

STATE OF INDIANA
CIVIL RIGHTS COMMISSION

DOCKET NO. (EEOC NO.)
EMsh03120470 (24FA400065)
EMsh03120473 (24FA400059)

DENISE M. WILKERSON,
and KRISTI JESSIE;
Complainants,

FILE DATED

VS.

FEB 27 2009

REMAX LEADERS,
Respondent.

Indiana State Civil Rights Commission,

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On February 4, 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



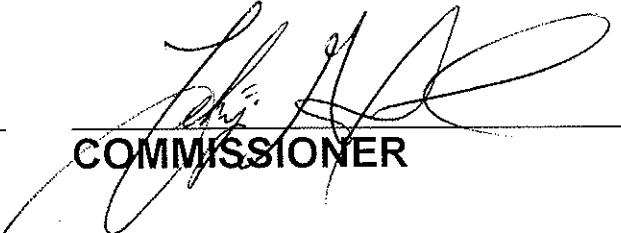
COMMISSIONER



COMMISSIONER



COMMISSIONER



COMMISSIONER

Dated: 27 February 2009

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

Denise M. Kline
431 West Hendricks Street
Shelbyville, IN 46176

Kristi Jessie
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REMAX Leaders
c/o Secretary or other Executive Officer
6335 Intech Commons Drive, Suite H
Indianapolis, IN 46278

REMAX Leaders
c/o Gina Lynne White, President
219A Stonedale Place
Indianapolis, IN 46227

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

Frederick S. Bremer, Esq.; Staff Attorney
Indiana Civil Rights Commission
Attorney for Complainants Denise M. Kline and Kristi Jessie
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Indianapolis, IN 46204-2255

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FEB 04 2009

vs.

Indiana State Civil Rights Commission

REMAX LEADERS,
Respondent.

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

A Hearing On Damages was held in these consolidated cases before the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") by conference telephone call on July 2, 2008. Complainants, Denise M. Wilkerson (now Denise M. Kline and hereinafter "Kline") and Kristi Jessie ("Jessie") collectively "Complainants") participated and were represented by counsel, Frederick S. Bremer, Esq. Staff Attorney at the ICRC. Respondent, REMAX Leaders ("REMAX"), did not appear, by counsel or otherwise.

Complainants waived their opening statements and each testified on her own behalf. Both waived closing argument. The ALJ ordered that Complainants file what they suggested that the ALJ enter as proposed findings of fact, conclusions of law, and order on or before July 16, 2008. The cause was taken under advisement.

On July 18, 2008, Kline filed her [Suggested] Proposed Findings Of Fact, Conclusions Of Law, And Order. Also on July 18, 2008, Kline filed her [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. Kline and Jessie have been, at all material times, adult females residing in the state of Indiana.
2. REMAX is an Indiana real estate brokerage. There is no evidence that REMAX , at any material time, employed less than 6 persons for wages or salary within the state.
3. The body of Kline's complaint reads as follows:
 - I. On November 5, 2003, I quit my job as office manager. I had worked for Respondent three weeks.
 - II. I quit because of sexual harassment from Owner Don Wells.
 - III. I believe Respondent discriminated against me because of my sex, female, because:
 - a. Don Wells touched my body on several occasions, even putting his hands between my legs.
 - b. I asked Don Wells to stop the harassment, but he continued to harass me verbally and physically.
 - c. Wells made me feel uncomfortable on the job.

COMPLAINT OF DISCRIMINATION (December 12, 2003) ("KLINE COMPLAINT").
4. The body of Jessie's complaint reads as follows:
 - I. On November 5, 2003, I quit my job as receptionist. I had worked for Respondent three weeks.
 - II. I quit because of sexual harassment from Owner Don Wells.
 - III. I believe Respondent discriminated against me because of my sex, female, because:

- a. Don Wells touched my body on several occasions, even putting his hands on my buttocks. He also hugged me a lot.
- b. I asked Don Wells to stop the harassment, but he continued to harass me verbally and physically.
- c. Wells made me feel uncomfortable on the job.

