

LARRY D. and STEPHANIE W.
GRAY,

Complainants,

vs.

THOMAS ZAKROWSKI,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 20, 2006, 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"). On May 5, 2006, Complainants, Larry D. Gray ("Larry") and Stephanie W. Gray ("Stephanie") (collectively "the Grays"), filed Complainants' Objections To Proposed Findings Of Fact, Conclusions Of Law, And Order. On August 11, 2006, the Grays filed Complainants' Brief In Support Of Objections To Proposed Findings Of Fact, Conclusions Of Law, And Order. On August 15, 2006, Respondent, Thomas Zakrowski ("Zakrowski"), filed Respondent[s] Brief In Opposition To Complainant's (*sic*) Objections.

Alpha Blackburn, Chairperson of the ICRC, presided over oral argument on the Grays' Objections on October 27, 2006. Other Commissioners present were Barry Baynard, David C. Carter (the Vice-Chairperson), Tehiji G. Crenshaw, John E. Garcia, and Charles D. Gidney. Commissioner Stephen A. Ramos was absent. The Grays were represented by counsel, Michael C. Healy, Esq., Staff Counsel with the ICRC. Zakrowski was represented by counsel, Frank J. Agostino, Esq. of South Bend. Arguments of counsel were heard, questions were asked by Commissioners, and the cause was taken under advisement.

Having carefully considered the foregoing and being duly advised in the premises, the ICRC finds and rules as follows.

1. The Grays have not shown that the asserted reasons for their eviction were pretexts for unlawful discrimination because of religion.
4. The Grays have failed to meet the burden of an objecting party to demonstrate an error that affected the result.

IT IS, THEREFORE, ORDERED


1. Complainants' Objections To Proposed Findings Of Fact, Conclusions Of Law, And Order are **OVERRULED**.
2. 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 by reference .

INDIANA CIVIL RIGHTS COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER


COMMISSIONER

Dated: 27 October 2006

To be served by first class mail on the following parties and attorney s of record:

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STATE OF INDIANA
CIVIL RIGHTS COMMISSION

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GRAY,
Complainants,

FILE DATED

vs.

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Indiana State Civil Rights Commission

THOMAS ZAKROWSKI,
Respondent.

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

A Hearing was held before the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") on January 26, 2005 and February 2, 2005. Complainants, Larry D. Gray ("Larry") and Stephanie W. Gray ("Stephanie") (collectively "the Grays"), were present and were represented by counsel, Robin Clay, Esq.; a Staff Attorney with the ICRC. Respondent, Thomas Zakrowski ("Zakrowski"), was present and was represented by counsel, Frank J. Agostino, Esq of South Bend.

Zakrowski reasserted the issues that he had raised in his Motion To Dismiss. This was opposed by the Grays and denied by the ALJ. Before opening statements were made Complainant's Exhibit A ("CX_"), CXB, CXC, CXD, CXE, CXF, CXG, CXH, CXI, CXJ, CXK, CXL, CXM, CXN, CXO, CXP, CXQ, CXR, CXS, CXT, CXU, CXV, CXW, CXX, CXY, CXZ, CCXAA, CXBB, and CXCC were admitted into evidence without objection. Thereafter, opening statements were made on behalf of the Grays and Zakrowski.

The Grays called the following witnesses: Larry, Sheila Pratt, and Stephanie. During the presentation of the Grays' case, Respondent's Exhibit 1 ("RX_") through RX93, inclusive, were admitted into evidence without objection.

Zakrowski testified on his own behalf and also called Karol Snyder ("Snyder"). During the presentation of Zakrowski's case, RX94, RX95, RX96, CXEE, CXFF, and CXGG were admitted into evidence without objection. Larry testified in rebuttal and Zakrowski testified in surrebuttal. Closing arguments were made on behalf of the Grays and Zakrowski. The ALJ took the cause under advisement and ordered the parties to submit what they suggested that he enter as proposed findings of fact, conclusions of law, and order on or before April 1, 2005.

