

STATE OF INDIANA  
CIVIL RIGHTS COMMISSION

DOCKET NO. EMse07020074  
EEOC NO. 24FA0700179

DESIRAE SULLIVAN,  
Complainant,

FILE DATED

SEP 24 2010

v.

Indiana State Civil Rights Commission.

REVOL CELL PHONES/ SWEET  
TOOTH, and MILLENIUM  
INNOVATIONS, INC.;

Respondents.

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

On August 13, 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").

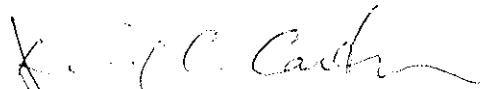
No objections have been filed to the ICRC's adoption of the proposed decision.

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: 24 September 2010

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

Desirae Sullivan  
8223 Laughlin Drive  
Indianapolis, IN 46219-1822

Revol/Sweet Tooth  
Millenium Innovations, Inc.  
c/o Anthony Moorman  
8363 Tilly Mill  
Indianapolis, IN 46278

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

Michael C. Healy, Esq.; Staff Counsel  
Indiana Civil Rights Commission  
Attorney for Complainant Desirae Sullivan  
Indiana Government Center North  
100 North Senate Avenue, Room N103  
Indianapolis, IN 46204-2255

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DESIRAE SULLIVAN,  
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REVOL CELL PHONES/ SWEET  
TOOTH, and MILLENIUM  
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FILE DATED

AUG 1 2 2010

Indiana State Civil Rights Commission

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

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A Hearing On Damages was held before the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") on January 13, 2010. Complainant, Desirae Sullivan ("Sullivan"), was present and was represented by counsel, Michael C. Healy, Esq., Staff Counsel. Respondents – Revol Cell Phones/Sweet Tooth and Millenium Innovations, Inc. (collectively "Respondents") – did not appear, by counsel or otherwise.

Opening statement was waived and Sullivan testified on her behalf. Closing argument was waived. The ALJ ordered that Sullivan file, on or before January 27 of 2010, what she suggested that the ALJ enter as proposed findings of fact, conclusions of law, and order and the cause was taken under advisement. On January 25, 2010, Sullivan 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. Sullivan is an adult female who has, at all material times, resided in the state of Indiana.
2. Respondents were, at all material times, Indiana businesses that employed 6 or more persons for wages or salary within the state.
3. Sullivan's complaint, as amended, was timely filed and alleges employment discrimination based upon sex, asserting that she was not hired because she is female. COMPLAINT OF DISCRIMINATION (February 20, 2007); AMENDMENT TO COMPLAINT OF DISCRIMINATION (April 14, 2009).
4. On April 23, 2009, Sullivan timely served Complainant's First Set of Interrogatories to Respondents and Complainant's First Request for Production of Documents.
5. Respondents did not respond in any manner before Sullivan filed her (First) Motion To Compel Discovery on June 4, 2009.
6. On June 17, 2009, the ALJ issued his ORDER GRANTING MOTION TO COMPEL DISCOVERY ordering Respondents to respond to the aforementioned discovery requests on or before June 29, 2009.
7. Respondents responded, in substance, to the Request for Production but did not make a substantial effort to comply with its duty to respond to the Interrogatories.
8. On July 6, 2009, Sullivan filed Complainant's Application For Order By Default.
9. On July 8, 2009, Respondents filed their Respondents (*sic*, Response?) To All Motions Granted And Motion To Dismiss.
10. On July 17, 2009, Sullivan filed Complainant's Response To "Respondents To All Motions Granted And Motion To Dismiss".
11. On July 24, 2009, Sullivan filed Complainant's Second Motion To Compel Discovery.

12. On August 25, 2009, the ALJ entered his ORDER ON PENDING MOTIONS. In this ORDER, the ALJ (1) granted Sullivan's Second Motion To Compel, again ordering Respondents to respond to Sullivan's Interrogatories; (2) denied Respondents' Motion To Dismiss; and (3) denied the Application For Order By Default, noting that default is discretionary even if all elements required for default are present..

