEOC NO. 24FA30083

DOCKET NO. EMrt03030068

EEOC NO. 24FA3000125

DOCKET NO. EMrt03060174

EEOC NO. 24FA3000179

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On June 24, 2009, 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: 28 August 2009

To be served by first class mail on the following parties:

Michelle Weddle-Van Sickle
1738 Walnut Lane
Greenwood, IN 46143

Franklin Gardens Family Restaurant, Inc.
c/o Chief Executive Officer
2180 East King Street, Suite C
Franklin, IN 46131

and to be personally served on the following attorney of record:

Michael C. Healy, Esq.; Staff Counsel
Indiana Civil Rights Commission
Indiana Government Center North
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Indianapolis, IN 46204-2255

**STATE OF INDIANA
CIVIL RIGHTS COMMISSION**

FILE DATED

JUN 24 2009

Indiana State Civil Rights Commission

MICHELLE WEDDLE-VAN SICKLE,

Complainant, **DOCKET NO. EMsh03010004**

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v.

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**FRANKLIN GARDENS FAMILY
RESTAURANT, INC.;**

DOCKET NO. EMrt03060174

EEOC NO. 24FA3000179

Respondent.

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

A Hearing On Damages was held in these consolidated cases on May 28, 2009 before the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC"). Complainant, Michelle Weddle-Van Sickle ("Weddle-Van Sickle"), participated and was represented by counsel, Michael C. Healy, Esq., Staff Counsel. Respondent – Franklin Gardens Family Restaurant, Inc. ("FGFR") - did not appear, by counsel or otherwise.

Weddle-Van Sickle waived her opening statement and testified on her own behalf. Weddle-Van Sickle waived closing argument. The ALJ ordered that Weddle-Van Sickle file what she suggested that the ALJ enter as proposed findings of fact, conclusions of law, and order on or before June 11, 2009.

On June 11, 2009, Weddle-Van Sickle filed Complainant's [Suggested] Proposed Findings Of Fact, Conclusions Of Law, And Order.

Having carefully considered 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. Weddle-Van Sickle is an adult female who has resided, at all material times, in the state of Indiana.
2. FGFR was, at all material times, an Indiana business that employed 6 or more persons for wages or salary within the state.
3. Weddle-Van Sickle filed the complaint docketed as DOCKET NO. EMsh03010004 ("ORIGINAL COMPLAINT") against FGFR on January 6, 2003, alleging employment discrimination based upon sex, asserting that, in November of 2002, she was subjected to unwelcome conduct of a sexual nature. ORIGINAL COMPLAINT.
4. Weddle-Van Sickle filed the complaint docketed as DOCKET NO. EMrt03030068 ("FIRST RETALIATION COMPLAINT") against FGFR on March 3, 2003, alleging that she was retaliated against for filing the ORIGINAL COMPLAINT by having her pay cut by \$1.00 per hour and by being written up twice. FIRST RETALIATION COMPLAINT.
5. Weddle-Van Sickle filed the complaint docketed as DOCKET NO. EMsh03060174 ("SECOND RETALIATION COMPLAINT") against FGFR on May 30, 2003, alleging that she was terminated for filing the ORIGINAL COMPLAINT. SECOND RETALIATION COMPLAINT.
6. On August 2, 2007, ALJ Sandra L. Jensen issued her REPORT OF TELEPHONE STATUS CONFERENCE ("FIRST REPORT") in all of these cases, stating, among other things, that "[a] final telephone status conference is scheduled for November 15, 2007 at 10:00 a.m., eastern daylight time, 9:00 a.m., central daylight time." FIRST REPORT, ¶4.
7. FGFR did not participate in the November 15, 2007 conference, by counsel or otherwise.
8. On May 1, 2008, and May 8, 2008, ALJ Jensen issued a NOTICE OF PROPOSED DEFAULT ("NPDO") in all of these cases. Except for the date, these documents are identical and include the following:

The Respondent has ten days from the date of this notice to file a written motion requesting that the proposed default not be imposed and stating grounds relied upon for the request. If no appropriate motion is filed, the Special Administrative Law Judge will enter a final order of default
NPDO, ¶2.

