

STATE OF INDIANA
CIVIL RIGHTS COMMISSION

DOCKET NO. EMra05090476
EEOC NO. 24FA500387

DARNELL GRAVES,
Complainant,

v.

DB SALES INC. d/b/a BURD
AUTOMALL; and BURD
AUTOMOTIVE, INC. d/b/a
BURD

Respondents

FILE DATED

MAR 26 2010

Indiana State Civil Rights Commission

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On February 11, 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").

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: 26 March 2010

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STATE OF INDIANA
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DARNELL GRAVES,
Complainant,

v.

DB SALES INC. d/b/a BURD
AUTOMALL; and BURD
AUTOMOTIVE, INC. d/b/a
BURD FORD;

Respondents.

FILE DATED

June 11, 2009

Indiana State Civil Rights Commission

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

On May 21, 2009, Respondent Burd Automotive, Inc. d/b/a Burd Ford ("Burd Automotive"), filed Burd Automotive, Inc.'s Motion For Summary Judgment and Respondent's Designation Of Evidence In Support Of Motion For Summary Judgment. On June 4, 2009, Complainant, Darnell Graves ("Graves"), filed Complainant's Objections To Burd Automotive, Inc.'s Motion For Summary Judgment and Complainant's Designation Of Evidence In Support Of His Objections To Respondent's Motion For Summary Judgment.

A Hearing was held on Burd Automotive's motion before the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") on June 11, 2009. Joshua Brewster, Esq., ICRC Staff Attorney, appeared in the public interest on behalf of Graves and Mark J. Pizur, Esq. and Lante K. Earnest, Esq. of the Indianapolis firm of TABBERT HAHN EARNEST & WEDDLE, LLP, appeared on behalf of Respondents DB Sales, Inc. d/b/a Burd Automall ("DB") and Burd Automotive.

Arguments of counsel were heard and 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. On September 7, 2005, Graves filed this complaint against DB, an automobile dealership selling and servicing automobiles and then doing business at 7848 Pendleton Pike in Indianapolis. The complaint alleges that Graves was subjected to a hostile working environment because of racial harassment, culminating in his termination on August 12, 2005. COMPLAINT OF DISCRIMINATION (September 7, 2005) ("COMPLAINT"). The COMPLAINT was later amended to add Burd Automotive as a respondent. AMENDMENT TO COMPLAINT OF DISCRIMINATION (March 27, 2009).
2. Respondents disputed Graves' claims. ANSWER ((October 6, 2005); ANSWER (April 2, 2009).
3. On August 2, 2007, after an investigation, the ICRC found probable cause to believe that an unlawful discriminatory practice had occurred. NOTICE OF FINDING (August 2, 2007). This Finding makes no mention of a hostile environment based upon race, relying instead on a theory that Graves was subjected to disparate treatment compared to a similarly situated white employee.
4. DB's motion presented evidence and argument that Graves was not subjected to a hostile working environment because of racial harassment.
5. Graves' reply does not present evidence or argument in support of a claim that Graves was subjected to a hostile working environment based on racial harassment; instead, Graves argues that he was subjected to disparate treatment because of race.
6. Graves was hired by DB on April 22, 2005 as a Service Advisor, a position that required him to make an initial assessment of a customer's repair needs, to diagnose and describe those needs on a repair order form, and to promptly process paper work with service repair technicians and the parts department.

