STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION

YUFEN (HE) DUSAN Complainant,	)	ICRC No.: EMha13101544 EEOC No.: 24F-2014-00051
VS.	)	DATE FILED OCT 21 2019 ICRC COMMISSION
BELTERRA CASINO, Respondent,	)	

FINAL ORDER

On May 24, 2019, Hon. Caroline A. Stephens Ryker, Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") issued her Initial Findings of Fact, Conclusions of Law, and Order ("Order"). The Parties had opportunity to object to the Order, and both Complainant and Respondent objected to the Order on June 10, 2019 and June 7, 2019 respectively. IC 4-21.5-3-29. Both Parties submitted briefs to the Commission by August 23, 2019, and the Commission held oral arguments on Parties' objections on September 20, 2019. After due consideration of the complete record in this matter, the Commission adopts the following and HEREBY Orders:

THE COMMISSION HEREBY ORDERS:

1. The findings of fact and conclusions of law as stated in the Order, a copy of which is attached hereto, are incorporated herein by reference. IC 4-21.5-3-28(g)(2).
2. The Order is AFFIRMED under IC 4-21.5-3-29 and hereby becomes the Final Order disposing of the proceedings. IC 4-21.5-3-27(a).

Either party to a dispute filed under IC 22-9 may, not more than thirty (30) days after the date of receipt of the Commission's final appealable order, appeal to the court of appeals under the same terms, conditions, and standards that govern appeals in ordinary civil actions. IC 22-9-8-1.

ORDERED by the Commission majority vote of 4 Commissioners on this 18 day of October, 2019

Chair Steven A. Ramos
Indiana Civil Rights Commission

Certificate of Service

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STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION

YUFEN (HE) DUSAN Complainant, VS. BELTERRA CASINO, Respondent,	ICRC No.: EMha13101544 EEOC No.: 24F-2014-00051 DATE FILED MAY 24 2019 OFFICE OF THE ADMINISTRATIVE JUDGE

INITIAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The presiding Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC"), Caroline A. Stephens Ryker, held a public Hearing in this matter on December 10th through December 13th of 2018 and on February 13th of 2019.[1] Complainant Yufen (He) Dusan appeared personally along with Staff Attorney for the ICRC, Attorney Michael C. Healy, in support of her Complaint on behalf of the public interest. Respondent Belterra Casino appeared personally by Sarah T. Basset and by counsel Attorney Joseph C. Pettygrove of Kroger, Gardis and Regas, LLP.

The Hearing was conducted because on March 26, 2014, the ICRC completed a neutral investigation and found reasonable cause on Complainant's October 18, 2013 complaint, in which she alleged Respondent discriminated against her on the basis of national origin and disability in violation of the Indiana Civil Rights Law ("ICRL"). The Parties submitted a Joint Prehearing Statement ("JS") on October 26, 2018, which was supplemented by the November 26, 2018 final Supplemental Joint Prehearing Statement ("JPHS") that summarized the Parties' allegations and defenses as well as provided stipulations concerning facts and evidence. Complainant alleged racial discrimination in the JS, to which Respondent objected. The ALJ

[1] On the first day of the Hearing, Respondent raised an issue with respect to undisclosed documents that were responsive to discovery requests made by Respondent. After reviewing the relevant documents, Respondent requested no relief. While Respondent also asserted that the results of a third-party subpoena were not disclosed, at a January 10, 2019 status conference, the Parties determined the subpoenaed records were properly disclosed. The February 13, 2019 continuance resulted.

afforded the Parties the opportunity to provide pre-hearing position statements on the appropriateness of Complainant's racial discrimination claim as subject matter for the Hearing. Ultimately, in the JPHS, Respondent continued to oppose Complainant's ability to bring a racial discrimination claim, and Complainant reasserted it.

At the beginning of the proceeding, the ALJ granted Complainant's oral motion for the witnesses to be separated, and the Parties waived opening arguments. The ALJ facilitated the over-the-phone presence of Cantonese interpreters for the duration of the five-day Hearing to ensure Complainant's complete understanding of the proceeding. Complainant's witnesses included Yufen (He) Dusan and Maria Conway, and Complainant's admitted exhibits included: C1, C2, C3, C4, C5, C6, C7, C8, C9, C10, C11, C12, C14, C15, C16, C17, C18, C19, C20, C21[2], C22, C23, C25, C26, C27, C28, C29, and C30.[3] Complainant Yufen (He) Dusan served as Complainant's rebuttal witness. Respondent's witnesses included Sarah Gross, Tricia McAlpine, and Lee Smela, and Respondent's admitted exhibits included R1, R2, R3, R5, R6, R8, R9, R10, R11, R12, R13, R21, and R22.[4] Respondent did not call any rebuttal witnesses. Both Parties waived closing arguments.

At the conclusion the Hearing, the ALJ set an April 1, 2019 deadline for the submission of simultaneously filed post-hearing briefs and an April 15, 2019 deadline for the submission of reply briefs. Respondent timely filed a post-hearing brief; no reply briefs were filed. The ALJ also set a May 1, 2019 deadline for the submission of suggested decisions under 910 IAC 1-11-3. Both Complainant and Respondent timely filed suggested decisions.

Accordingly, the ALJ took the matter under advisement. Specifically, based on the evidence and arguments presented in the record of this matter, the ALJ considered Complainant's allegations that Respondent violated the ICRL by 1) discriminating against Complainant on the basis of disability by refusing to provide her with a reasonable accommodation, which resulted in her discharge and 2) by discriminating against Complainant on the basis of national origin by providing Complainant with less favorable terms and conditions than employees not of Complainant's national origin during the transitional duty program and with respect to taking English classes, which resulted in her discharge, and that 3)

[2] C21 and R12 are the same document.
[3] All exhibits admitted without objection, with the exception of C6, C7, C8, C9, C10, C11, C27, and C29.
[4] All exhibits admitted without objection.

Respondent's actions entitle Complainant to relief.[5] Furthermore, the ALJ considered Respondent's defenses that 1) Respondent acted in good faith and for legitimate-nondiscriminatory reasons, 2) Respondent engaged in the interactive process and any breakdown was the fault of Complainant, 3) no reasonable accommodation was available, 4) the proposed accommodations placed an undue hardship on Respondent, 5) any possible award should be discounted because Complainant failed to mitigate damages, 6) any possible award should be discounted by Complainant's subsequent employment, and 7) Complainant's race discrimination claim is barred by failure to exhaust administrative remedies. Having carefully considered the evidence and being duly advised in the premises, the presiding ALJ for the ICRC proposes that the Commission enter the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Respondent is a resort and casino property located in Florence, Indiana that employs more than 900 employees. (JPHS at Stip. 1; Tr. 401:16-21; Tr. 572:15-23.)
2. Complainant is a Chinese national who at the time relevant to her complaint lived and worked in Indiana. (JPHS at Stip. 2; Tr. 137:14-19.)
3. In 2010, Respondent hired Complainant as a Guest Room Attendant. (JPHS at Stip. 2; Tr. 138:21-23; Tr. 139:1-13.) As a Guest Room Attendant, Complainant was responsible for cleaning hotel rooms on Respondent's property, which included a great deal of manual labor like cleaning bathrooms, moving furniture, making beds, taking out trash, and vacuuming. (R1; Tr. 98:11-99:15.)
4. Although Complainant spoke very little English, Complainant was generally able to communicate with her supervisors and co-workers concerning the day-to-day functions of her position as Guest Room Attendant. (JPHS at Stip. 3; JPHS at Stip. 4; Tr. 145:5-12; C28 at 17.) However, communication was often complicated by the language barrier because Complainant primarily spoke, and still primarily speaks, Cantonese. (JPHS at Stip. 3; Tr. 179:13-21; Tr. 446:9-21; Tr. 448:15-21; Tr. 593:1-19.)
5. Early in her employment, Complainant attempted to take advantage of Respondent's offer to reimburse employees for the cost of taking English classes. (Tr. 145:15-147:13; Tr. 409:8-23; Tr. 593:21-594:22.) The English class Complainant requested was taught on Tuesdays, Thursdays, and Saturdays. (Tr. 256:16-21.)