13. Respondents did not respond in any manner to Sullivan's Interrogatories.

14. On November 19, 2009, the ALJ entered and served his NOTICE OF PROPOSED DEFAULT ORDER ("NPDO"). The NPDO advised Respondents that they could file a written motion requesting that the proposed default order not be imposed and stating the grounds upon which they relied within 7 days after service of the NPDO. NPDO, ¶2. The NPDO also advised that if no such motion is filed, the ALJ MUST enter the proposed default order under IC 4-21.5-3-24(c). NPDO, ¶3.

15. Respondents did not file a written motion requesting that the proposed default order not be imposed.

16. On December 14, 2009, the ALJ issued his ORDER BY DEFAULT AND NOTICE OF HEARING ON DAMAGES.

17. As alleged in Sullivan's COMPLAINT, that must be accepted as true:

A. During December of 2006, Sullivan applied for an available position with Respondents at one of their new store locations. She was told that she would be hired when the new store opened in January of 2007.

B. On January 8, 2007, Sullivan was told by Brandis Tanner, Respondents' Hiring Manager, that the owner [Anthony] Moorman, changed his mind and was only hiring males to operate his new store.

18. Had Sullivan been hired by Respondents as a cashier, she would have been paid at the rate of \$7.00 per hour for working 40 hours per week, or \$280.00 per week, gross.

19. After being denied a position by Respondents, Sullivan continued to work at K-Mart, where she had been employed as a cashier since June 21, 2006, at the rate of \$7.25 per hour for working between 20 and 25 hours weekly, or approximately \$163.13 weekly, gross.

20. Sullivan worked at K-Mart until June of 2008, when she accepted a position at McDonald's restaurant at the rate of \$7.15 per hour for working between 25 and 30 hours per week, or approximately \$196.63 per week, gross (27.5 hours/week x \$7.15/hour). Sullivan continued to work at McDonald's until May 24, 2009, when she voluntarily left her employment.

21. Had Sullivan been hired by Respondents, she would have earned a total of \$34,720.00 between January 8, 2007 and May 24, 2009 (\$7.00/hour x 40 hours/week x 124 weeks).

22. Sullivan's total interim earnings between January 8, 2007 and May 24, 2009 were \$21,722.62, calculations being shown below:

K-Mart	\$163.13/week x 75 weeks	= \$12,234.75
McDonald's	\$193.63/week x 49 weeks	= <u>9,487.87</u>
TOTAL		\$21,722.62

23. The difference between the pay Sullivan would have received had she been hired by Respondents and the interim income she actually earned is \$12,997.38.

24. There is no evidence that, at any material time, Sullivan rejected a job that she was offered, or failed to seek a job that she could have obtained.

25. As a result of Respondents' failure to hire Sullivan, Sullivan lost a total of \$12,997.38 in wages.

26. Sullivan has also lost the use of the wages she lost.

27. Awarding interest is the way to compensate someone for the loss of the use of money to which the person was entitled. Calculated as simple interest at the rate of 8%, compounded annually, Sullivan is entitled to interest, up to the date of May 24, 2009 in the amount of \$3,328.95. Calculations are shown below:

2007	\$12,997.38 x .08 x 51/52 =	\$1,019.79
2008	\$14,017.17 x .08 =	1,121.37
2009	\$15,138.54 x .08 x 21/52 =	<u>1,187.79</u>
TOTAL		\$3,328.95

28. Sullivan does not seek an order that she be hired.

29. 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. Sullivan and Respondents are each a "person", as that term is defined in section 3(a) of the Indiana Civil Rights Law, I.C. 22-9-1-1 *et. seq.* ("the ICRL"), IC 22-9-1-3(1).
3. Each Respondent is an "employer", as that term is defined in the ICRL. IC 22-9-1-3(h), IC 22-9-1-3(i).
4. The ICRC's Rule 6.1 (1) provides, in material part, that "[w]hen a party has failed to plead or otherwise defend as provided by this article", that party is in default. 910 IAC 1-6-1(1).
5. Default is appropriate under 910 IAC 1-6-1(1).
6. The rules of discovery are applicable in administrative proceedings. Ind. Trial Rule 28(F) ("T.R. \_\_\_").
7. A party may be defaulted for failure to comply with an order compelling it to answer Interrogatories. T.R. 37(B)(2).
8. Default is appropriate under IC 4-21.5-3-24(a)(2).