7. Graves has, at some point, claimed harassment based upon the following claims:
 - A. Being told by co-workers to hurry up on his paper work because he was slow. Respondents' Exhibit F¹ ("RX_"), pp. 2, 4, 8, 12-13.
 - B. Receiving complaints that his employment deficiencies were interfering with his co-workers' job performance and DB's profit margin. RXF, pp. 2, 4, 8, 12-13.
 - C. Being called a "bitch", "dumb mother fucker", and a "fat ass". RXF, pp. 1-2, 8, 11-12, 16.
 - D. Being subjected to "kissing motions" from his co-workers. RXF, pp. 2, 12-13.
 - E. Being told by a co-worker that the co-worker was going to engage in sexual intercourse with Graves' girlfriend. RXF, pp. 1-2, 11-12.
 - F. Not receiving an apology from a co-worker for a purportedly false accusation of failing performance. RXF, p. 5.
8. None of the foregoing harassment claims involves any racial slur or racial stereotype and there is no evidence that any of the incidents was motivated by race.
9. On or about April 25, 2005, Graves and Russell Adamson ("Adamson"), a White Service Technician, had a confrontation, when Adamson complained to Graves about paperwork and directed Graves to hurry up. In the course of this confrontation, Adamson called Graves a "dumb mother fucker". Graves complained to Tom Lockhart ("Lockhart"), head of the Service Department and Graves' immediate supervisor, about 3 days later. RXC, Exhibit F ("RXCXF").
10. Lockhart looked into the matter and later met with Graves, reprimanding him for his open hostility and telling him he can't get mad and let the job upset him. It also appears that Lockhart told Adamson to stop the name-calling and to limit his discussions with Graves to business. RXCXF.
11. On or about May 1, 2005, Damon Riggins ("Riggins"), a White Service Technician and Mike Massey ("Massey"), a White employee of the Parts Department, complained about untimely and inaccurate repair order forms. "They" would, according to Graves,

1. Respondents and Graves have each included exhibits identified by stickers labeled "Plaintiff's Exhibit _". Both are identified by letter.

stand or sit in his office and rush him on his paperwork, call him slow and stare with mean looks. Graves did not complain to Lockhart about this behavior. RXCXF.

12. On or about July 26, 2005, Graves reported to work and almost immediately requested that he be permitted to leave because of what he described of an inability to work with complaining co-workers. Lockhart reprimanded Graves for his performance deficiencies, stating that Graves was causing lost profits. RXCXF.

13. On or about August 2, 2005, Massey, Adamson, and Riggins were, according to Graves, giving him dirty looks. Graves did not report this behavior to management. RXCXF.

14. On or about August 5, 2005, Lockhart met with Graves again, noting that Graves' deficiencies in accurately diagnosing vehicle problems and in processing the required order forms was causing the dealership to lose money. Graves' response was to blame his co-workers' treatment of him for his shortcomings. Graves has acknowledged that this meeting was disciplinary in nature. RXCXF.

15. One week later, on August 12 of 2005, Lockhart again met with Graves to discuss Graves' performance failings. According to Graves, they were picking on him over a \$200 to \$300 ticket that they "had to eat". RXCXF.

16. At a later time that same day, Graves was sitting at his desk, loudly, and profanely letting off steam. A secretary who worked nearby heard him and was upset and threatened. RXCXF.

17. This secretary reported her concern to Lockhart, who called Graves in and fired him for "not being able to control his temper". Complainant's Exhibit B ("CX_"), RXE.

18. Graves has argued that 3 White employees of DB were treated less harshly than was he. Those are Mario Bostic ("Bostic"), Don Baker ("Baker"), and Tanya Bonham ("Bonham").

19. Bostic was discharged on June 23, 2005 for "insubordination, attendance, and violation of rules". CXD, RXG. The evidence is that Bostic had one previous warning (on May 20, 2005). *Id.* Bostic's treatment is not evidence of a similarly situated White employee treated less favorably than Graves for two reasons. First, Bostic is not similarly situated to Graves in that Bostic was supervised by Baker, the Body Shop Manager.

Second, Bostic was fired – like Graves – and had one prior warning, although it is unclear what the warning was about. Graves had had several prior reprimands, at least one of which was for the offense for which he was terminated. So, Bostic was neither similarly situated to Graves nor treated less harshly than Graves.

20. Baker was on the verge of termination on July 7, 2005, as a result of claiming that he refused to work under Lockhart. It was explained to Baker that Lockhart was his supervisor and that if he refused to work under that arrangement, he would be quitting. Baker agreed to work for Lockhart and the issue was closed.. CXD. Baker was not similarly situated to Graves in that there is no evidence of any prior discipline for the same problem.