[5] Complainant's racial discrimination allegation is addressed later in this order.

6. Respondent attempted to rearrange Complainant's work schedule so that she could attend most of the English classes, but Respondent could not guarantee that Complainant could have every Saturday off because Saturdays were Respondent's busiest days. (Tr. 256:13-257:21; Tr. 265:18-266:10; Tr. 410:2-411:14.) Importantly, Complainant's Housekeeping Supervisor did not guarantee any Guest Room Attendants a schedule where they would not regularly work Saturdays, which was not disputed by the testimony of Maria Conway ("Conway"), a Guest Room Attendant from Peru who successfully took English classes, because Conway did not testify about Conway's work schedule. (Tr. 411:23-412:4; Tr. 92:19-22; Tr. 93:7-11; Tr. 94:6-20; Tr. 118:4-119:22; Tr. 91:1-133:23.) Outside of accommodating Complainant's preferred class schedule, Respondent, through its Risk and Safety Manager, Lee Smela ("Smela"), also attempted to find English classes that could fit Complainant's work schedule completely, but none were available. (Tr. 594:6-22; Tr. 267:7-17). Ultimately, Respondent offered Complainant the same reasonable opportunity to attend English classes within the boundaries of attending work when needed as was offered to other employees of different national origins.
7. On April 16, 2012, Complainant sustained a back injury while cleaning a room on Respondent's property. (JPHS at Stip. 5; Tr. 160:1-8; Tr. 412:6-17; Tr. 588:13-22.) Complainant reported the injury to her supervisors. (Tr. 273:10-19; Tr. 277:21-278:2; Tr. 279:6-17; Tr. 170:11-21.) Despite Complainant's understanding that her Housekeeping Supervisor was going to send someone to replace her, Complainant continued to clean the room. (Tr. 278:5-179:23.)
8. Complainant arrived at work on April 19, 2012, her next scheduled work day, and requested to see a doctor for her injury for the first time. (*Compare* Tr. 278:5-179:23 *with* Tr. 170:20-717:4.) Complainant's Housekeeping Supervisor explained that she would arrange a doctor's appointment for Complainant that afternoon. (Tr. 281:23-282:13.) Complainant worked until around noon that day when she asked, with the help of another employee, to go to a doctor immediately. (Tr. 280:1-22; Tr. 171:5-172:6.) In response, Complainant's Housekeeping Supervisor sent Complainant to Respondent's Worker's Compensation Clinic, the Carrol County Memorial Hospital ("Clinic"), to receive treatment from Dr. Nunnelley. Respondent's employees' actions were consistent with Respondent's workplace injury policy for employees who did not wish to seek immediate medical assistance at the time of their

injury. (Tr. 581:3-582:6; Tr. 407:3-14; R2[6]; JPHS at Stip. 6.) Given Complainant's behavior and the language barrier, Respondent's employees acted reasonably.

9. Although Complainant has alleged that Conway received better and more immediate treatment after a workplace injury, Complainant's situation differed from Conway's in that Conway's injury was clearly emergent in nature while Complainant's actions indicated to Respondent that Complainant's was not. (Tr. 100:15-106:2.)

10. Complainant's April 19, 2012 visit to the Clinic resulted in medical restrictions, including 1) not lifting over five (5) pounds, 2) minimized stooping, bending, or twisting, 3) no squatting, climbing, or crawling, and 4) working in a sit down job only. (JPHS at Stip. 6; C5 at 53[7].) Her restrictions remained largely unchanged until June 6, 2012 when the limitation of a sit down only job was removed and September 6, 2012 when her weight limit was changed to ten (10) pounds. (C5[8].) Her permanent restrictions of limited bending and a lifting limit of ten (10) pounds went into effect on November 9, 2012 when Complainant's physician determined she had reached maximum medical improvement ("MMI"). (*Id.*[9]; R6; R8; R9; C26 at 15-16.) At no time did Complainant's physician ever restrict Complainant's ability to engage in pushing or pulling. (C5; Tr. 290:8-11[10].)

11. As with other employees, Respondent accommodated Complainant's physician-imposed restrictions through the transitional or "light" duty program ("transitional duty program"). (Tr. 419:23-420:13; Tr. 610:20-611:6; Tr. 174:18-23; Tr. 176:5-15; R2.) Through the transitional duty program, employees were assigned a set of individually customized tasks within their physician's restrictions with the goal of keeping the affected employees engaged in the workforce. (R2; Tr. 417:23-418:19; Tr. 422:13-423:9; Tr. 424:18-20; Tr. 433:1-8; Tr. 579:7-580:7; Tr. 583:21-584:6; Tr. 584:15-586:4; Tr. 587:3-6.) The tasks assigned, which did not constitute a position, were based on the employee's restrictions and the availability of

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[6] Although R2, Respondent's Fact Sheet Work Injury/Illness, is dated for March of 2014, the only information that changed from 2013 to 2014 was the phone numbers used to contact named officials. (Tr. 704:3-705:5.) The substance of the policy was effective in 2013. *Id.*

[7] Carroll County Memorial Hospital Health and Work form dated April 19, 2012.

[8] Changes to restrictions are documented at Page 38 (Carroll County Memorial Hospital Health and Work form dated June 6, 2012) and Page 36 (Carroll County Memorial Hospital Health and Work form dated September 6, 2012).

[9] Changes to restrictions are documented at Page 31 (Carroll County Memorial Hospital Health and Work form dated November 9, 2012).

[10] Complainant testified that "[t]he doctor did not say – the doctor did not say I cannot push. He just restrict my -- the weight to ten pounds, but it also limit me I shouldn't bend over."

work. (Tr. 422:13-423:9; Tr. 583:21-587:6.) Because no business need existed for the tasks performed, transitional duty was designed to end once the employee reached MMI. (Tr. 585: 8- 587:6; R6; R9; R11.)

12. Complainant provided her physician's restrictions to Smela so that Smela could assign compatible tasks.[11] (R2; Tr. 582:1-6; Tr. 583-2-8; Tr. 708:19-709:11; Tr. 181:1-8.) Accordingly, Complainant was placed on transitional duty in the laundry room because her restrictions could not be accommodated in the Guest Room Attendant position. (JPHS at Stip. 7; Tr. 609:17-610:18.) Although other employees of different national origins, Conway and Alicia Gibson ("Gibson"), a Laundry Room Attendant of Hispanic national origin, were assigned tasks like replacing small items in guest's rooms, rearranging cards, or light housework based on their respective injuries, which were not back or hip related, Complainant's restrictions, which included the limitation of a sit down job, did not allow her to perform similar work. (C5; Tr. 108; 3-110:15; Tr. 460:11-13; C26 at 8.)
13. Instead, Complainant was assigned tasks that included: folding wash cloths and rags, cleaning rags, and cutting the edges off of torn rugs. (Tr. 419:23-420:13; Tr. 610:20-611:6; Tr. 174:18-23; Tr. 176:5-15.) She was able to complete these tasks sitting down at a table, with the laundry brought to her by way of a cart. (Tr. 610:20-611:6.)
14. While Complainant testified that she was asked to perform tasks outside of her restrictions, the credible testimony of Complainant's supervisors and Smela, demonstrates that she was not. (Tr. 419:23-420:13; Tr. 610:20-611:6; Tr. 174:18-23; Tr. 176:5-15; Tr. 427:4-8; Tr. 598: 1-14.) Additionally, Complainant's primary complaint involved pushing and pulling extremely heavy carts, which would have fallen *within* the boundaries of her restrictions -- particularly after June 6, 2012.[12] (C5; Tr. 290:8-11; Tr. 176:5-21; Tr. 291:2-295:5.)
15. Throughout her transitional duty, Complainant complained to her supervisors, Smela, and her physician that she was in "much pain." (C25 at 51 and 34[13]; Tr. 492:19-493:16; Tr. 730:7-733:8; Tr. 833:2-18; Tr. 595:6-579:6; C28 at 25; R5.) In response, Smela would schedule an appointment with Complainant's physician. (Tr. 494:4-11; Tr. 599:5-600:21.) Although

[11] Dr. Nunnelley also provided the restrictions directly to Respondent. (C24 at 10; R8.)
[12] Complainant also complained about lifting more than ten (10) pounds with respect to wet towels and mats, but she was unsure as to the weight of these items. (Tr. 289:18-4.)
[13] Complaints are documented at Page 51 (Carroll County Memorial Hospital Health and Work form dated April 26, 2012) and at Page 34 (Carroll County Memorial Hospital Health and Work form dated September 26, 2012).

