

CHAYLENE M. DICKS,
Complainant,

FILE DATED

v.

JUL 23 2010

A BETTER WATER, INC.;
Respondent.

Indiana State Civil Rights Commission

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On March 25, 2010, 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"). On April 7, 2010, Respondent – A Better Water, Inc. ("ABW") – filed its Objections To [Proposed] Findings Of Fact, Conclusions Of Law, And Order And Request For Stay Of Final (*sic*) Order. On June 4, 2010, ABW filed its Brief In Support Of Objection[s] To [Proposed] Findings Of Fact, Conclusions Of Law, And Order By Administrative Law Judge. On June 11, 2010, Complainant, Chaylene M. Dicks ("Dicks"), formerly "Mullins", filed Complainant's Brief In Response To Respondent's Objections.

Alpha Blackburn, Chairperson of the ICRC, presided over oral argument on ABW's Objections on June 25, 2010 in Terre Haute, Indiana. Commissioners present for the entire argument were David C. Carter (the Vice-Chairperson), Barry Baynard, John E. Garcia, and Charles D. Gidney. Commissioner Tehiji G. Crenshaw arrived after the proceeding had begun and Commissioner Steven A. Ramos was absent. ABW was represented by counsel, Mark A. McCann, Esq. of the Kokomo firm of McCANN | LEGAL. Dicks was represented by counsel, Joshua Sol Brewster, Esq.; Deputy Director of the ICRC. Arguments of counsel were heard and the cause was taken under advisement.

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

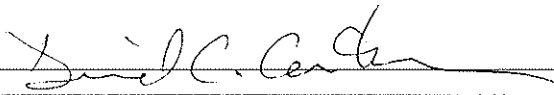
1. ABW hasnot met the burden of an objecting party to show an error that affected the result.

IT IS, THEREFORE, ORDERED

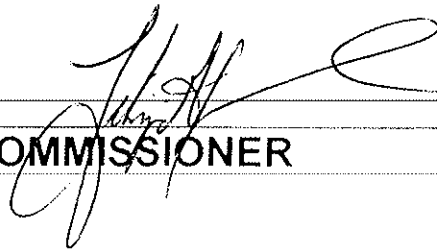
1. ABW's Objections To [Proposed] Findings Of Fact, Conclusions Of Law, And Order are **OVERRULED**.

2. The ICRC 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: 23 July 2010

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

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CHAYLENE M. DICKS,
Complainant,

FILE DATED

v.

A BETTER WATER, INC.;;
Respondent.

FILED IN

**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 October 8, 2009. Complainant, Chaylene M. Dicks ("Dicks"), formerly "Mullins", was present and was represented by counsel, Frederick S. Bremer, Esq.; Staff Attorney with the ICRC. Respondent – A Better Water, Inc. ("ABW") - was represented by counsel, Mark A. McCann, Esq. of the Kokomo firm of McCANN PEELLE.

After opening statements were made, Dicks testified on her behalf, and also called Bruce Dicks ("Bruce") and Gary White as witnesses. During the presentation of Dicks' case, Complainant's Exhibit 1 ("CX__"), Respondent's Exhibit I ("RX__"), RXC, and RXK were admitted into evidence without objection.

After Dicks rested her case, ABW called Bradford Shockney, Josh Bradley and Robert A. Brewer, Jr. ("Brewer"). During the presentation of ABW's case, RXB, RXD, RXE, RXJ, CX2, CX3, CX4, CX5, and CX6 were admitted into evidence without objection.

Dicks elected not to present any evidence in rebuttal, and both parties waived oral closing arguments. 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 December 4, 2009. The ALJ also permitted the parties to file briefs on or before the same date..