On April 1, 2005, the Grays filed Complainant's [Suggested] Proposed Findings Of Fact, Conclusions Of Law, And Order. On April 4, 2005, Zakrowski filed Respondent's Proposed Findings Of Fact and Proposed Conclusions Of Law.

Having carefully considered the evidence and the arguments of counsel, 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. The Grays are adults and a married couple who resided, at all material times, in the state of Indiana.
2. Zakrowski is an adult resident of Indiana who purchased real property at 50515 Lilac Road in South Bend, Indiana ("the property") some time prior to 2000 on an "as is" basis. The property includes a house, a garage, and a storage shed. Zakrowski has, at all material times, owned less than 3 single-family residences.
3. Larry was a member of the United States Army, serving as a Training Officer in the Reserves. He was frequently transferred to various sites by the Army. This aspect of Army life had led the Grays to decide to rent, rather than buy, residences.
4. The Grays practiced the Wiccan religion. Wicca is an Earth-based pagan religion. Followers believe in dual gods and goddesses, and celebrate solstices and holy days. Members gather to hold rituals, usually conducted outside. Some of these rituals involve fire, in the form of candles or torches, as well as chanting. When rituals were conducted

at the property while the Grays resided there, attendance was by invitation only, and those events were not open to the general public.

5. In January of 2000, Larry and Zakrowski entered into a lease agreement. CXA. This agreement was for a period from January 7, 2000 through February 27, 2001, and provided for a security deposit of \$900 and monthly rent of \$900. The printed terms of the lease prohibited pets, but Zakrowski added a provision allowing the family to keep a German Shepard dog outside of the house. CXA. The lease provided that the tenants were to maintain the lawn and pay the utilities, including cable TV, if desired. Further, the lease required that the landlord was to provide 24 hours of notice before entering the property. CXA. In March of 2000, another lease was executed, with the same terms, this one including Stephanie as a party. The ending date of this version of the lease was February 1, 2001. CXB.

6. The Grays moved into the property with their two minor sons, Shawn and Shane, and a cat that lived in the house. Zakrowski was aware of the cat but never complained.

7. At the time that the Grays moved in, Larry informed Zakrowski that they were looking for a long term living arrangement, lasting 3 to 5 years, but that they had no intention of purchasing the property.

8. The Grays and Zakrowski did not conduct a move-in inspection, either before the Grays moved in or at the beginning of their tenancy. There is no written document that reflects the condition of the house at the beginning of the Grays' tenancy. Since the house was sold to Zakrowski on an "as is" basis, it is likely that there were some imperfections, but specifying those is not possible.

9. The parties went through the year 2000 with no major problems. There was little interaction between them, most of that being when rent payments were delivered.

10. In April of 2001, while making repairs to one of the toilets, Zakrowski left a letter for the Grays, dated April 11 2001, (CXC) in which he stated that in order to approach what he called "full retirement", he was reducing his property holdings and that he would be selling the property. This letter advised the Grays that the property would no longer be available to rent after June 15, 2001 and offered the Grays the opportunity to purchase the property on an "as is" basis at a price specified in the letter CXC.