Complainant testified that she made explicit complaints concerning pushing and pulling carts and its impact on her injuries along with requests for a new assignment, Respondent's employees understood Complainant's complaints to be limited only to pain and requests for physician's appointments. (Tr. 178:4-180:23; Tr. 492:19-493:16; Tr. 730:7-733:8; Tr. 833:2-18; Tr. 595:6-579:6.)

16. Once Complainant reached MMI, Respondent's policy required that Complainant return to regular work. (R5; Tr. 499:9-21; Tr. 435:4-15; Tr. 518:14-22; Tr. 617:1-12; Tr. 585:11-18; Tr. 621:2-5; Tr. 625:3-20; Tr. 632:8-14; Tr. 643:3-644:3; R9; R11.) As the first step in the process, Smela reviewed Complainant's restrictions and the essential functions of her current position as a Guest Room Attendant to see if she could be accommodated. (Tr. 623:3-9; R11; R9; R5; R6.) Smela ultimately determined that Complainant's restrictions could not be accommodated in the Guest Room Attendant position. (R11; C26 at 31; R1.) As a result, Respondent's policy mandated that Complainant find a different position where her restrictions could be accommodated. (R5; Tr. 499:9-21; Tr. 435:4-15; Tr. 518:14-22; Tr. 617:1-12; Tr. 585:11-18; Tr. 621:2-5; Tr. 625:3-20; Tr. 632:8-14; Tr. 643:3-644:3; R11.)
17. Conway's and Gibson's restrictions allowed them to return to their original position within the boundaries of their restrictions, so they did not go through the process of applying for different positions. (Tr. 113:1-115:17; C26 at 8-11.)
18. On April 26, 2013, Smela, Respondent's Team Member Relations Counselor ("TMR Counsel"), one of Respondent's HR representatives, and Respondent's Housekeeping Supervisor, met with Complainant, and with the use of a phone translation service, explained to Complainant that she was responsible for finding and applying for a new position within thirty (30) days. (R5; R10; R11; Tr. 182:3-190:1; Tr. 317:2-328:6; Tr. 449:9-12; Tr. 630:17-635:17; Tr. 442:22-443:4.) To facilitate her search, Respondent's TMR Counselor gave Complainant a list of open jobs and told her to work with HR if she had any questions. (R10; R11; R12; C21; Tr. 317:11-16.) Complainant was also advised that if she did not find a new position within thirty (30) days, her employment with Respondent would be terminated. (Tr. 633:4-634:20; R10; R11.)
19. Of the positions provided to Complainant, Complainant contends that at the time of her discharge, she could perform the following positions, with or without a reasonable accommodation: a) Barista, b) Bartender, c) Concession Worker, d) Beverage Server, e)

Cage Cashier, and f) Specialty Room Foodserver. (C22; Tr. 202:6-9.) The positions' requirements with respect to Complainant's restrictions and qualifications were:

a. Barista: the position required the ability to lift or carry items for one (1) to two (2) hours a day. (C22; Tr. 650:11-654:5.) During those one (1) to two (2) hours, the weight of the items carried could range from fifty (50) pounds to ten (10) pounds or less. *Id.* Generally, the lifting involved with the Barista position involved stocking shelves, including heavy items like chips (30 pounds) and coffee (20-30 pounds). *Id.* Bending and twisting was required for one (1) to two (2) hours a day for tasks such as bussing tables. *Id.* Although a front-of-house position, the guest interaction required was limited to taking orders and manning the register.[14] *Id.*
b. Bartender: the position required an Indiana ABC Permit (Liquor License). (C22.)
c. Concession Worker: the position required the ability to lift or carry items for one (1) to two (2) hours a day. (C22; Tr. 660:1-622:17.) During those one (1) to two (2) hours, the weight of the items carried could range from twenty-five (25) pounds to ten (10) pounds or less. *Id.* Bending and twisting was required for five (5) to six (6) hours a day. *Id.* Generally, the bending and twisting involved the scooping of ice cream. *Id.* Although a front-of-house position, the guest interaction required was limited to taking orders and manning the register. *Id.*
d. Beverage Server: the position required the ability to lift or carry items for seven (7) or more hours a day. (C22; Tr. 644:1-666:13.) During those seven (7) hours, the weight of the items carried was limited to ten (10) pounds or less. *Id.* The position also required bending or twisting for five (5) to six (6) hours a day. *Id.* As a front-of-house position, a Beverage Server would take orders and respond to guest complaints. *Id.*
e. Cage Cashier: the position included the ability to lift or carry items for one (1) to two (2) hours a day, with items ranging in weight from fifty pounds (50) to less than ten (10) pounds. (C22; Tr. 666: 15-669:4.) Generally, the front-of-house position included exchanging money and calling credit companies. *Id.*
f. Specialty Room Foodserver: the position required an Indiana ABC Permit (Liquor License). (C22.)

[14] "Front of house means a lot of guest interaction, so team members are working in --directly with the guests, interacting directly with the guests face to face, providing services." (Tr. 648:20-23.) "Back of the house" refers to positions that the guests may or may not see, but they're not --there's not a lot of guest interaction." (Tr. 649: 1-3.)

20. Of the six (6) positions Complainant contends she could have worked at the time of her discharge, only the Barista position is plausibly a position that Complainant could have completed with or without a reasonable accommodation.[15] Complainant did not have a liquor license in 2013, and accordingly, she was not qualified for the Bartender or Specialty Room Foodserver positions. (Tr. 344:3-14.) As Dr. Nunnelley testified, Complainant could not have performed the Concession Worker position in 2013 because she would not have been able to scoop ice cream, which was the core function of the position. (C24 at 29.) As a Beverage Server, Complainant would be well outside of her limited bending instruction, and her limited English would disqualify her from being able to effectively handle guest complaints. (C5; C22; R8.)
21. However, Complainant could perform the essential functions of the Barista position that were affected by her qualifications (guest communications, stocking shelves, and bussing tables) with or without an accommodation. (C22.) The Barista position involved a more limited, vocation-specific and conversational vocabulary that would need to be learned on the job by any new employee, and Complainant could have been accommodated by having assistance with stocking the shelves with respect to the two items (chips and coffee) weighing over ten (10) pounds.[16] (C5; C22; R8.) Bussing tables falls within her restriction of limited bending, and although Dr. Nunnelley expressed concern about Complainant's ability to bus tables, he also concluded that the extent of Complainant's limitations might have best been determined based on a limited "...trial period to see what she could and couldn't do." (C25 at 32-33.)
22. Although Complainant testified that in 2013 and 2014 she could not 1) bend at the waist, 2) twist from side to side, 3) crouch low continuously, 4) stand for more than 20 minutes, 5) reach overhead without pain, or 6) walk more than two (2) meters without using a cane, her only physician recommended restrictions on April 26, 2013 were the ten (10) pound weight

[15] The ALJ notes that Complainant testified that she could perform the "five" positions contained in C22, although there are six (6) positions contained in C22. The ALJ concludes Complainant intended her response to reference all six (6) positions in C22 as she did not distinguish between any of the positons. More relevantly, Complainant has consistently asserted that she could perform the Barista position. (C9 Int. R 22.)

