

STATE OF INDIANA
CIVIL RIGHTS COMMISSION

DOCKET NO. EMse07010012
EEOC NO. 24FA700124

MEGAN HARNEY,
Complainant,

FILE DATED

MAY 22 2009

v.

Indiana State Civil Rights Commission

RED APPLE RESTAURANT,
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 27, 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.

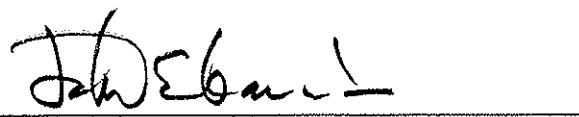
Having carefully considered the foregoing and being duly advised in the premises, the ICRC hereby adopts as its own the findings of fact, conclusions of law, and order proposed by the ALJ in the proposed decision, a copy of which is attached hereto and incorporated herein by reference.

INDIANA CIVIL RIGHTS COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER


COMMISSIONER

Dated: 22 May 2009

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

Megan Harney
513 North Alexander Street
Carlisle, IN 47838

Red Apple Restaurant
c/o Nufri Asani, Owner
8393 South Old U.S. Highway 41
Carlisle, IN 47838

Red Apple Restaurant
c/o Nufri Asani, Owner
1500 West Locust Lane
Robinson, IL 62454-3025

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

Joshua S. Brewster, Esq.; Staff Attorney
Indiana Civil Rights Commission
Indiana Government Center North
100 North Senate Avenue, Room N103
Indianapolis, IN 46204-2255

STATE OF INDIANA
CIVIL RIGHTS COMMISSION

DOCKET NO. EMse07010012
EEOC NO. 24FA700124

MEGAN HARNEY,
Complainant,

v.

RED APPLE RESTAURANT,
Respondent.

FILE DATED

APR 27 2009

Indiana State Civil Rights Commission

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

A Hearing On Damages was held on April 2, 2009 before the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") by conference telephone call. Complainant, Megan Harney ("Harney"), participated and was represented by counsel, Joshua S. Brewster, Esq., Staff Attorney. Respondent, Red Apple Restaurant ("RAR") did not appear, by counsel or otherwise.

Harney waived her opening statement and testified on her own behalf. Harney waived closing argument. The ALJ ordered that Harney file what she suggested that the ALJ enter as proposed findings of fact, conclusions of law, and order on or before April 16, 2009.

On April 16, Harney 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. Harney is an adult female who has resided, at all material times, in the state of Indiana.
 2. RAR was, at all material times, an Indiana businesses that employed 6 or more persons for wages or salary within the state.
 3. The body of Harney's complaint reads as follows:
 - I. On December 22, 2006 Respondent unlawfully terminated my employment.
 - II. I believe Respondent discriminated against me on the basis of sex (female) and pregnancy-related condition because:
 - A. On the above-mentioned date, Respondent's owner (Agin Asani) informed me that I was terminated due to the fact that I was pregnant.
 - B. Mr. Asani concluded I could not perform the essential functions of the job even though at all times I performed my job in a satisfactory fashion.
 - C. Mr. Asani stated I could reapply for a job after I had given birth.
 - D. It is in my belief that Respondent's decision to terminate my employment violates the Pregnancy Discrimination Act, which states in relevant part that "pregnant employees must be permitted to work as long as they are able to perform their jobs."
 - III. As a remedy, I am seeking reinstatement, lost wages and any others available for a violation of Title VII of the Civil Rights Act of 1964, as amended, and the Indiana Civil Rights Laws.
- COMPLAINT OF DISCRIMINATION (January 10, 2007) ("COMPLAINT").

4. On August 11, 2008, a Notice Of Initial Pre-Hearing Conference ("NPHC I") was served notifying the parties that an Initial Pre-Hearing Conference would be held before the ALJ on September 8, 2008 by conference telephone call.
5. After the ALJ learned of a forwarding address, an Amended Notice Of Initial Pre-Hearing Conference was served, again notifying the parties that an Initial Pre-Hearing Conference would be held before the ALJ on September 8, 2008 by conference telephone call. ("ANIPHC I").
6. Red Apple did not appear for the September 8 Conference.

7. On September 10, 2008, a Notice Of Initial Pre-Hearing Conference ("NPHC II") was served notifying the parties that an Initial Pre-Hearing Conference would be held before the ALJ on October 9, 2008 by conference telephone call.
8. On September 11, 2008, an Amended Notice Of Initial Pre-Hearing Conference ("ANIPHC II") was served notifying the parties that an Initial Pre-Hearing Conference would be held before the ALJ on October 9, 2008 in a specified location in Indianapolis.
9. ANIPHC II was received by Red Apple on September 13, 2008. Motion For Default Judgment (*sic*) ("MOTION"), Exhibit A. (December 16, 2008).
10. Each of the foregoing NOTICES expressly provided that "[a] party who fails to attend ... a Pre-Hearing Conference may be held in default"
11. Red Apple did not appear at the October 9 Pre-Hearing Conference.
12. On December 16, 2008, Harney moved for default.
13. On February 5, 2009, the ALJ issued his NOTICE OF PROPOSED DEFAULT ORDER ("NPDO"), notifying RAR, among other things, that (1) the ALJ proposed to enter an Order By Default against RAR (NPDO, ¶1); (2) that RAR could file a written motion requesting that the proposed default order not be imposed, stating the grounds, within 7 days after service of the proposed default order (NPDO, ¶2); and (3) if no such motion is filed the ALJ **MUST** enter the proposed default order. (NPDO¶3).
14. RAR did not respond to either the MOTION or the NPDO.
15. On February 27, 2009, the ALJ issued his ORDER BY DEFAULT AND NOTICE OF HEARING ON DAMAGES.
16. As alleged in the COMPLAINT, as amended, which must be accepted as true, RAR terminated Harney's employment because she was pregnant.
17. Being pregnant, as that word is used here, is a physical condition limited, in humans, to females. Thus, terminating Harney's employment because she was pregnant, while able to perform her job, was terminating her because of sex.
18. At the time of her termination, Harney was earning \$2.13 per hour and was working a 25 hour week. She also made about \$100.00 per week in tips.
19. Harney had planned to take 6 weeks off to have her baby and recover before returning to work. Her baby was born on March 16, 2007.

