STATE OF INDIANA
CIVIL RIGHTS COMMISSION

COURTNEY DILLON, and MELANIE JO PHEND;	**DOCKET NO. EMsh06010020 EMsh06010021**
Complainants,	
v.	
PIERCETON RUBBER PRODUCTS, INC.;	
Respondent.	

FILE DATED

JUL 25 2008

Indiana State Civil Rights Commission

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On June 26, 2008, 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: 25 July 2008

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PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On September 13, 2007, Respondent – Pierceton Rubber Products, Inc. ("PRP") - filed its Memorandum In Support Of Motion For Summary Judgment And Motion To Dismiss. On December 10, 2007, Complainants, Courtney Dillon ("Dillon") and Melanie Jo Phend ("Phend") (collectively "Complainants"), filed Complainants' Designation Of Materials In Support Of Complainants' Response To Respondent's Motion For Summary Judgment and Complainants' Response To Respondent's Motion For Summary Judgment. On December 17, 2007, PRP filed its Reply In Support Of Its Motion For Summary Judgment And Motion To Dismiss. Also on December 17, 2007, a hearing was held on the motions by conference telephone call before the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC"). No participant wished to introduce evidence and arguments were heard from counsel, Frederick S. Bremer, Esq., Staff Attorney at the ICRC and Christopher R. Putt, Esq. of the Mishawaka firm of MAY · OBERFELL · LORBER, counsel for PRP. The cause was taken under advisement.

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. Phend filed her complaint against PRP with the ICRC on January 6, 2006, claiming that PRP had terminated her employment as a result of sexual harassment.

2. Dillon filed her complaint against PRP with the ICRC on January 13, 2006, claiming that PRP had terminated her employment as a result of sexual harassment.

3. PRP's Motions claim that it is not an "employer" within the meaning of the Indiana Civil Rights Law, IC 22-9-1 ("the ICRL"), because it is does not have the 6 employees required by IC 22-9-1-3(h).

4. Phend began her employment with PRP on November 14, 2005 and her employment with PRP terminated on November 29, 2005.

5. Dillon began her employment with PRP on October 31, 2005 and her employment with PRP also terminated on November 29, 2005.

6. PRP is an Indiana corporation. There is no evidence suggesting that PRP is a professional corporation.

7. John Burnau ("John") and Tammy Burnau ("Tammy") (collectively "the Burnaus") were, at all material times, a married couple. John is "**an** owner, shareholder, and officer of the corporation". RESPONDENT'S RESPONSE TO COMPLAINANT'S ADDITIONAL REQUESTS FOR ADMISSION ("ADMISSION") (emphasis added).

8. The record does not reflect that John, Tammy, or the Burneaus collectively are **the** owners of PRP.

9. PRP has acknowledged that John "received a wage payment". ADMISSIONS #7.

10. With respect to John, PRP is "another" by whom John was, for some periods of time, employed and paid wages.

11. Tammy was, at all material times, employed by PRP as its Office & Sales Manager. AFFIDAVIT OF JOHN BURNAU, ¶5. Tammy is not, of course, a spouse of PRP.

12. Apart from some conclusory assertions in Affidavits, the record as to the number of persons employed by PRP consists of payroll records showing the people who were paid for specified weekly payroll periods ending in the second half of 2005. By counting the individuals named in each such payroll record, the following history (specifying if John, Tammy, Dillon and/or Phend was so employed) is shown:

A. **Periods ending July 3, 2005 through period ending August 21, 2005** -7 employees, including John and Tammy.

B. **Periods ending August 22[1], 2005 and September 4, 2005** – 8 employees, including John and Tammy.

C. **Periods ending September 11, 2005, September 18, 2005, and September 25, 2005** – 6 employees, including John and Tammy.

D. **Periods ending October 2, 2005 and through period ending October 30, 2005** – 5 employees, including John and Tammy.

E. **Period ending November 13, 2005** – 4 employees, including Tammy and Dillon.

F. **Period ending November 20, 2005** – 5 employees, including Tammy and Dillon.

G. **Period ending November 27, 2005** - 5 employees, including Tammy, Dillon and Phend.

H. **Period ending December 4, 2005** – 5 employees, including Tammy and Dillon.

13. During the entire period of time that Dillon and Phend were employed, PRP employed less than 6 employees.

14. Although there was a period of time of about 3 months (July 3 through September 25 of 2005) during which PRP employed 6 or more persons, the remaining period of time

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1. So labeled on record. In view of the other records, the date should probably be August 28.