[16] Based on Complainant's ability to communicate effectively with her co-workers and her supervisors as a Guest Room Attendant, the ALJ concludes that her English was sufficient to capably perform as a Barista in 2013. Furthermore, the position description specifically explains, with respect to job qualifications, that "the skills are typically acquired through on-the-job experience in specialty coffee, snack bar or similar food facility." (C22.) The ALJ does not see a significant difference between the English skills required for positions at Wal-Mart or a doctor's office and the English skills needed for a Barista, which, despite concluding her English was limited, David Fink believed Complainant could perform successfully. (R21.) Furthermore, Complainant acquired a master's degree in China, evidencing that she was capable of learning vocation-specific vocabulary. (Tr. 137:20-138:20.)

limit restriction and the limitation on bending.[17] (Tr. 339:22-344:2; C5; R8; Tr. 349:14-353:7.) While Complainant testified that she would experience pain in performing various activities in 2013 and 2014, pain is not equivalent with inability. (*Compare* Tr. 339:22-344:2 *with* C26 at 9.)

23. Although Smela and Respondent's TMR Counselor characterized the job search process as a collaborative search effort between HR and Complainant, Respondent's April 26, 2013 letter, Respondent's May 30, 2013 letter, Complainant's understanding, Smela's notes, and Respondent's own actions establish that Respondent placed the burden squarely on Complainant to find a new position. (Tr. 617:14-23; Tr. 633:20-634:20; Tr. 505:7-17; Tr. 506:12-18; Tr. 507:17-20; Tr. 189:17-190:1; Tr. 184:11-185:15; R5; R10; R11; R13.) The sole assistance Respondent provided in the job search effort was a two-page list of positions open on April 26, 2013, without job descriptions, and a vague invitation to reach out for assistance. (R11; R12; C21.) The totality of the evidence presented demonstrates that Respondent's HR department did not actively look for positions that Complainant could have completed within her restrictions during the thirty (30) day period and did not reach out to Complainant outside of the April 26, 2013 meeting. Furthermore, although it was a possibility, Respondent did not extend Complainant's thirty (30) days for a reasonable period of time in the event that additional, more compatible positions would become available.[18] (Tr. 626:13-21.)

24. During the thirty (30) day job search period, Complainant did not apply for any positions, and she stopped attending work. (Tr. 339:5-15; Tr. 328:4-6; Tr. 336:2-17.) Although Complainant and Respondent disagree as to whether Complainant left voice messages for Respondent's employees that were unreturned and as to whether Complainant immediately indicated her interest in a number of positions during the April 26, 2013 meeting, the ultimate result of Complainant's attempted communications was that Complainant did not successfully communicate to Respondent that she intended to apply for any position with

[17] Complainant testified to occasionally facing bedrest, but the simple use of paid time off/sick time or the accommodation of reasonable unpaid time off sufficiently addresses this concern. (Tr. 349:14-353:7.)
[18] Respondent's behavior facilitated an outcome in-line with Respondent's facially problematic policy that an "employee must present a restriction free Work Status Report to return to 'regular duty,'" which suggests it is not Respondent's typical practice to attempt to accommodate employees once they have transitioned away from the transitional duty program. (R2.)

Respondent.[19] (Tr. 184:1-7; Tr. 322:9-328:3; Tr. 330: 18-336:17; Tr. 189:17-192:1; Tr. 357:3-362:12; Tr. 444:4-19; Tr. 514:21-515:20; Tr. 534:4-6; Tr. 432:18- 440:13; Tr. 637:10-639:1; Tr. 647:3- 648:11; Tr. 813:5-814:16.) As a result, Complainant's employment was terminated on May 29, 2013. (R13; C1 at Int. R. 6; C2 at Int. R 14; JPHS at Stip. 10.)

25. Complainant testified that Smela told Complainant to "go home," meaning China, during her employment at least three (3) times. (Tr. 180: 1-14; Tr. 297:17-229:11; Tr. 881:2-10; C23.) However, Complainant also testified that she was unclear when confronted with a similar statement from a different employee as to whether "home" referred to Complainant's residence or to Complainant's country of origin. (Tr. 179:8-21.) Furthermore, employees on transitional duty were told to go home when work within their restrictions was not available, and Smela told Complainant to "go home" when Complainant's pain was at a level where continuing to work was not advisable. (C26 at 11; Tr. 600:9-15.)
26. Additionally, Smela credibly testified that, as supported by the testimony of other employees, she never told Complainant to go back to China. (Tr. 440:15-441:19; Tr. 507:22-508:7; Tr. 602:11-603:5.) Smela also evidenced a genuine desire to help Complainant when she stepped outside her job duties to assist Complainant with finding English classes and with Complainant's immigration paperwork, which supports a finding that Smela did not make statements to Complainant indicating that Complainant should return to her country of origin. (Tr. 601:6-602:9; Tr. 301:22-302:1; Tr. 304:8-12; Tr. 594:6-22; Tr. 267:7-17.)
27. At the time of her discharge, Complainant was making $10.40 per hour and working forty (40) hours a week. (Tr. 141:6-16; Tr. 158:1-3; C14.)
28. Complainant diligently searched for work from the date of her termination, May 29, 2013, to the date of the issuance of this order, but she was not successful in obtaining employment.[20] (Tr. 191:18-201:12; C10; C16; C17; C19; C20.) However, beginning in August of 2014, she began seeking part-time work only.[21] (R21; Tr. 369:21-374:23; Tr. 344:15-348:11.) Additionally, she received $200.00 in spousal payments beginning in November of 2016 and

[19] Phone calls were made on April 26, 2013 and April 29, 2013. (C29; C18; C29; R22.)
[20] Complainant applied for jobs with at least the following employers: Subway; Wal-Mart; Snappy Tomato Pizza; Jack's Place; Hong Kong Garden; Anderson's Riviera Inn; Family Dollar; BP Gas Station; Kroger; River Side Inn; New Chinese Buffet; Woodland Hills Nursing Home; The Clearing House; Rising Star Casino and Resort; Schwan Food Co., and various Job and Career Fairs, Work One Southeast; Kelly Services; and SIEOC. (C10.)
[21] Complainant did not dispute that she only looked for part-time employment, but she did testify that she could perform full time employment now. (Tr. 373:21-374:23.)

ending around May of 2018, and she withdrew money from her pension with Respondent. (C10)

29. Complainant also applied for and obtained Supplemental Security Income ("SSI") with the Social Security Administration ("SSA") in September of 2017. (C15.) During 2017, she received monthly payments of $555.00, and in 2018, she received monthly payments of $570.00 until at least August of 2018. Her benefits will continue until at least August of 2022. *Id.* If Complainant had been working part-time with Respondent while receiving SSI, her monthly award would have continued, but at lower monthly rate. *Id.* The award would have been reduced by the amount of her earned income as calculated by the SSA, which would have been approximately $383.50 per month.[22] *Id.*

30. Although Complainant provided evidence that a physician determined she could work without any restrictions in June of 2013, Complainant's own testimony concerning the work she could perform in 2013 and her failure to seek full-time employment in 2014 illustrates that Dr. Nunnelley's medical findings and resulting restrictions should be given far greater weight. (C11; R21; Tr. 339:22-344:2.)

31. In making these findings of fact, less weight was given to Complainant's Exhibits C1, C2, C3, C4, C5, C6, C7, C8, and C9, in favor of the live testimony provided at the Hearing. Similarly, little weight was given to C27, which is a video of Complainant doing some minimal physical activity for approximately one (1) hour and forty (40) minutes over the course of two days, because the relevance and reliability of the exhibit is minimal.