11. Some time in late May or early June of 2001, the Grays advised Zakrowski that they had never seen the April 11 letter. Zakrowski delivered another letter, dated June 3, 2001, extending the last day of occupancy until July 15, 2001. CXD. This letter made no offer to sell the property to the Grays. CXD.
12. The Grays responded to this letter with a letter from Larry dated June 29, 2001 (CXE) indicating that he was expecting a promotion and transfer within the next few months. The Grays offered to forfeit their security deposit and to pay \$1000 in monthly rent. CXE.
13. Zakrowski accepted these terms in a letter dated July 8, 2001, extending the lease for a period of three to six months. CXF.
14. Larry's unit was deployed and he was sent to Fort Hood, Texas in response to the terrorist attacks of September 11, 2001. The Grays informed Zakrowski that their moving plans had changed and that the remaining family members would need to stay until Larry's return in a letter dated October 7, 2001. CXG.
15. Zakrowski accepted this new understanding in a letter dated October 10, 2001, saying that they could discuss the rental agreement "upon your return" . CXH. This letter also mentioned a need for Zakrowski to stop by to clean/maintain the blower motor on the furnace. CXH.
16. Larry remained in deployment status continuously from October 2001 until August 2002. During this time, Stephanie continued to pay the rent and maintain the house. Although some payments were late, Zakrowski never attempted to impose any late fees or penalties.
17. In July of 2002, on one of the hottest days of the summer, the air conditioning unit at the house went out. Stephanie made several attempts to contact Zakrowski to have it repaired. When those attempts were unsuccessful, she called a repairman. When Zakrowski learned of that repair, he was angry, and called Larry at Fort Hood. During this conversation, Zakrowski told Larry that he had received complaints from neighbors about chanting and yard torches being lit and Larry informed Zakrowski that the family was Wiccan. At the end of the conversation, Zakrowski yelled, "I want you people out of the house".

18. Later, Zakrowski went to the house and repaired the air conditioner. During this visit, he saw Stephanie's altar, a makeshift coffee table covered with a black cloth. It had a pentagram, candles, a dagger with a six-inch blade, symbols of the moon and crystal balls on it.

19. In August of 2002, Zakrowski was at the house doing some landscaping when Stephanie and the children arrived home. Arrangements were made for Zakrowski to work in the house the next day. Zakrowski thought that arrangements had been made for him to arrive in the morning, and he did, at about 10 A.M. Stephanie thought that Zakrowski was going to arrive in the evening, and she and the children were still in bed. Stephanie heard noise downstairs and got the family gun and started down the stairs. Zakrowski heard footsteps on the stairway and went to meet the person. When Stephanie and Zakrowski met on the stairway, she was pointing the gun at him until she recognized him and lowered the gun. This incident really frightened Zakrowski, who had recently, and unintentionally, interrupted a robbery at his own house in which a gun was pulled. It was also disturbing to Stephanie, who felt the need to call Larry and tell him what had happened.

20. Shortly before this incident, Zakrowski had seen a report on television that Larry's unit was being returned from deployment status.

21. On or about August 27, 2002, Zakrowski filed suit in the St. Joseph County Superior Court, Small Claims Division ("the Court") seeking damages and immediate possession of the property. In his AFFIDAVIT FOR IMMEDIATE POSSESSION, Zakrowski asserted that he was entitled to immediate possession because (1) the tenancy is month to month and more than thirty days had passed since notice was given to the Grays to vacate the premises; (2) that the Grays "have committed waste on the property destroying trees, putting holes in walls, keeping animals in the home, and practicing (*sic*) unholy witchcraft". CXL.

22. After a trial, the Court awarded Zakrowski possession and also awarded him damages of \$3,000.00 plus costs, the maximum amount awardable.

23. There is credible evidence that the Grays' Wiccan religion was a factor in Zakrowski's. This evidence is found in Zakrowski's own affidavit referring to "unholy

witchcraft” and in the telephone conversation in which he told Gray that “I want you people out of the house”.

24. The preponderance of the evidence is that Zakrowski would have evicted the Grays even if he had not considered religion.

A. Zakrowski wanted to end the landlord-tenant relationship between himself and the Grays in 2001, before he learned of their Wiccan religion. Larry’s deployment prevented this.

B. It is credible that the incident with the gun truly frightened Zakrowski and led him to want to avoid dealing with the Grays.

C. The Grays did do some damage to the house, even though the amount claimed by Zakrowski is probably exaggerated by including some normal wear and tear and some damage for which the Grays are not responsible.

25. 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. Larry, Stephanie, and Zakrowski are each a “person” as that term is defined in the Indiana Civil Rights Law, IC 22-9-1-1 *et. seq.* (“the ICRL”). IC 22-9-1-3(a).