On December 4, 2009, ABW filed Respondent's [Suggested] Proposed Findings Of Fact And Conclusions Of Law [And] Order. On December 8, 2009, Dicks filed her Motion For Order Granting Full Consideration By ALJ Of Complainant's Tender Of [Suggested Proposed] Findings Of Fact, Conclusions Of Law And Post[-]Trial (*sic*) Brief Although Belatedly Filed (a Motion to which ABW did not object), her Tender Of [Suggested Proposed] Findings Of Fact, Conclusions Of Law And Order As Proposed By Complainant and Complainant's Post[-]Trial (*sic*) Brief. On December 9, 2009, the ALJ entered his Order granting the Motion filed December 8.

Having carefully considered the evidence and the arguments of counsel, 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 identified are (1) whether Dicks was dismissed by ABW as a result of pregnancy and, (2) if so, what relief should be awarded. FIRST PRE-HEARING ORDER ¶8 (March 13, 2009).
2. Dicks is an adult female who has resided, at all material times, in the state of Indiana.
3. ABW is a for profit corporation that operates a facility located in Kokomo that bottles water. ABW has, at all material times, employed six or more persons for wages or salary within the state of Indiana. The Kokomo facility is a small operation, generally employing around a dozen people.
4. Dicks began working at ABW as an employee of Manpower in July of 2006. This arrangement lasted for a couple of months.
5. Dicks was hired as an employee of ABW and began as such on September 5,

2006. Her immediate supervisor was Brewer, the plant manager.

6. From September of 2006 until February of 2007, Dicks was one of two females employed in the plant. The other female was terminated after a positive drug test in late February of 2007, and Dicks was the only female employed in the plant from then until her termination. (There was a female employed in the office during some, but not all, of Dicks' employment with ABW.)

7. As might be expected of a site with a small workforce, ABW required its employees to be capable of performing many, if not all, of the jobs in the facility. An employee did not know for certain prior to arriving at work where s/he would be assigned to work that day. On the other hand, employees did know what their usual assignment was, even though they also knew that they might be re-assigned.

8. Throughout most of her employment with ABW, Dicks worked in the gallon room or the fill room. In the gallon room, she was required to see that the caps were filled, that the bottles had caps, that the labeler was working and had the right dates. Any lifting that was required involved items weighing about 10 pounds.

9. At some point several weeks prior to July 3 of 2007, Dicks advised Brewer that she was pregnant. ~~No employment-related action was requested by either at that time.~~

10. On July 3, 2007, Dicks noticed that she was "spotting" and requested permission to see her doctor. Permission was granted and Dicks did go see her doctor. She was advised to take a few days off, and she did, calling in to notify ABW as required.

11. Dicks returned, intending to go back to work, on July 9, 2007, having obtained the two documents from the doctor's office that, together, are CX1. One of these is a note explaining Dicks' absence as having been under the doctor's care. The other, more critical to this case, is on a prescription form and reads as follows:

Pt may work
1) Restriction -- Do not lift anything over 25 lbs
2) Avoid noxious gases or wear mask
CX1.

12. Dicks gave these documents to Brewer. Shortly thereafter, Brewer called Dicks and Bruce into his office for a meeting.. (Bruce, at the time, lived with Dicks, then Mullins.

(They later married, explaining her name change.)

13. Brewer began this meeting by stating that he did not understand what kind of mask was required. He went on to say that he had talked to the owners and they had agreed that it was too big a risk, noting that he was unclear about not only the kind of mask required but also what were "noxious gases". During this meeting, Dicks asked if she was fired and Brewer said no. It was clear that she was not to return to work before the child was born and Brewer noted in a payroll report for that week that she was "laid off due to work restrictions for pregnancy per doctor's restrictions". RXD.

14. There is ozone in the plant and that could be considered noxious; however, at no time did Brewer seek any clarification from the doctor's office, either himself or through Dicks, as to what were noxious gases or what kind of mask would suffice,

15. Dicks' child was born on February 16, 2008.

16. Dicks sought to return to work after she had recovered from childbirth, personally appearing and talking to Brewer sometime in April of 2008. Brewer told her that she would need a statement from her doctor lifting her restrictions.