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[22] Complainant's SSI award letter explains that her award is calculated by subtracting her income from the base award rate. (C15.) Income is calculated by adding her unearned income (spousal payments), minus the first $20.00, to her earned income, minus the first $65.00 and divided by two. *Id.* Although Complainant stopped receiving spousal payments in May of 2017, her spousal payment was calculated in her award until at least August of 2018. (C10; C15.) For the purpose of completing these calculations, each month has four weeks. Had Complainant continued to work part-time for Respondent, her monthly awards would have been:

Sept. 2017: $735.00 monthly SSI benefit – (($200.00-$20.00)+ ((($10.40 X 20)X4) - $65.00)/2)) = $171.50
Jan. 2018: $750.00 monthly SSI benefit – (($200.00-$20.00)+ ((($10.40 X 20)X4) - $65.00)/2)) = $186.50
Aug. 2018: $750.00 monthly SSI benefit – ((($10.40 X 20)X4) - $65.00)/2) = $366.50

If the amounts actually received are subtracted from the amounts Complainant would have received, the value is equal to the amount of her earned income as calculated by the SSA.

Earned Income: ((($10.40 X 20)X4) - $65.00)/2)) = $383.50
Sept. 2017: $555.00-$171.50 =$383.50
Jan. 2018: $570.00 - $186.50 = $383.50
Aug. 2018: $750.00 - $366.50 = $383.50

32. Complainant did not allege racial discrimination in her original complaint filed on October 18, 2013, and Complainant did not amend the complaint to include racial discrimination.
33. Any Conclusion of Law that should have been deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. The ICRC is statutorily tasked with protecting employees from unlawful discriminatory practices based on race, religion, color, sex, disability, national origin, or ancestry and with protecting employers from unfounded claims of discrimination. IND. CODE § 22-9-1-2. Accordingly, the Commission has jurisdiction over "sufficiently complete" complaints of discrimination in employment on the basis of race, disability, and national origin. IND. CODE § 22-9-1-2; IND. CODE § 22-9-1-6(d); IND. CODE § 22-9-1-3(o); IND. CODE § 22-9-1-3(p).
2. Complainant and Respondent are persons subject to the ICRL because Complainant is an employee and Respondent is an employer. IND. CODE § 22-9-1-3(a), (h), and (i); IND. CODE § 22-9-5-9; IND. CODE § 22-9-5-10.
3. Discriminatory practices include practices or systems that exclude "...a person from equal opportunities because of race...disability, [and] national origin..." IND. CODE § 22-9-1-3(l). Importantly, "[e]very discriminatory practice relating to ... employment... shall be considered unlawful unless it is specifically exempted by this chapter." *Id.*
4. The Commission may only find discrimination has occurred if Complainant has established her claims by a preponderance of the evidence through the provisions of reliable evidence in support of her allegations. *Roman Marblene Co. v. Baker*, 88 N.E.3d 1090, 1096 (Ind. Ct. App. 2017), *transfer denied*, 97 N.E.3d 236 (Ind. 2018); IND. CODE § 4-21.5-3-1(c).
5. Indiana Courts look to federal law and precedent for guidance when interpreting the ICRL. *Filter Specialists v. Brooks*, 906 N.E.2d 835, 838 (Ind. 2009).

Racial Discrimination

6. The Commission cannot hold a Hearing in the absence of a complaint. IND. CODE § 22-9-1-6(d). A trier of fact has a duty to raise subject matter jurisdiction where subject matter jurisdiction cannot properly be asserted. *Carpenter v. State*, 266 Ind. 98, 103 (1977).
7. Complainant did not include her racial discrimination allegation in her original complaint or amend her complaint prior to the Hearing, and Respondent has not consented to the inclusion

of the claim. 910 IAC 1-2-8. Accordingly, the Commission does not have subject matter jurisdiction over Complainant's racial discrimination claim.

8. The racial discrimination claim, to the extent raised by the Complainant in the JS and JPHS is not properly before the Commission and cannot be considered. *Fishers Adolescent Catholic Enrichment Soc'y, Inc. v. Elizabeth Bridgewater ex rel. Bridgewater*, 23 N.E.3d 1, 3 (Ind. 2015)("...the agency exercises such authority subject to the confines of its enabling statute.")

National Origin Discrimination

9. Complainant may establish national origin discrimination under the direct or indirect method. Under the direct method, Complainant must provide direct evidence of Respondent's discriminatory intent or circumstantial evidence from which a court could reasonably infer evidence of discriminatory intent. *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 860-62 (7th Cir. 2007). Under the indirect method, Complainant may utilize the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green*. 411 U.S. 792, 804-05 (1973); *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 839-40 (Ind. 2009). Complainant has proceeded under both the direct and indirect method.

Direct Method

10. Complainant has alleged that Smela told Complainant to go back to China at pivotal points during Complainant's employment, including when Complainant requested reasonable accommodations and when Complainant was required to find a new job or be discharged, which would evidence that national origin played a role in Respondent's decision-making. However, Complainant's designated evidence is unconvincing with respect to discriminatory intent. Smela may have told Complainant to "go home," but Smela was referring to Complainant's residence, not China. Accordingly, Complainant has not succeeded on providing national origin discrimination under the direct method.

Indirect Method

11. In order to succeed on a national origin discrimination claim under the indirect method, Complainant must first establish that 1) she was a member of a protected class, 2) Complainant was meeting Respondent's legitimate expectations, 3) Respondent took an adverse action against her, and 4) similarly situated individuals not of Complainant's national origin were treated more favorably. *Gusewelle v. City of Wood River*, 374 F.3d 569, 574 (7th

Cir. 2004)(adapted to national origin.) If a prima facie case is established, Respondent has the burden of production to articulate a legitimate non-discriminatory reason for its actions. *Filter Specialists, Inc.*, 906 N.E.2d at 839-40. Next, Complainant must demonstrate that Respondent's stated rationale is pretextual. *Id.* at 840. Pretext is established if Complainant shows that "(1) that the employer was more likely motivated by a discriminatory reason, or (2) that the employer's proffered reason is unworthy of credence." *Johnson v. Univ. of Wisconsin-Milwaukee*, 783 F.2d 59, 63 (7th Cir. 1986). Importantly, "[t]he burden of persuasion remains with the employee at all times." *Id.; Filter Specialists, Inc.*, 906 N.E.2d at 840.

12. Although Complainant has established that she is a member of a protected class by way of her national origin and she has alleged that she was subject to several adverse actions: 1) the inability to take English classes, 2) less favorable assignments on transitional duty, and 3) the termination of her employment, Complainant has not shown that a nexus existed between her national origin and the alleged adverse actions.
13. English Classes: Respondent *approved* Complainant for the English class program, subject to occasionally missing Saturday classes to attend work. Complainant designated Conway as a comparator with respect to the English classes; however, Complainant has not designated any evidence that illustrates Respondent rearranged Conway's work schedule such that Conway never missed an English class.
14. Transitional Duty: While Complainant has established that she was assigned *different* transitional duty tasks than her co-workers Conway and Gibson, she has not proven that the tasks were *less favorable* in nature. Conway, Gibson, and Complainant were all assigned tasks within their individual restrictions, and Complainant has not shown that the tasks assigned to Conway and Gibson conferred an additional benefit outside of compliance with their physician-imposed restrictions. Additionally, Conway is not a proper comparator for Complainant with respect to Respondent's response to Complainant's injury because their injuries presented very differently. Furthermore, even if the ALJ found that Complainant had made her prima facie case, Complainant still could not succeed on her claim because Respondent provided two legitimate, nondiscriminatory reasons for the differentiation that are not pretextual: the difference in the employees' injuries and the availability of work. Conway, Gibson, and Complainant sustained different injuries, and Complainant has not

demonstrated that the tasks performed by Conway or Gibson were available to her during the time Complainant was part of the transitional duty program.