3. Zakrowski, because he does not own the statutory minimum of single-family houses, is not covered by the Indiana Fair Housing Act, IC 22-9.5 (the IFHA”). IC 22-9.5-3-1(a)(1)(A)(i).

4. The ICRL provides as follows:

(l) “Discriminatory practice” means:

(1) the exclusion of a person from equal opportunities because of ... religion ...;

(2) ...

(3) ...

(4)...

Every discriminatory practice relating to the acquisition ... of real estate ... shall be considered unlawful unless it is specifically exempted by **this chapter**.

IC 22-9-1-3(l). (All emphasis added.)

5. Zakrowski's reliance on *Michigan Protection and Advocacy Service, Inc. v. Babin*, 18 F.3d 337 (6th Cir. 1994) is misplaced. In *Babin*, an action brought under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3600, *et. seq.* ("the FHA" or "Title VIII"), the defendant claimed to be exempt under the "less than three houses owned" provision cited above. Defendant was a real estate agent, acting in her personal capacity, when she sold a house she had purchased as an investment, a sale challenged as motivated by disability in violation of the FHA.
6. That exemption requires that the sale be made without the use of the sales or rental services of a real estate broker, agent, or sales person.
7. Plaintiffs in the *Babin* case argued that the defendant could not be exempt because defendant used a real estate agent, herself, citing a provision in Michigan's licensing law that provided that a sale of real estate by a real estate salesperson, other than a sale of his or her principal place of residence, shall be deemed to be done as a principal vocation of the salesperson and the sale shall be through a licensed broker. In its opinion, the *Babin* court did state, as cited by Zakrowski, that "we do not believe that a state regulation can negate the clear intent of a federal statutory provision". *Michigan Protection and Advocacy Service, Inc. v. Babin*, 18 F.3d 337, 338 (6th Cir. 1994).
8. This case does **not** involve a claim that some state statute or regulation makes the FHA exemption inapplicable. The claim here is that the ICRL applies and the Grays seek to enforce their rights under the ICRL.
9. Zakrowski also argues that the IFHA and the ICRL are *in para materia* and that the ICRL should be construed to incorporate the IFHA exemption. This, too, is unpersuasive. It is true that the ICRL and the IFHA overlap; however, the IFHA covers only residential real estate transactions while the ICRL covers all real estate transactions. The two statutes were enacted some 26 years apart, do not cover precisely the same subject matter, and provide for different remedies. This is nearly the same situation, at the state level, as was addressed at the federal level in *Johnson v. Zaremba*, 381 F. Supp. 165

(N.D. Ill. 1973), in which the court found that the FHA and 42 U.S.C. §1982 were independent and concurrent.

10. Indiana accords great weight to housing discrimination cases decided under Title VIII in its application and interpretation of the ICRL. *Indiana Civil Rights Commission v. Alder*, 714 N.E.2d 632 (Ind. 1999).

11. Cases decided under Title VIII follow closely the elements of employment discrimination. *Kormoczy v. Secretary of United States Housing and Urban Development ex. rel. Briggs*, 53 F.3d 821 (7th Cir. 1995).

12. Unlawful discrimination can be established in two ways, through direct or circumstantial evidence. *Kormoczy, supra*.

13. If, as here, there is credible direct evidence that an unlawful consideration was a factor in an adverse decision, the respondent will lose unless it proves by a preponderance of the evidence that the same decision would have been made absent the impermissible factor. *Bachman v. St. Monica's Congregation*, 902 F.2d 1259 (7th Cir. 1990)

14. The Grays proved by a preponderance of the evidence that religion was a factor in the decision to evict them.

15. Zakrowski proved by a preponderance of the evidence that the Grays would have been evicted in the absence of the consideration of religion.

16. Zakrowski committed a discriminatory practice by considering the Grays' religion in deciding to evict them from the property. Because there is no exemption in the ICRL for such a practice, it was unlawful.

