

STATE OF INDIANA
CIVIL RIGHTS COMMISSION

DOCKET NO. EMse06050172
EEOC NO. 24F-2006-05282

GARRY E. CRUTCHFIELD,
Complainant,

FILE DATED

v.

MAY 22 2009

PAPA BUD'S PUB; and CECE, INC.
d/b/a PAPA BUD'S PUB;

Indiana State Civil Rights Commission

Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 23, 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:

Garry E. Crutchfield
338 South 26th Street
Lafayette, IN 47904

Papa Bud's Pub
c/o Russell Tarter, Proprietor
3215 South 18th Street, Suite 909
Lafayette, IN 47909

CECE, Inc. d/b/a Papa Bud's Pub
c/o Kyle Mandeville, Incorporator
415 Columbia Street, Suite 1000
Lafayette, IN 47902

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

Joshua S. Brewster, Esq.; Staff Attorney
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Indiana Government Center North
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APR 24 2009

Indiana State Civil Rights Commission

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

A Hearing On Damages was held on April 1, 2009 before the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") by conference telephone call. Complainant, Garry E. Crutchfield ("Crutchfield"), participated and was represented by counsel, Joshua S. Brewster, Esq., Staff Attorney. Respondents – Papa Bud's Pub ("the pub") and CECE, Inc. d/b/a Papa Bud's Pub ("CECE") (collectively "Respondents") – did not appear, by counsel or otherwise.

Crutchfield waived his opening statement and testified on his own behalf. Crutchfield waived closing argument. The ALJ ordered that Crutchfield file what he suggested that the ALJ enter as proposed findings of fact, conclusions of law, and order on or before April 15, 2009.

On April 15, Crutchfield file 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. Crutchfield is an adult male who has resided, at all material times, in the state of Indiana.
 2. The pub and CECE are Indiana businesses that have, at all material times, employed 6 or more persons for wages or salary within the state.
 3. The body of Crutchfield's complaint reads as follows:
 - I. On March 24, 2006 I was terminated from my position with Papa Bud's Pub.
 - II. I consider my termination discriminatory on the basis of sex because:
 - A. On March 24, 2006 I was approached by manager Chris Schiuzui who stated I was terminated. He apologized, saying that owner, Russell Tarter, believed business would be better if there was a woman bartender.
 - III. I believe Respondent's actions violate the Indiana Civil Rights Law and I request all available remedies.
- COMPLAINT OF DISCRIMINATION (May 14, 2006) ("COMPLAINT").
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4. The COMPLAINT named only the pub as a respondent.
 5. On March 27, 2008, a Notice Of Initial Pre-Hearing Conference was served notifying the parties that an Initial Pre-Hearing Conference would be held before the ALJ on May 12, 2008.
 6. The pub did not appear at the May 12 Conference.
 7. On May 14, 2008, Crutchfield filed his Motion For Leave To Amend Complaint., seeking to add CECE as a respondent.
 8. After allowing a reasonable time for a response and with none forthcoming, the ALJ granted the motion for leave to amend. ORDER GRANTING LEAVE TO AMEND COMPLAINT (June 10, 2008).
 9. On June 23, 2008, Crutchfield filed the amendment adding CECE as a respondent. AMENDMENT TO CHARGE OF DISCRIMINATION (June 23, 2008).
 10. On July 1, 2008, a NOTICE OF INITIAL PRE-HEARING CONFERENCE ("NIPHC II") was served notifying the parties that an Initial Pre-Hearing Conference would be held before the ALJ on July 31, 2008 at a specified location in Indianapolis.

11. NIPHC II was received by Respondents on or about July 2, 2008. MOTION FOR ORDER BY DEFAULT (August 15, 2008) ("MOTION"), Exhibit A.

12. Each of the foregoing NOTICES expressly provided that "[a] party who fails to attend ... a Pre-Hearing Conference may be held in default"

13. Neither the pub nor CECE appeared at the July 31 Initial Pre-Hearing Conference. FIRST PRE-HEARING ORDER (August 7, 2008).

14. On August 15, 2008, Crutchfield moved for default.

15. On February 5, 2009, the ALJ issued his NOTICE OF PROPOSED DEFAULT ORDER ("NPDO"), notifying Respondents, among other things, that (1) the ALJ proposed to enter an Order By Default against Respondents (NPDO, ¶1); (2) that Respondents 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).

16. Neither the pub nor CECE responded to either the MOTION or the NPDO.

17. On February 27, 2009, the ALJ issued his ORDER BY DEFAULT AND NOTICE OF HEARING ON DAMAGES.

18. As alleged in the COMPLAINT, as amended, which must be accepted as true, Respondents terminated Crutchfield's employment because he is a male.

19. At the time of his termination, Crutchfield was earning \$6.00 per hour and was working a 40 hour week. He also made about \$100.00 per week in tips.

20. Although he sought other employment, Crutchfield was unemployed for approximately 4 months, when he obtained employment at Novelty, Incorporated earning \$480.00 per week, more than he had been paid by Respondents.

21. Had Crutchfield not been unlawfully terminated by Respondents, he would have earned a total of \$5,440.00, gross, during the period that he was unemployed. This is 16 weeks times \$340.00 per week.

22. Crutchfield also lost the use of the income he would have earned from Respondents.

23. 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, Crutchfield is entitled to interest, through the date of the Hearing On Damages, in the amount of \$1,428.43, calculated as follows:

2006	$\$5,440.00 \times .08 \times 39.8/52$	\$333.10
2007	$\$5,773.10 \times .08$	461.85
2008	$\$6,234.95 \times .08$	498.80
2009	$\$6,773.75 \times .08 \times 13/52$	<u>134.68</u>
TOTAL		\$1,428.43

24. 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. ~~Crutchfield and Respondents 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. Respondents are both 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 Respondents. 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 male employee for the purpose of replacing him with a female employee 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. Crutchfield has proven that he 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

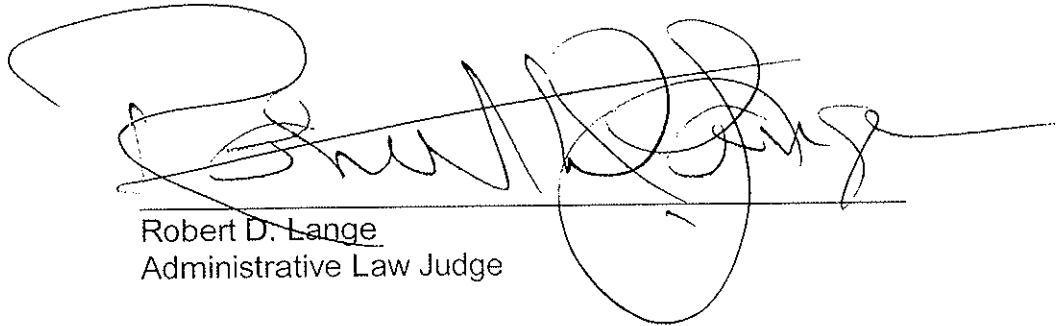
basis for each objection within 15 days after service of this proposed decision. IC 4-21.5-3-29(d).

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

ORDER

1. Respondents shall cease and desist from terminating employees because of sex.
2. Respondents shall deliver to the ICRC one or more cashier's checks payable to Crutchfield, in amounts totaling \$6,868.43. Of this total, \$5,440.00 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: 24 April 2009



Robert D. Lange
Administrative Law Judge

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

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Lafayette, IN 47904

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