15. Termination: Although Complainant has identified two employees who were not discharged after completing the transitional duty program, both Conway's and Gibson's restrictions could be accommodated within their original positions. Alternatively, Complainant could not have performed the job duties of Guest Room Attendant within her restrictions, accounting for the different closing procedures. Furthermore, Smela did not make comments concerning Complainant's national origin during the April 26, 2013 meeting.
16. Employees of a different national origin were not treated more favorably, and no nexus exists between Complainant's alleged adverse actions and her national origin. Accordingly, Complainant has not met her burden under the indirect method to establish Respondent discriminated against Complainant in her employment on the basis of her national origin.

Reasonable Accommodation Denial

17. An employer is required to provide a qualified employee with a reasonable accommodation necessary for the employee to complete his or her work provided the employee has a disability as defined by the ICRL about which the employer has knowledge. IND. CODE § 22-9-5-7(5); IND. CODE § 22-9-5-16; IND. CODE § 22-9-5-17.
18. An employee is "qualified" when an employee can perform the essential functions of his or her job with or without an accommodation. IND. CODE § 22-9-5-16. The essential functions of a job do not include the marginal functions of the position. *Knox Cty. Ass'n for Retarded Citizens, Inc. v. Davis*, 100 N.E.3d 291, 305 (Ind. Ct. App.), *aff'd on reh'g*, 107 N.E.3d 1111 (Ind. Ct. App. 2018). Employers' determinations and written descriptions to that effect are evidence of functions being essential to a position. IND. CODE § 22-9-5-16.
19. A disability is a "physical or mental impairment that substantially limits at least one (1) of the major life activities of the individual." IND. CODE § 22-9-5-6(a). Lifting, bending, and performing manual tasks are major life activities. *Knox Cty. Ass'n for Retarded Citizens, Inc.*, 100 N.E.3d at 301 and 304; *see also*, 29 C.F.R. § 1630.2(i)(1)(i) (2012). Importantly, "[t]here is no time threshold to overcome for a restriction to substantially limit a major life activity," and the term should be "construed broadly in favor of expansive coverage." *Knox Cty. Ass'n for Retarded Citizens, Inc.*, 100 N.E.3d at 304 (internal citations removed.)

20. During the time relevant to her complaint, Complainant had, and still has, a disability as defined by the ICRL because she could not perform manual labor, engage in extensive bending, and lift items that weighed over ten (10) pounds, which Respondent has not contested.[23] Respondent was aware of Complainant's disability because Respondent made its decisions concerning Complainant's transitional duty tasks and discharge based on her physician-imposed restrictions, as is particularly evident in Respondent's November 15, 2012 and April 26, 2013 letters. (R11; R6)
21. In order to make a reasonable accommodation request, an employee must make the request in such a way that the employer can reasonably understand that the obligations to reasonably accommodate an employee have been triggered. *Beck v. Univ. of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996)("An employee has the initial duty to inform the employer of a disability before ADA liability may be triggered...") For example, a request may be made in the form of a doctor's note that includes work restrictions. *Knox Cty. Ass'n for Retarded Citizens, Inc.*, 100 N.E.3d at 308. Additionally, "[a] request as straightforward as asking for continued employment is a sufficient request for accommodation." *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 694 (7th Cir. 1998).
22. Once an employee makes a reasonable accommodation request, the employer and the employee enter the interactive process, during which they engage in a conversational back and forth designed to identify possible accommodations. *Knox Cty. Ass'n for Retarded Citizens, Inc.*, 100 N.E.3d at 307 ("... we conclude this interactive process is mandatory."); *EEOC v. Sears, Rosebuck & Co*, 417 F.3d 789, 805 (7th Circ. 2005); *Reeves ex rel Reeves v. Jewel Food Stores, Inc.* 759 F.3d 698, 701-702 (7th circ. 2014).
23. An employer is not required to provide the specific accommodation requested, provided the accommodation granted meets the disability-related needs of the employee. *Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996). Furthermore, employers are not required to provide employees with accommodations that place create an undue hardship for the employer. IND. CODE § 22-9-5-18; 910 IAC 3-2-16.
24. Reasonable accommodations can include: "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or

[23] Respondent similarly determined that Complainant's restrictions prevented her from performing manual labor in the Guest Room Attendant position. (R11; C26 at 31; R1.)

devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations..." IND. CODE § 22-9-5-17.

25. Complainant's physician-imposed restrictions constituted a reasonable accommodation request, which Respondent immediately granted by restructuring Complainant's job and assigning Complainant compatible tasks in the laundry room. Alternatively, the totality of the evidence illustrates that Complainant's additional complaints of "much pain" did not rise to the level of reasonable accommodation requests because they were understood by Respondent's employees as requests for additional worker's compensation treatment, which was reasonable given the language barrier and considering that Respondent believed it had already granted the entirety of Complainant's reasonable accommodation request.
26. When Complainant reached MMI and received permanent restrictions, Respondent began reviewing the essential functions of the Guest Room Attendant position to see if Complainant could be accommodated. Ultimately, Respondent concluded that Complainant could not perform the essential functions of the Guest Room Attendant position, with or without an accommodation, which was reasonable in light of Complainant's restrictions.
27. When an employee is unable to perform the essential functions of his or her employment, even when his or her disability is accommodated, the employer is obligated to consider accommodating the employee by reassigning him or her into a different, vacant position. *E.E.O.C. v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012)("ADA does indeed **mandate** that an employer appoint employees with disabilities to vacant positions for which they are qualified...)(emphasis added); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 498-99 (7th Cir. 1996); IND. CODE § 22-9-5-17.
28. An employer is only obligated to reassign an employee to a vacant position for which the employee is qualified. IND. CODE § 22-9-1-13; IND. CODE § 22-9-5-16. Qualification in the context of a reassignment means that the employee is qualified for the ***new*** position. *See generally, Gile v. United Airlines, Inc.*, 95 F.3d 492 (7th Cir. 1996)(explicitly rejecting the argument that an employer is not required to accommodate an employee via reassignment when the employee is not qualified for the employee's current job); *Rehling v. City of Chicago*, 207 F.3d 1009, 1014 (7th Cir. 2000); *Dalton v. Subaru-Isuzu Auto., Inc.*, 141 F.3d 667, 677-78 (7th Cir. 1998).

29. Reassignment as an accommodation is more than simply allowing an employee to compete for a new job because it is an outgrowth of the interactive process. *Gile v. United Airlines, Inc.*, 213 F.3d 365, 373-374 (7th Cir. 2000)(finding an employer's reliance on the ability of the employee to facilitate her own transfer through a bidding process insufficient.) Importantly, "[a] disabled employee need not be the most qualified applicant for a vacant position..." *Brown v. Milwaukee Bd. of Sch. Directors*, 855 F.3d 818, 820 (7th Cir. 2017); *E.E.O.C. v. United Airlines, Inc.*, 693 F.3d 760, 764 (7th Cir. 2012). However, reassignment may not be reasonable if it upsets employee seniority policies or other similar policies. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 403-06 (2002)(explaining that even if the proposed accommodation is unreasonable in light of a seniority system, then the employee may still succeed on the failure to accommodate claim by presenting evidence on the accommodation's reasonableness.) Ultimately, the employer determines the position into which the employee can transfer; the employee cannot dictate the position. *Rehling v. City of Chicago*, 207 F.3d 1009, 1014 (7th Cir. 2000).