9. FGFR did not file a motion that default not be imposed.
10. On March 27, 2009, the Chairman of the ICRC appointed the undersigned to serve as the ALJ in these cases. ORDER APPOINTING ADMINISTRATIVE LAW JUDGE (March 27, 2009).
11. On March 31, 2009, the ALJ issued his ORDER BY DEFAULT AND NOTICE OF HEARING ON DAMAGES.
12. As alleged in Weddle-Van Sickle's complaints, which must be accepted as true,
 - A. Weddle-Van Sickle was subjected to unwelcome conduct of a sexual nature (ORIGINAL COMPLAINT);
 - B. Weddle-Van Sickle was written up twice and had her pay cut by \$1.00 per hour because she filed the ORIGINAL COMPLAINT. FIRST RETALIATION COMPLAINT.
 - C. Weddle-Van Sickle was terminated because she filed the ORIGINAL COMPLAINT. SECOND RETALIATION COMPLAINT.
13. Between February 14, 2003 and May 14, 2003, Weddle-Van Sickle would have earned an additional amount of \$4,410.00, gross, if FGFR had not cut her pay cut because she filed the ORIGINAL COMPLAINT. This is the difference between the \$1,000.00 per week, gross, she had earned as a manager and the \$650.00 per week, gross, she earned as a waitress for 12.6 weeks.
14. FGFR closed no later than July 26, 2007. AMENDED REPORT OF TELEPHONE STATUS CONFERENCE (May 7, 2008).
15. Between May 15, 2003 and July 26, 2007, Weddle-Van Sickle would have earned a total of \$219,200.00, gross, if FGFR had not terminated her employment because she filed the ORIGINAL COMPLAINT. This is \$1,000.00 per week for 219.2 weeks.
16. After her termination from FGFR, Weddle-Van Sickle made reasonable and diligent efforts to obtain other employment but was not successful until she obtained a position beginning on August 25, 2003 as an Employment Counselor with Independent Residential Living ("IRL") in Greenfield where she earned \$320.00 per week in a job involving obtaining employment for developmentally disabled adults. This position required travel and travel expenses were not paid. Between that fact and the fact that Weddle-Van Sickle was commuting from Johnson County, she was spending almost as much money to work as she was earning;

thus, she resigned on December 25, 2003. Weddle-Van Sickle earned a total of \$5,696.00, gross, from IRL. This is \$320.00 per week for 17.8 weeks.

17. After she left IRL, Weddle-Van Sickle made reasonable and diligent efforts to obtain other employment but was not successful until she obtained a position through a temporary service at a factory beginning in October of 2004 where she earned \$320.00 per week. She held this job until May of 2005 when the company was purchased by another company and all temporary employees were laid off. Weddle-Van Sickle earned a total of \$9,600.00 in this job. This is \$320.00 per week for 30 weeks.

18. After she was laid off from the factory job, Weddle-Van Sickle made reasonable and diligent efforts to obtain other employment but was not successful until she obtained a position in August of 2005 as a server at a restaurant named Grif 1's where she earned \$300.00 per week. She held this job until September of 2006 when the restaurant went out of business. Weddle-Van Sickle earned a total of \$18,300.00 in this job. This is \$300.00 per week for 61 weeks.

19. There is no evidence that, at any material time, Weddle-Van Sickle rejected a job that she was offered or failed to seek a job she could have obtained.

20. As a result of having her pay cut because she filed the ORIGINAL COMPLAINT and being discharged because she filed the ORIGINAL COMPLAINT, Weddle-Van Sickle lost a total of \$190,014.00, gross. This is the difference between what she would have earned from FGFR and what she did earn in other employment through July 26, 2007, when FGFR was closed.

21. Weddle-Van Sickle has not sought interest.

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. Weddle-Van Sickle and FGFR are each a "person" as that term is defined in the Indiana Civil Rights Law, IC 22-9 ("the ICRL"). IC 22-9-1-3(a).
3. FGFR is an "employer", as defined by the ICRL. IC 22-9-1-3(h) and (i).