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9. The ALJ was required to conduct further proceedings after default without the participation of Respondents. IC 4-21.5-3-24(d).

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10. The effects of an order by default include that the allegations of the complaint are deemed admitted.
11. What constitutes a discriminatory practice is set out in the following subsection of the ICRL:
  - (1) "Discriminatory practice" means:
    - (1) The exclusion of a person because of 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).
12. Respondents committed an unlawful discriminatory practice by failing to hire Sullivan to an available position because of sex. Because there is no applicable exemption in the ICRL, that failure to hire was unlawful.

13. 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 take further affirmative action as will effectuate the purposes of the ICRL,. Such an order may include restoring Complainant's losses incurred as a result of the discriminatory treatment. IC 22-9-1-6(k)(A).

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

15. 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 of money is within the authority of the ICRC.

16. 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).

17. 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).

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18. Administrative review of this proposed decision may be obtained by any interested and affected person who is not in default by the filing of a writing specifying with reasonable particularity each basis for each objection within 15 days after service of this proposed decision. IC 4-21.5-23-29(d).

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

## ORDER

1. Revol Cell Phones/Sweet Tooth and Millennium Innovations, Inc. shall cease and desist from excluding persons from equal employment opportunities on the basis of sex.

2. Revol Cell Phones/Sweet Tooth and Millennium Innovations, Inc. shall cease and desist from failing to hire qualified persons on the basis of sex.



3. Revol Cell Phones/Sweet Tooth and Millennium Innovations, Inc. shall post and prominently display statements of policies to provide equal employment opportunity.
4. Each and every owner and manager of Revol Cell Phones/Sweet Tooth Millennium Innovations, Inc. shall, within 180 days after the effective date of this Order, take and successfully complete a diversity training seminar, approved in advance by the ICRC's Director, addressing the employer's recognition, prevention and treatment of unlawful discrimination in the workplace. Proof of completion shall be filed within 30 days of the completion of the seminar.
5. Revol Cell Phones/Sweet Tooth and Millennium Innovations, Inc. shall deliver to Sullivan a check payable to Sullivan in the amount of \$16,326.33 minus deductions required by law and/or agreement, within 30 days of the effective date of this Order. Of this amount, only \$12,997.38 shall be subject to taxes and other deductions.
6. Revol Cell Phones/Sweet Tooth and Millennium Innovations, Inc. shall deliver a copy of the check to the ICRC within 30 days of the effective date of this Order.
7. 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 pursuant to IC 4-21.5-3-31(b), or stayed by a court of competent jurisdiction.

Dated: 13 August 2010



Robert D. Lange  
Administrative Law Judge

To be served by first class mail this 13<sup>th</sup> day of August, 2010 on the following parties:

Desirae Sullivan  
8223 Laughlin Drive  
Indianapolis, IN 46219-1822

Revol/Sweet Tooth  
Millenium Innovations, Inc.  
c/o Anthony Moorman  
8363 Tilly Mill  
Indianapolis, IN 46278

and to be personally served this 13<sup>th</sup> day of August, 2010 on the following attorney of record:

Michael C. Healy, Esq.; Staff Counsel  
Indiana Civil Rights Commission  
Indiana Government Center North  
100 North Senate Avenue, Room N103  
Indianapolis, IN 46204-2255

and to be served by electronic mail this 13<sup>th</sup> day of August, 2010 on the following:

Indiana Civil Rights Commission  
c/o Jamal L. Smith, Executive Director  
Jamsmith@gov.in.gov

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