30. An employer has the duty to assist an employee in finding a vacant position for which the employee is qualified.[24] *Dalton v. Subaru-Isuzu Auto.*, Inc., 141 F.3d 667, 678 (7th Cir. 1998); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 694-95 (7th Cir. 1998); *Jackson v. City of Chicago*, 414 F.3d 806, 813 (7th Cir. 2005)("...the burden of 'exploring' reasonable accommodation lies with the employer.") *Gile v. United Airlines, Inc.*, 213 F.3d 365, 373 (7th Cir. 2000)(discussing that the employer "...had the affirmative burden..." to "...seek [the employee] out and work with her to craft a reasonable accommodation...") Specifically, the employer must "identify the full range of alternative positions for which the individual [employee] satisfies the employer's legitimate, nondiscriminatory prerequisites...," including positions that would constitute a demotion. *Dalton,* 141 F.3d at 678. Additionally, the employer must "...determine whether the employee's own knowledge, skills, and abilities

[24] The EEOC advises that an "...employer is obligated to inform an employee about vacant positions for which s/he may be eligible as a reassignment. However, an employee should assist the employer in identifying appropriate vacancies to the extent that the employee has access to information about them." Equal Employment Opportunity Commission (EEOC), *Enforcement Guidance: Reasonable Accommodations and Undue Hardship Under the Americans with Disabilities Act*, Notice No. 915.002 (Oct. 17, 2002), *available at* https://www.eeoc.gov/policy/docs/accommodation.html#N_87_. The EEOC's guidance is not binding on the Commission, but it does provides some insight into how these cases are interpreted.

would enable her to perform the essential functions of any of those alternative positions, with or without reasonable accommodations." *Id.*

31. Reassignment as an accommodation does not require an employer to create a new job, to "bump" a current employee from a job, to remove the essential functions of a job, or to offer permanent light duty. *Gratzl v. Office of Chief Judges of 12th, 18th, 19th, & 22nd Judicial Circuits*, 601 F.3d 674, 680 (7th Cir. 2010); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996).

32. If the interactive dialogue does not result in the reassignment of an employee to a new position, the interactive process itself must be scrutinized to see if the breakdown was due to one or both parties acting in bad faith. In assessing fault, "[n]o hard and fast rule will suffice, because neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability." *Beck v. Univ. of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996). A party fails to act in good faith by delaying the process, obstructing the process, or failing to communicate during the process. *Id.* at 1136. Importantly, "[t]he last act in the interactive process is not always the cause of a breakdown," and a totality of the circumstances must be assessed before determining which party was at fault. *E.E.O.C. v. Sears, Roebuck & Co.*, 417 F.3d 789, 806 (7th Cir. 2005).

33. Respondent, at least on a surface level, attempted to provide reassignment as an accommodation to Complainant for her permanent work restrictions. However, Respondent's attempted accommodation was really no accommodation at all. Respondent provided Complainant thirty (30) days ***to apply*** for a new position. The full measure of Respondent's assistance was a two-page list of positions open on April 26, 2013, without job descriptions or any assessment by Respondent of Complainant's ability to perform the essential functions of those positions.[25] Instead, Respondent placed the burden squarely and solely on Complainant to apply for positions based on Complainant's own understanding of

[25] This is made particularly evident by the fact that a part-time laundry room position was available, and Respondent did not discuss offering to accommodate Complainant by allowing her to continue her same transitional tasks in the laundry room as a restructured job position on the laundry room team. (C21; R12; R10.) As Smela explained, Complainant could not continue to do her transitional duty tasks when she was placed on MMI because she was not a Laundry Room Attendant and her transitional duty tasks were temporary in nature. (Tr. 724:1-725:2.) While part-time employment is not the first step in the interactive process, an employer may consider lower paying jobs or demotions when no other positions are available.

her possible qualifications and limited Respondent's duty to assess Complainant's qualifications and restrictions to the typical and competitive application process.

34. Respondent points to Complainant's relatively passive response to Respondent's directive to undercut Respondent's own passive attempt to accommodate Complainant. However, "[i]t is not an employee's responsibility...to repeatedly prod a reticent employer." *EEOC v. Sears, Rosebuck & Co*, 417 F.3d 789, 808 (7th Circ. 2005). Regardless of Complainant's failure to more actively engage in a job search, the interactive process ultimately broke down because Respondent's thirty (30) day application period and vague invitation to provide assistance offered Complainant nothing past what Complainant could have achieved on her own at any time by simply applying for new jobs with Respondent or any new employer. After all, Respondent had Complainant's work restrictions and her general qualifications, and Respondent has not contended that Complainant would have provided missing, vital information (outside of her personal preference which Respondent was not required to consider) through the application process. Respondent effectively ended the interactive dialogue on April 26, 2013 when Respondent communicated to Complainant that she would not be accommodated through job restructuring or through genuine reassignment.

35. If an employer fails to engage in the interactive process, the employer can still defeat an employee's failure to accommodate claim if the employee could not be accommodated. *Knox Cty. Ass'n for Retarded Citizens, Inc. v. Davis*, 100 N.E.3d 291, 308 (Ind. Ct. App.), *aff'd on reh'g*, 107 N.E.3d 1111 (Ind. Ct. App. 2018); *Hansen v. Henderson*, 233 F.3d 521, 523 (7th Cir. 2000).

36. Importantly, when considering cases where the interactive process has failed, courts have imposed a burden shifting test. If an employee proves that the employee was not accommodated and that the employer failed to participate in the interactive process, then the burden of production shifts to the employer to demonstrate that no reasonable accommodation existed. *Knox Cty. Ass'n for Retarded Citizens, Inc.*, 100 N.E.3d at 308; *Mays v. Principi*, 301 F.3d 866, 870 (7th Cir. 2002), *abrogated by E.E.O.C. v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012)(on other grounds)("...the only consequence of the employer's failing to consult with the employee concerning a possible accommodation of the employee's disability is to shift the burden of production concerning the availability of a reasonable accommodation from the employee to the employer."); *Hansen*, 233 F.3d at 523.

Ultimately, the burden of persuasion always rests on the employee, who must demonstrate that the employer's statements concerning the inability to accommodate are false and that the employee could have been accommodated. *Jackson v. City of Chicago*, 414 F.3d 806, 813 (7th Cir. 2005).

37. Complainant was not qualified for most of Respondent's positions available on April 26, 2013; however, Respondent has not provided credible evidence as to why Complainant could not have been accommodated through reassignment to the positon of Barista with additional accommodations like minor job restructuring, the help of co-workers, or the use of occupational tools for her physician-imposed restrictions.[26] Similarly, Respondent did not explain why, if Respondent believed that Complainant could not perform any of the jobs open on April 26, 2013, Respondent did not extend Complainant's thirty (30) day period for a reasonable period of time to allow for the possibility of future, compatible vacancies.
38. Respondent has not designated evidence that a seniority policy or collective bargaining policy made reassignment unreasonable or created undue hardship for Respondent.
39. Complainant could have been accommodated without imposing undue hardship on Respondent through reassignment to the Barista position, with additional accommodations made to limit her bending and lifting, or through a reasonable extension of her job search period to allow for possible future vacancies.[27] Accordingly, Respondent discriminated against Complainant on the basis of disability by failing to provide her with a necessary reasonable accommodation.

Damages

40. If the Commission determines that an employer has committed an unlawful discriminatory practice, the Commission shall order the employer to "cease and desist from the unlawful discriminatory practice" and to take "affirmative action as will effectuate the purposes of [IC 22-9-1]" and may order the employer "... to restore complainant's losses incurred as a result

[26] At most, Respondent noted that it did not know how many Baristas worked a single shift, but concluded that more than one was employed. (Tr. 715:11-716:22.) Although Respondent is not required to reassign Complainant to a position for which she was not already qualified and Complainant would need to learn the vocation-specific vocabulary for the Barista position on-the-job, any first-time Barista would similarly need to learn the vocabulary through on-the-job training. Requiring Complainant to already know the vocabulary would impose on her an unfair and heightened set of criteria by virtue of her having a disability and using the reassignment process, which would violate the ICRL.