COMPLAINT OF DISCRIMINATION (December 15, 2003) ("JESSIE COMPLAINT").

5. On or about July 16, 2007, a Notice Of Pre-Hearing Conference ("KLINE NPHC I") in the KLINE COMPLAINT was served on Kline and REMAX notifying the parties that a pre-hearing conference would be held before the ALJ at 8:00 A.M. on August 15, 2007 in Room 6 of the Conference Center in Indianapolis. KLINE NPHC I was served on REMAX at an address in Indianapolis on Eagle Creek Parkway.
6. On or about August 2, 2007, a Notice Of Pre-Hearing Conference ("KLINE NPHC II") in the KLINE COMPLAINT was served on Kline and REMAX. KLINE NPHC II was, in substance, identical, to the prior Notice but was served on REMAX at an address on Intech Commons Drive in Indianapolis and was sent in care of Gina Lynne White, President at an address on Stonedale Place in Indianapolis.
7. On or about July 16, 2007, a Notice Of Pre-Hearing Conference ("JESSIE NPHC I") in the JESSIE COMPLAINT was served on Jessie and REMAX notifying the parties that a pre-hearing conference would be held before the ALJ at 8:00 A.M. on August 15, 2007 in Room 6 of the Conference Center in Indianapolis. JESSIE NPHC I was served on REMAX at an address in Indianapolis on Eagle Creek Parkway.
8. On or about August 2, 2007, a Notice Of Pre-Hearing Conference ("JESSIE NPHC II") in the JESSIE COMPLAINT was served on Jessie and REMAX. JESSIE NPHC II was, in substance, identical, to the prior Notice but was served on REMAX at an address on Intech Commons Drive in Indianapolis and was sent in care of Gina Lynne White, President at an address on Stonedale Place in Indianapolis.
8. The proof of mailing for all of the foregoing NOTICES sent to REMAX care of Ms. White were returned by the Postal Service "unclaimed". APPLICATION, Exhibit A.

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

10. REMAX did not appear at the Pre-Hearing Conference. THIRD PRE=HEARING ORDER (August 24, 2007) (“PHO3, ¶__”). The cases were consolidated at that conference. PHO3, ¶1.

11. On May 7, 2008, Complainants filed their Application For Order By Default (“APPLICATION”).

12. On May 9, 2008, the ALJ issued his NOTICE OF PROPOSED DEFAULT ORDER (“NPDO”), notifying REMAX, among other things, that (1) the ALJ proposed to enter an Order By Default against REMAX (NPDO, ¶1); (2) that REMAX 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); (3) if no such motion is filed the ALJ **MUST** enter the proposed default order (NPDO, ¶3).

13. REMAX did not respond to either the APPLICATION or the NPDO.

14. REMAX did not file a written motion requesting that the proposed default order not be imposed.

15. On June 5, 2008, the ALJ issued his ORDER BY DEFAULT AND NOTICE OF HEARING ON DAMAGES (“ORDER”).

16. The Hearing on Damages was held without the participation of REMAX.

17. As alleged in the KLINE COMPLAINT and the JESSIE COMPLAINT, which must be accepted as true, Complainants were constructively discharged due to sexual harassment in REMAX’s workplace.

18. Kline was constructively discharged from her job on the basis of sex.

19. At the time of her discharge, Kline was being paid at the rate of \$9.00 per hour and working a 40 hour week. She had qualified for a raise to \$10.00 per hour according to representations by Donald Wells (“Wells”), Owner.

20. Kline sought other employment after her termination at REMAX and eventually obtained a position at Champion Chrysler Jeep Dodge (“Champion”) starting in January of 2004. This position began at \$8.00 per hour and went to \$8.50 per hour within 3 months.

Champion eliminated Kline's job in late August or early September of 2004.