(October 2 through December 4 of 2005) is one in which PRP employed less than 6 persons. It cannot be said, on this record, that PRP has a historical practice of employing 6 or more persons. While the history of PRP includes some periods in which it employed 6 or more people, to call that a practice, especially in a way that is meaningful in this context, suggests a kind of repetitiveness that makes it fairer and more accurate, on balance, to consider the respondent as an entity that does employ 6 persons than to consider it as an entity that employs less than 6 persons. Such an analysis might be appropriate in a case in which a respondent's number of employees fluctuates between less than 6 and 6 or more, but does not seem appropriate in a case, such as this, where the number of employees, once it got below the threshold 6, stayed there. In this case, it appears that the practice the record reflects is that the number of employees has been dwindling.

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

CONCLUSIONS OF LAW

1. Dillon, Phend, and PRP 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).

2 The ICRL defines the term "discriminatory practice", in material part, as follows:

> (l) "Discriminatory practice" means:
>
> (1) the exclusion of a person from equal opportunities because of ... sex ...;
>
> (2) a system that excludes persons 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).

3. The term "employment" is not defined in the ICRL and its meaning must be derived from its common association with the terms "employer" [defined in IC 22-9-1-3(h)] and "employee" [defined in IC 22-9-1-3(i)]. *Indiana Civil Rights*

Commission v. Kightlinger & Gray, 567 N.E.2d 125, 55 FEP Cases 182 (Ind. App. 1991).

4. Section 3(h) of the ICRL provides, in material part, as follows:

> "Employer" means ... any person employing six (6) or more persons within the state ....
> IC 22-9-1-3(h).

5. Section 3(i) of the ICRL provides, in material part, as follows:

> "Employee" means any person employed by another for wages or salary. However, the term does not include any individual employed:
> (1) by his ... spouse ...
> ...
> IC 22-9-1-3(i)(1).

6. 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).

7. In *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 74 AD Cases 289 (2003), the Supreme Court held director-shareholder physicians were not to be counted as "employees" of a professional corporation under Title VII.

8. This case is distinguishable from *Clackamas* as to whether John, Tammy, or both should be considered employees of PRP because (1) there is only evidence that John was "an" owner of PRP, not evidence, as in *Clackamas*, that the disputed individuals were "the" owners of the corporation; and (2) PRP is not a professional corporation.

9. At the times that they were receiving wages or salary from PRP, John and Tammy were employees of PRP.

10. The issue of whether a respondent has or had the threshold number of employees to be governed by the ICRL is not an issue going to subject matter jurisdiction. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 97 FEP Cases 737 (2006). In Indiana, the issue is likely to be treated as one of jurisdiction over the particular case. See *State ex. Rel. Hight v. Marion Superior Court*, 547 N.E.2d 267 (Ind. 1989), *Park Improvement Co. v. Review Board*, 109 Ind. App. 538, 36 N.E.2d 985 (1941).

11. Summary judgment may be granted if the designated evidence establishes that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. IC 4-21.5-3-23(b), *Madison County Bank & Trust Company v. Kreegar*, 514 N.E.2d 279 (Ind. 1987). No weighing of the evidence is to be involved, *Mogan v. Southern Indiana Bank and Trust Company*, 473 N.E.2d 158 (Ind. App. 1985), and all doubts must be resolved against the moving party. *Jones v. City of Logansport*, 436 N.E.2d 1138 (Ind. App. 1982). PRP has met this standard.

12. PRP has established, by the foregoing standard, that it was not, as to Dillon or Phend, an employer as that term is defined in the ICRL.

A. PRP never had 6 employees at any time that either Dillon or Phend was employed.

B. The record does not raise a genuine issue of material fact that PRP had a practice of employing 6 or more persons.

C. Complainants' argument that an entity should be considered covered by section 3(h) of the ICRL if it has a practice of employing the required number of individuals is unpersuasive. While the statute could be more specific, the proposed interpretation is less clear than the language it seeks to interpret.

D. It is by no means clear that the interpretation suggested by Complainants would result in more persons being covered by the ICRL.

12. The ICRC lacks jurisdiction over these particular cases.

13. 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).

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

ORDER

1. PRP's Motion For Summary Judgment is **GRANTED**.

2. PRP's Motion To Dismiss is **DENIED**.

3. Complainants' complaints are **DISMISSED**, with prejudice.

Dated: 26 June 2008

Robert D. Lange
Administrative Law Judge

To be served by first class mail this 26th day of June, 2008 on the following parties and attorneys of record:

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Indiana Civil Rights Commission
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