17. Dicks returned a couple of days later with that doctor's statement but this time, Brewer told her that there was nothing available for her.

18. The day before Dicks returned with the doctor's statement releasing her from her restrictions, Brewer had hired a man who had been a temporary employee to be a full-time employee. Furthermore, a temporary employee provided by Manpower was at ABW getting ready to go to work while Brewer was talking to Dicks.

19. Later that afternoon, Dicks contacted Brewer by telephone and asked when he would know whether something was available. Brewer said he did not know.

20. ABW never contacted Dicks to tell her she could return to work.

21. At one point, Brewer told Bruce that women in the workplace are distracting.

22. Sex was at least one motive in the decision by ABW to refuse to let Dicks continue to work in July of 2007 and in the decision by ABW not to re-employ Dicks after the birth of her child.

23. ABW has not proven by a preponderance of the evidence that it would have made the same decision, either with respect to the layoff in July of 2007 or with respect to the

return in 2008 if sex had not been a consideration.

24. ABW laid off Dicks in July of 2007 because of sex.

25. ABW failed to re-employ Dicks in April of 2008 because of sex.

26. Dicks earned \$8.00 per hour and worked 40 hours per week at ABW.

27. Had she not been laid off by ABW and had she been re-employed by ABW, Dicks would have earned a total of \$35,776.00, gross, through October 8, 2009. This allows a month off before the birth and another month off after the birth, and is calculated as follows:

$$\begin{array}{r} \$8.00 \text{ per hour} \\ \times 40 \text{ hours per week} \\ \hline \$320.00 \text{ per week} \\ \times 111.8 \text{ weeks} \\ \hline \$35,776.00 \end{array}$$

28. Dicks sought other employment after the birth of the child. She worked for about a month for Tru Flite (phonetic) at \$8.00 per hour between 30 and 35 hours per week. She left that position because she was not getting enough hours. Her next position was her current job at Main Street Gas Station, where she started on September 11, 2008 at \$7.00 per hour. In July of 2009, her hourly rate was increased to \$7.25, and it was raised again about a month and a half prior to the Hearing to \$7.75. She worked 35 hours weekly through summer, after which she got a couple of days a week. The available information is imprecise¹ but it appears reasonable to deduce that Dicks earned a total of \$14,743.00, gross, after she last worked at ABW. Calculations are shown below:

Tru Flite	\$8.00/hour x 32.5 hours/week x 4 weeks	= \$1,040.00
Main Street		
09/11/08 – 07/04/09	\$7.00/hour x 35 hours/week x 42.4 weeks	= 10,338.00
07/05/09 – 08/22/09	\$7.25/hour x 35 hours/week x 7 weeks	= 1,776.25
08/23/09 – 09/19/09	\$7.75/hour x 35 hours/week x 5 weeks	= 1,356.25
09/27/09 - 10/08/09	\$7.75/hour x 15 hours/week x 2 weeks	= <u>232.50</u>
TOTAL		\$14,743.00

¹ There are references in Dicks' Suggested Proposed Decision to exhibits to her Deposition (RXK) that could further detail her subsequent earnings history. See Tender Of [Suggested Proposed] Findings Of Fact, Conclusions Of Law And Order As Proposed By Complainant, Finding 20, p. 6. The deposition does NOT include those exhibits. RXK.

29. There is no evidence that Dicks rejected any job she was offered or failed to seek any job that she could have obtained.
30. Dicks lost a total of \$21,033.00, gross, as a result of being laid off, and not being re-employed, by ABW because of sex. This is the difference between what she would have earned at ABW and what she did earn.
31. Dicks does not seek interest.
32. 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. Dicks and ABW are each a “person” as that term is defined in section 3(a) of the Indiana Civil Rights Law, IC 22-9-1-1 *et. seq.* (“the ICRL”). IC 22-9-1-3(a).