21. After Champion, Kline worked for Benefit Resources ("Benefit"), a temporary service, between October 1, 2005 through the end of December of 2005. Her hours varied between 15 and 40 per week and her pay varied between \$7.00 per hour and \$10.00 per hour.

22. In January of 2006, Kline obtained a position as Sales Coordinator with Bunzel Distribution paying \$13.00 per hour, more than she was earning at REMAX.. She held this position as of the Hearing.

23. Had Kline not been unlawfully constructively discharged by REMAX, she would have earned a total of \$43,840.00, gross, between November 3, 2003 and January 1 of 2006, when she obtained a better job. This is 112 weeks and 3 days (or 112.6 weeks) times \$10.00 per hour times 40 hours per week.

24. Kline earned, during that same period, a total of \$13,190.00, calculated as follows:

Champion	\$8.00 per hour x 40 hours per week x 12 weeks =	\$3,840.00
	\$8.50 per hour x 40 hours per week x 22 weeks =	7,480.00
Benefit	\$8.50 per hour x 27.5 hours per week x 8 weeks =	<u>1,870.00</u>
TOTAL		\$13,190.00

25. Kline lost a total of \$31,850.00, gross, as a result of being constructively discharged by REMAX. This is the difference between what she would have earned at REMAX and what she did earn until the time when she obtained a higher paying job.

26. Kline also lost the use of the income she would have earned from REMAX.

27. 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, Kline is entitled to interest, up to the date of the Hearing On Damages, in the amount of \$13,810.35, calculated as follows:

2003	\$31,850.00 x .08 x .2/52	\$ 401.80
2004	\$32,251.80 x .08	2,580.14
2005	\$34,831.94 x .08	2,786.56
2006	\$37,618.50 x .08	3,009.48
2007	\$40,627.98 x .08	3,250.24
2008	\$43,878.22 x .08 x 26.4/52	<u>1,782.13</u>
TOTAL		\$13,810.35

28. Jessie was constructively discharged from her job on the basis of sex.
29. At the time of her discharge, Jessie was being paid at the rate of \$7.00 per hour and working a 48 hour week. She had qualified for a raise to \$9.00 per hour according to representations by Donald Wells ("Wells"), Owner.
30. Jessie sought other employment after her termination at REMAX and obtained a position as a telemarketer at Unique Window and Door ("Unique") working 35 to 40 hours per week at \$9.00 per hour. She left this job after 2 weeks because of scheduling difficulties.
31. Jessie's next job was with Champion and started about 3 weeks later. At Champion, Jessie earned \$9.00 per hour for a 40 hour week until her employment terminated on June 30, 2006. There is no evidence that Jessie was employed after June 30, 2006.
32. There is no evidence that Jessie failed to make reasonable efforts to obtain employment after June 30, 2006.
33. Had Jessie not been unlawfully constructively discharged by REMAX, she would have earned a total of \$104,544.00, gross, between November 3, 2003 and the Hearing. This is 242 weeks times \$9.00 per hour times 48 hours per week.
34. Jessie earned, during that same period, a total of \$42,075.00, calculated as follows:
- | | | |
|--------------|---|--------------------|
| Unique | \$9.00 per hour x 37.5 hours per week x 2 weeks | \$ 675.00 |
| Champion | \$9.00 per hour x 40 hours per week x 112 weeks | <u>41,400.00</u> |
| TOTAL | | \$42,075.00 |
35. Jessie lost a total of \$62,469.00, gross, as a result of being constructively discharged by REMAX. This is the difference between what she would have earned at REMAX and what she did earn.
36. Jessie also lost the use of the income she would have earned from REMAX.
37. 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, Jessie is entitled to interest, up to the date of the Hearing On Damages, in the

amount of \$23,591.54, calculated as follows:

2003	\$62,469.00 x .08 x 8.2/52	\$ 788.07
2004	\$63,257.07 x .08	5,060.57
2005	\$68,317.64 x .08	5,465.41
2006	\$73,783.05 x .08	5,902.64
2007	\$79,685.69 x .08	6,374.85
2008	\$86,060.54 x .08 x 26.4/52	3,495.71
TOTAL		\$23,591.54