21. Bonham was an accountant who worked in Payroll Administration. Her supervisor was Amber Delvey (a handwritten surname that is difficult to read). She was reprimanded due to negligence in regards to an employee theft and warned that any perceived lack of judgment or sabotage would be grounds for termination. CXE. Bonham is not similarly situated to Graves since she had a different supervisor and since there is no evidence of any prior offenses of any sort.

22. DB did not terminate Graves because of race.

23. 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. Each of Graves and Respondents are 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. Summary judgment is authorized in proceedings before the ICRC by section 23 of the Administrative Orders And Procedures Act, (“the AOPA”), IC 4-21.5-3-23. Because the substance of section 23 of the AOPA is nearly identical to the substantive portions of Ind. Trial Rule 56 (“T.R. ___”), cases decided under the substantive provisions of T.R. 56 are persuasive in the interpretation of section 23.

4. 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).

5. There is no genuine issue of material fact.

6. Section 6(k) of the ICRL authorizes the ICRC to award relief if it finds an unlawful discriminatory practice.

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

(l) "Discriminatory practice" means:

(1) the exclusion of a person from equal opportunities because of race

Every discriminatory practice relating to ... employment ... shall be considered unlawful unless it is specifically exempted by this chapter.
IC 22-9-1-3(l).

8. 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).

9. There is no evidence that Graves was subjected to harassment because of race.

10. When disparate treatment is alleged, the allocation of burdens and order of presentation of proof is as outlined in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). *Ind. Dept. of Natural Resources v. Cobb*, 832 N.E.2d 585 (Ind. App. 2005).

11. To meet his burden of establishing a prima facie case of race discrimination by disparate treatment, Graves must show that (1) he was a member of a protected class; (2) he was qualified for the job in question or was meeting the employer's legitimate performance expectations; (3) he suffered an adverse employment action; and (4) the employer treated similarly situated persons not in the protected class more favorably. *Cobb*, 832 N.E.2d 591.

12. It is unnecessary to demonstrate that Complainant was actually meeting the employer's legitimate expectations where, as here, the claim is that other employees were also failing to meet the employer's legitimate expectations but were not disciplined as harshly, in other words that "a comparable non-protected person was treated better." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-583 (6th Cir. 1992), *Cobb* at 592.

13. To successfully make that sort of claim, a complainant must show that he is similarly situated with respect to performance, qualifications, and conduct. *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617 (7th Cir. 2000). Normally, this argument requires a showing that the complainant and the comparator "dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct". *Id.* At 617-18.

14. Graves has not demonstrated a genuine issue of material fact that similarly situated White employee were treated more favorably.

15. Respondents did not commit an unlawful discriminatory practice against Graves.

16. If the ICRC finds that a person has not committed an unlawful discriminatory practice, it must dismiss the complaint as against such person. IC 22-9-1-6(m).

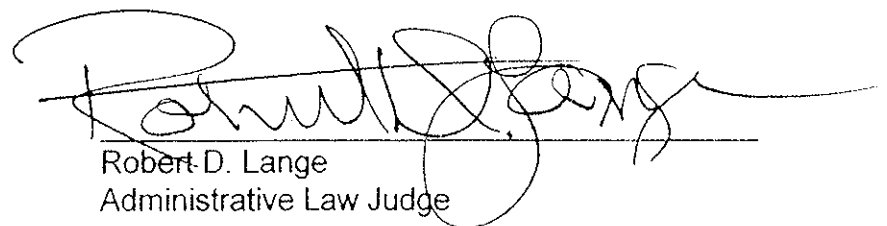
17. Any interested and affected person may object to the ICRC's adoption of this proposed decision by filing a writing identifying the basis of each objection with reasonable particularity within 15 days after service of this proposed decision. IC 4-21.5-3-29(d).

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

ORDER

1. Burd Automotive Inc.'s Motion For Summary Judgment is **GRANTED**.
2. Graves' COMPLAINT, as amended, is **DISMISSED**, with prejudice.

Dated: 11 February 2010


Robert D. Lange
Administrative Law Judge

To be served by first class mail this 11th day of February, 2010 on the following parties and attorneys of record:

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