4. The ICRC's Rule 6.1(1) provides, in material part, that "[w]hen a party has (1) failed to plead or otherwise defend as provided by this article ... such party is in default." 910 IAC 1-6-1(1).
5. Default is appropriate under 910 IAC 1-6-1(1).
6. A party may be defaulted under the Administrative Orders And Procedures Act for failure "to attend or participate in a prehearing conference". IC 4-21.5-3-24(a)(2).
7. Default is appropriate under IC 4-21.5-3-24(a)(2).
8. The ALJ must conduct further proceedings after default without the participation of Respondent. IC 4-21.5-3-24(d).
9. The effects of an order by default include that the allegations of the complaint are deemed admitted.
10. The ICRL defines what is an unlawful discriminatory practice at section 3(l), which provides, in material part, as follows:

"Discriminatory practice " means:

 - (1) the exclusion of a person from equal opportunities because of ... sex ...;

...

Every discriminatory practice relating to ... employment ... shall be considered unlawful unless it is specifically exempted by this chapter.
IC 22-9-1-3(l).
11. Subjecting an employee to unwelcome conduct of a sexual nature excludes that employee from equal opportunities because of sex and is a discriminatory practice under the ICRL. Because there was no applicable exemption for such a practice, it was unlawful. IC 22-9-1-3(l).
12. Section 6(h) of the ICRL provides, in material part, as follows:

(h) The commission shall prevent any person from discharging ... or otherwise discriminating against any other person because he filed a complaint....
IC 22-9-1-6(h).
13. FGFR committed violations of this provision by cutting Weddle-Van Sickle's pay because she filed the ORIGINAL COMPLAINT and by discharging her because she filed the ORIGINAL COMPLAINT.

14. 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 and to take further affirmative action as will effectuate the purposes of the ICRL, which may include restoring complainant's losses incurred as a result of discriminatory treatment. IC 22-9-1-6(k)(A).
15. Weddle-Van Sickle has proven that she sustained lost earnings that were the proximate result of the proven unlawful discriminatory practice.
16. 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).
17. Administrative review of this proposed decision may be obtained by any interested and affected person who is not in default by the filing of a writing identifying with reasonable particularity each basis for each objection within 15 days after service of this proposed decision. IC 4-21.5-3-29(d).
18. Any Finding Of Fact that should have been deemed a Conclusion Of Law is hereby adopted as such.

ORDER

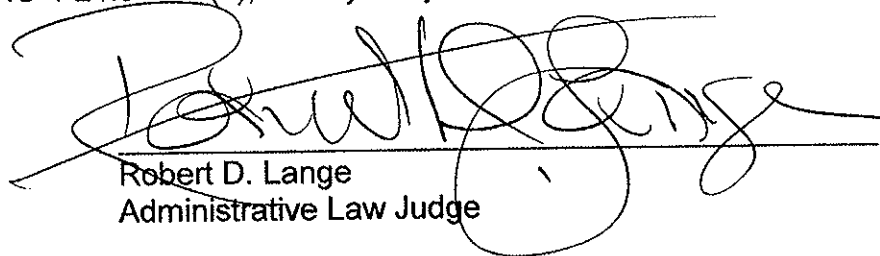
1. FGFR shall cease and desist from excluding persons from equal opportunities because of sex.
2. FGFR shall cease and desist from discharging or otherwise discriminating against persons because they filed a complaint with the ICRC.
3. FGFR shall purge its records of Weddle-Van Sickle's employment of all references to these complaints and all incidents and circumstances pertaining to these complaints. In the event of a reference request is made by any third party, FGFR shall not make any reference to the purged items or give any negative evaluations.
4. FGFR shall post and prominently display statements of its policies to provide equal employment opportunity and to prohibit sexual harassment.
5. Each and every owner and manager of FGFR shall, within 180 days of the effective date of this Order a professionally developed training seminar, approved in advance by the ICRC's Executive Director, addressing the employer's recognition, prevention, and treatment of sexual

harassment in the workplace. Proof of successful completion of this seminar shall be filed with the ICRC within 300 days after the effective date of this Order.

6. RAR shall deliver to the ICRC one or more cashier's checks payable to Weddle-Van Sickle, in amounts totaling \$190,014.00 minus deductions required by law and/or agreement.

7. 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 IC 4-21.5-3-31(b), or stayed by a court of competent jurisdiction.

Dated: 24 June 2009



Robert D. Lange
Administrative Law Judge

To be served by first class mail this 24th day of June, 2009 on the following parties:

Michelle Weddle-Van Sickle
1738 Walnut Lane
Greenwood, IN 46143

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and to be personally served this 24th day of June, 2009 on the following:

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