38. 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. Kline, Jessie and REMAX are each a "person" as that term is defined in section 3(a) of the Indiana Civil Rights Law, IC 22-9-1 *et. seq.* ("the ICRL"). IC 22-9-1-3(a).
3. REMAX is an "employer" as that term is defined in the ICRL. IC 22-9-1-3(h).
4. The ICRC's Rule 6.1 provides, in material part, that "[w]hen a party has failed to plead or otherwise defend as provided by these rules, after proper notice, and that fact is made to appear by affidavit or otherwise, the party may be defaulted". 910 IAC 1-6-1.
5. Default is appropriate under 910 IAC 1-6-1.
6. 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).
7. The effects of an order by default include that the allegations of the complaint are deemed admitted.
8. 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).

9. Causing the termination of an employee because of sexual harassment is a discriminatory practice under the ICRL. *Zeller Elevator Co. v. Slygh*, 796 N.E.2d 1198 (Ind. App. 2003). Because there is no applicable exemption for such a practice, it was unlawful. IC 22-9-1-3(l).
10. 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, which may include restoring complainant's losses. IC 22-9-1-6(k)(A).
11. Kline and Jessie have each proven that she sustained lost earnings that were the proximate result of the proven unlawful discriminatory practice.
12. The loss of the use of wages is a part of the loss that a discriminatee incurs when the wages are lost. Thus, the awarding of interest to compensate for the loss of the ability of the victim to use the wages wrongfully denied is within the authority of the ICRC.
13. 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 specifically applicable statute. *Indiana Insurance Company v. Sentry Insurance Company* 437 N.E.2d 1381 (Ind. App. 1982).
14. 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).
15. Administrative review of this proposed decision may be obtained by parties who are not in default by the filing of a writing specifying with reasonable particularity each basis for each objection within 15 days of 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

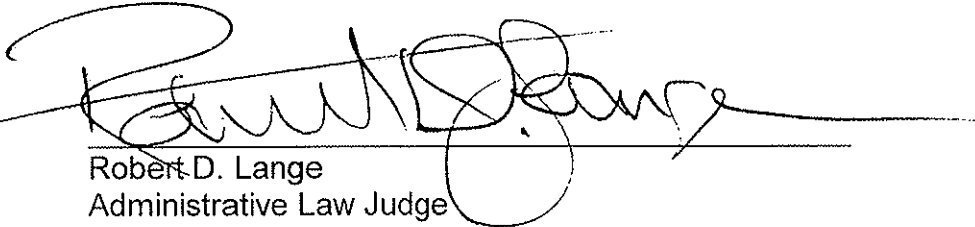
1. REMAX shall cease and desist from subjecting any employee to sexual harassment.

2. REMAX shall deliver to the ICRC a check, payable to Kline, in the amount of \$45,390.35. Of this amount, \$31,580.00 shall be subject to deductions required by law and/or agreement.

3. REMAX shall deliver to the ICRC a check, payable to Jessie, in the amount of \$86,060.54. Of this amount, \$62,469.00 shall be subject to deductions required by law and/or agreement.

4. This Order shall take effect immediately after it is approved and signed by a majority of the members of 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: 04 February 2009



Robert D. Lange
Administrative Law Judge

To be served by first class mail this 4th day of February, 2009 on the following parties:

Denise M. Kline
431 West Hendricks Street
Shelbyville, IN 46176

Kristi Jessie
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6335 Intech Commons Drive, Suite H
Indianapolis, IN 46278

REMAX Leaders
c/o Gina Lynne White, President
219A Stonedale Place
Indianapolis, IN 46227

and to be personally served this 4th day of February, 2009 on the following:

Frederick S. Bremer, Esq.; Staff Attorney
Indiana Civil Rights Commission
Attorney for Complainants Denise M. Kline and Kristi Jessie
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