17. The foregoing order of proof – direct evidence of an impermissible factor rebutted by evidence that the same decision would have been made anyway – derived from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1990); a decision made pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e ("Title VII"). *Bachman, supra*. Under *Price Waterhouse*, this would have led to a finding of no liability.

18. In the Civil Rights Act of 1991, Congress expressly provided that when an impermissible consideration is a factor in an adverse decision but the same decision would have been made absent the impermissible consideration, that is an unlawful act

that warrants injunctive relief but does not warrant individual relief, such as damages. 42 U.S.C. §2000e-5(g)(2)(A).

19. Section 6(k) of the ICRL governs the ICRC's authority upon the finding of an unlawful discriminatory practice and provides that, among its powers and duties, the ICRC

... shall state its findings of fact after a hearing and, if the commission finds the person has engaged in an unlawful discriminatory practice, shall cause to be served on this person an order requiring the person to cease and desist from the unlawful discriminatory practice and requiring the person to take further affirmative action as will effectuate the purposes of his chapter, including but not limited to the power:

(A) to restore complainant's **losses incurred as a result of discriminatory treatment**, as the commission may deem necessary to assure justice

IC 22-9-1-6(k).

20. The losses incurred by the Grays as a result of the eviction were not "losses incurred as a result of discriminatory treatment" as that phrase is used in section 6(k)(A) of the ICRL as those losses would have occurred in the absence of consideration of their religion.

21. 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).

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

ORDER

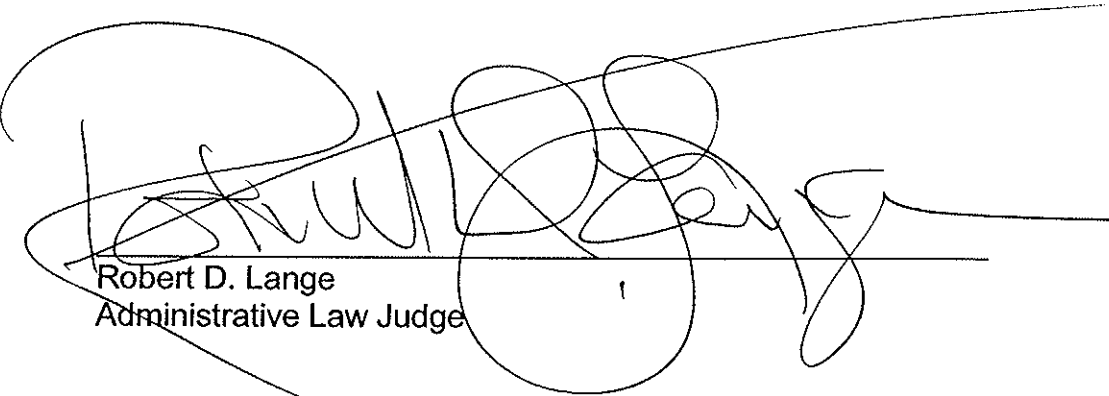
1. Zakrowski shall cease and desist from consideration of tenants' religion in evicting tenants from housing

2. Zakrowski shall attend a professionally developed seminar approved by the ICRC's Director and addressing housing discrimination. Attendance at that seminar shall be completed within 180 days after the effective date of this Order. Proof of attendance shall be filed with the ICRC.

3. Zakrowski shall draft and implement an equal housing opportunity provision to be part of any future lease agreements. A copy of that provision shall be delivered to the ICRC within 30 days of the effective date of this Order.

4. 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 4-21.5-3-31(b), or stayed by a court of competent jurisdiction.

Dated: 20 April 2006



A large, stylized handwritten signature in black ink, appearing to read 'Robert D. Lange', is written over a horizontal line. The signature is highly cursive and loops around the line.

Robert D. Lange
Administrative Law Judge

To be served this 20th day of April, 2006 by first class mail on the following parties and attorneys of record:

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and to be personally served this 20th day of April, 2006 on the following:

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Indiana Civil Rights Commission
c/o The Honorable Gregory Kellam Scott, Esq.; Director
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