20. Harney next obtained employment in May of 2007, again as a waitress. In this job, she earned \$6.00 per hour and earned more than she had at RAR.

21. There is no evidence that, at any time between her termination from RAR and her next job, Harney rejected a job that she was offered or failed to seek a job she could have obtained.

22. Had Harney not been unlawfully terminated by RAR, she would have earned a total of \$2,452.00, gross, during the period that she was unemployed and able to work. This is 16 weeks (December 22, 2007 through May 25, 2007 is 22 weeks (minus 6 weeks off) times \$153.25 per week.

23. Harney also lost the use of the income she would have earned from RAR.

24. Interest is the way to compensate someone for the loss of use of money to which the person was entitled. Calculated at simple interest at the rate of 8%, compounded annually, Harney is entitled to interest, through the date of the Hearing On Damages, in the amount of \$470.58, calculated as follows:

2006	$\$2,452.00 \times .08 \times 1/52$	\$ 3.77
2007	$\$2,455.77 \times .08$	196.46
2008	$\$2,652.23 \times .08$	212.18
2009	$\$2,864.41 \times .08 \times 13.2/52$	<u>58.17</u>
TOTAL		\$470.58

25. 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. Harney and RAR 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. RAR 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. The ALJ must conduct further proceedings after default without the participation of Respondent. IC 4-21.5-3-24(d).

7. 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).

8. Default is appropriate under IC 4-21.5-3-24(a)(2).

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. Terminating a female employee because she is pregnant 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. 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. IC 22-9-1-6(k)(A).

13. Harney has proven that she sustained lost earnings that were the proximate result of the proven unlawful discriminatory practice.

14. The loss of the use of wages is a part of the loss that a complainant incurs when those wages are lost. Thus, the awarding of interest to compensate for the loss of use is within the authority of the ICRC.

15. 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 applicable statute. *Indiana Insurance Company v. Sentry Insurance Company*, 437 N.E.2d 1381 (Ind.App. 1982).

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 parties who are 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.

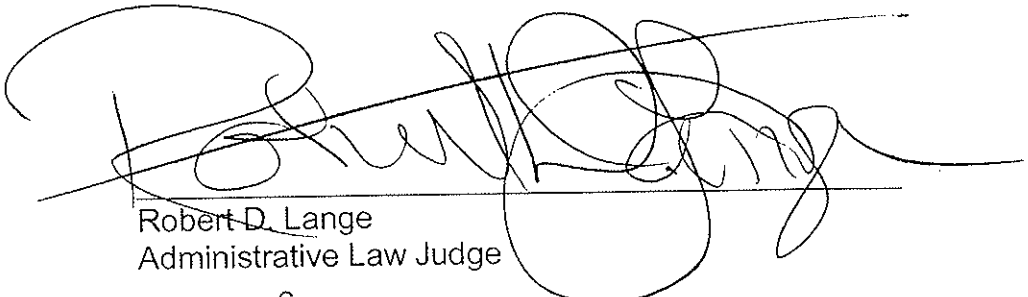
ORDER

1. RAR shall cease and desist from terminating employees because of pregnancy.

2. RAR shall deliver to the ICRC one or more cashier's checks payable to Harney, in amounts totaling \$2,922.58. Of this total, \$2,452.00 shall be subject to deductions required by law and/or agreement.

3. 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: 27 April 2009



Robert D. Lange
Administrative Law Judge

To be served by first class mail this 27th day of April, 2009 on the following parties:

Megan Harney
513 North Alexander Street
Carlisle, IN 47838

Red Apple Restaurant
c/o Nufri Asani, Owner
8393 South Old U.S. Highway 41
Carlisle, IN 47838

Red Apple Restaurant
c/o Nufri Asani, Owner
1500 West Locust Lane
Robinson, IL 62454-3025

and to be personally served this 27th day of April, 2009 on the following:

Joshua S. Brewster, Esq.; Staff Attorney
Indiana Civil Rights Commission
Indiana Government Center North
~~100 North Senate Avenue, Room N103~~
Indianapolis, IN 46204-2255

Indiana Civil Rights Commission
c/o Tony A. Kirkland, Executive Director
Indiana Government Center North
100 North Senate Avenue, Room N103
Indianapolis, IN 46204-2255