3. ABW is an “employer”. IC 22-9-1-3(h),(i).

4. What constitutes an unlawful discriminatory practice is set out in the following subsection of the ICRL:
 - (l) “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).

5. 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. *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835 (Ind. 2009); *Indiana Civil Rights Commission v. Culver Educational Foundation*, 535 N.E.2d 112 (Ind. 1989).
6. One method for proving unlawful employment discrimination under Title VII is by

by use of the mixed motive theory, which provides that if a preponderance of the evidence shows that an unlawful consideration and one or more lawful considerations motivated a particular decision, then that decision is unlawful unless the employer proves by a preponderance of the evidence that it would have made the same decision without consideration of the unlawful factor. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

7. Dicks proved by a preponderance of the evidence that sex was a motive in the decision to lay her off and in the decision to not re-employ her.

8. ABW did not prove that it would have made the decision to lay off Dicks or the decision to not re-employ Dicks absent consideration of sex.

9. ABW laid Dicks off in July of 2007 and refused to re-employ her after the birth of her child because of sex.

10. ABW's termination of Dicks was a "discriminatory practice" as that term is defined in section 3(l) of the ICRL. Because there is no applicable exemption in the ICRL for such a practice, it was unlawful.

11. Section 6(k) of the ICRL governs ICRC's authority upon the finding of an 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).~~

12. Dicks has proven out of pocket losses that were the proximate result of the proven unlawful discriminatory practice.

13. 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).

14. Unemployment compensation is not deducted when calculating back pay under the ICRL. *Indiana Civil Rights Commission v. Weingart, Inc.*, 588 N.E.2d

1288 (Ind. App. 1992).

15. 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).

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

ORDER

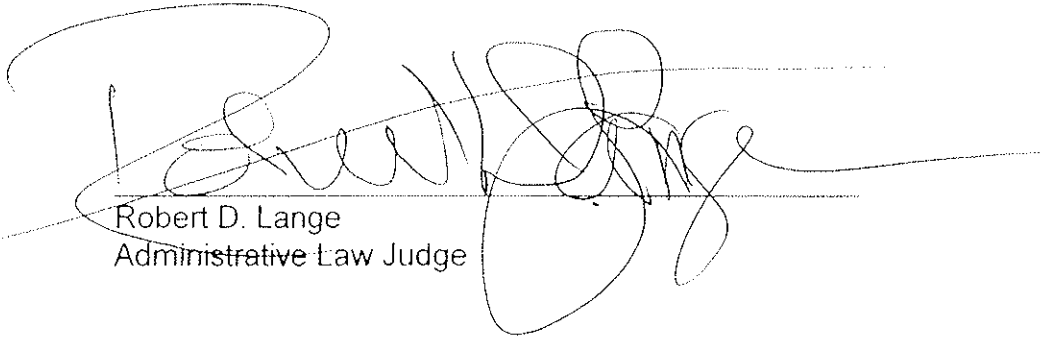
1. ABW shall cease and desist from laying employees off, and from refusing to re-hire former employees, because of sex.

2. ABW shall deliver to the ICRC a check payable to Dicks, in the amount of \$21,033.00, minus taxes and other deductions required by law and/or agreement.

3. ABW shall offer to Dicks by telephone or electronic mail the next hourly worker position for which it would seek applicants. Dicks shall have at least 21 days from her receipt of the offer in which to report for duty. If Dicks does not accept this offer, then ABW's obligation under this Order is terminated.

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 ICRC pursuant to IC 4-21.5-3-31(a), stayed by ICRC under 4-21.5-3-31(b), or stayed by a court of competent jurisdiction.

Dated: 25 March 2010



Robert D. Lange
Administrative Law Judge

To be served by first class mail this 25th day of March, 2010 on the following parties and attorneys of record:

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and to be personally served this 25th day of March, 2010 on the following:

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