[27] The ALJ limits her analysis to the full-time positions available based on the facts of this case, but she notes that the interactive process may require an employer to explore reassignment to part-time positions, lower paying positons, or positions that will become available within a reasonable time as well.

of discriminatory treatment, as the commission may deem necessary to assure justice..." In employment cases, restoration of losses is limited to "...wages, salary, or commissions..." IND. CODE § 22-9-1-6(j); *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 850 (Ind. 2009). The Commission may also order the employer to post a "...notice setting forth the public policy of Indiana concerning civil rights and respondent's compliance with ..." it, to provide "...proof of compliance... at periodic intervals," and if relevant, require a Respondent "...to show cause to [a] licensing agency why the [Respondent's] license should not be revoked or suspended." IND. CODE § 22-9-1-6(j).

41. An award of "wages" includes an award of back pay, to which employees are "...presumptively entitled..." *Knox Cty. Ass'n for Retarded Citizens, Inc. v. Davis*, 100 N.E.3d 291, 309 (Ind. Ct. App.), *aff'd on reh'g*, 107 N.E.3d 1111 (Ind. Ct. App. 2018). Back pay is calculated from the date of discharge to the date that an order is issued. *Filter Specialists, Inc.*, 906 N.E.2d at 850.
42. An award of back pay may be reduced because an employee failed to mitigate his or her damages. *Knox Cty. Ass'n for Retarded Citizens, Inc.*, 100 N.E.3d at 309. An employer has the burden of demonstrating an employee failed to mitigate his or her damages by establishing that the employee "...failed to exercise reasonable diligence to mitigate his damages, and that (2) there was a reasonable likelihood that the employee might have found comparable work by exercising reasonable diligence." *Id.*
43. Although Complainant did actively seek work after her discharge, starting in August of 2014, Complainant only looked for part-time work. Accordingly, Complainant's back pay is reduced by half for the years she sought only part-time work.
44. Additionally, back pay is reduced by the amount of money earned by Complainant during the relevant pay bay period. *Id.* Money earned does not include unemployment compensation, which the employee must pay back under Indiana Code 22-4-13-1, or spousal payments. *Indiana Civil Rights Comm'n v. Weingart, Inc.*, 588 N.E.2d 1288, 1291 (Ind. Ct. App. 1992; *Filter Specialists, Inc. v*, 906 N.E.2d at 850. Alternatively, an employee's back pay may be reduced by the amount of SSI awards and pension payments, provided the reduction does not create a "discrimination bonus" for the employer. *Flowers v. Komatsu Min. Sys., Inc.*, 165 F.3d 554, 558 (7th Cir. 1999)(considering discretion to offset damages with respect of Social

Security Disability Income payments); *E.E.O.C. v. O'Grady*, 857 F.2d 383, 391 (7th Cir. 1988).

45. Because the pension used by Complainant was an earned benefit of her employment, it should not reduce the amount of her back pay. *E.E.O.C.*, 857 F.2d at 391. However, Complainant's SSI payments should offset her back pay because SSI is the functional equivalent of a new job with a new employer. Like the earnings made from a new employer and unlike unemployment compensation benefits or Social Security Disability Income payments, Complainant is not required to return the amount of her SSI payments that she would not have received had she continued working for Respondent. Accordingly, Complainant's back pay is reduced only by the amount of SSI that she would not have received had she been working for Respondent. [28]

46. Pre-judgment interest is presumptively available to compensate Complainant for the "loss of the use of the money." *Knox Cty. Ass'n for Retarded Citizens, Inc.*, 100 N.E.3d at 311. Prejudgment interest is calculated from the date of the dismissal to the date of the issuance of this order. *Id.* The Indiana Court of Appeals has considered pre-judgment interest to be calculated in line with post-judgment interest under 28 U.S.C.A. § 1961, which includes the averaging of the 1-year constant maturity Treasury yield's interest as published by the Board of Governors of the Federal Reserve System over the week before the issuance of this order, which was 2.32.[29] *Id.* The pre-judgment interest is compounded annually. *Id.*

47. Accordingly, Complainant's total back pay is **$76,583.41,** calculated as follows[30]:

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[28] While some courts have concluded that SSDI does not reduce back pay awards, few courts have considered the effect of SSI, which differs significantly in that income is calculated in the month it is paid, closing the door to repayment. *Tomao v. Abbott Labs., Inc.*, No. 04 C 3470, 2007 WL 2225905, at *25 (N.D. Ill. July 31, 2007); 42 U.S.C.A. § 1382(b)(5); 42 U.S.C.A. § 404. The closed door runs contrary to back pay's purpose of placing an employee in the same position in which the employee would have been had the discrimination not occurred. *Id.* at *23. The adjustments made to Complainant's award are based on the instructions provided with Complainant's SSI award letter.

[29] The interest rates from May 13, 2019 to May 17, 2019 were: 2.32, 2.32, 2.30, 2.33, and 2.33. The average was found by adding all five (5) rates together and dividing by five (5). Interest rates available at: https://www.federalreserve.gov/releases/h15/.

[30] The math below was completed under the following parameters: All dollar values were rounded to the second decimal place. All weeks were rounded to a whole number and were calculated by dividing the number of days by the number of days (7) in a week. SSI awards are presumed "awarded" on the first day of the month. There are 52 weeks in every year. Prejudgment interest is calculated using the following formula that calculates the damages daily and compounds the interest yearly: damage awarded X [one + (interest as a decimal/number of times interest is compounded within one year)] to the power of (the number of times interest is compounded within one year X the number of years) = total damages with interest.

Year	Dates	Calculation	Amount	Interest
One	May 29, 2013 to May 28, 2014	($10.40 X 40 hours a week) X 52 weeks	$21,632.00	$21,632.00 X [(1+(0.0232/1))^(1X6)] =$24,823.32
Two	May 29, 2014 to May 28, 2015	A + B= total A. ($10.40 X 40 hours a week) X 10 weeks = $4,160.00 B. ($10.40 X 20 hours a week) X 42 weeks = $8,736.00	$12,896.00	$12,896.00 X [(1+(0.0232/1))^(1X5)] = $14,462.98
Three	May 29, 2015 to May 28, 2016	($10.40 X 20 hours a week) X 52 weeks	$10,816.00	$10,816.00 X [(1+(0.0232/1))^(1X4)] = $11,855.20
Four	May 29, 2016 to May 28, 2017	($10.40 X 20 hours a week) X 52 weeks	$10,816.00	$10,816.00 X [(1+(0.0232/1))^(1X3)] = $11,586.39
Five	May 29, 2017 to May 28, 2018	(($10.40 X 20 hours a week) X 52 weeks) - ($383.50 in additional SSI award X 9 months received)	$7,364.50	$7,364.50 X [(1+(0.0232/1))^(1X2)] = $7,710.18
Six	May 29, 2018 to May 24, 2019	(($10.40 X 20 hours a week) X 51 weeks) – ($383.50 in additional SSI award X 12 months received)	$6,006.00	$6,006.00X [(1+(0.0232/1))^(1X1)] = $6,145.34
		Total Back Pay: $69,530.50 Total Back Pay with Interest: **$76,583.41**		

48. Front pay is an equitable remedy that can be awarded when reinstatement is not appropriate, and it is designed to compensate an employee for the wages the employee expects to lose in the future as a result of the unlawful discrimination. *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 953–54 (7th Cir. 1998). Front pay awards must be reduced to the present value of the award using the following formula: present value = award/ interest rate. *Laurenzano v. Blue Cross & Blue Shield of Massachusetts, Inc. Ret. Income Tr.*, 191 F. Supp. 2d 223, 241 (D. Mass. 2002). Given that Complainant expressed a desire not to be reinstated and that Complainant faced barriers to receiving an accommodation that she would still need, reinstatement is not the preferred remedy. (Tr. 203:19-205:23.) However, to receive an award of front pay, Complainant must provide the necessary information to calculate the award, including 1) the amount of the award, 2) the number of years Complainant expected to work for Respondent, and 3) the appropriate interest rate. *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 862 (7th Cir. 2001). Complainant has not provided the information necessary to calculate front pay, and accordingly, she cannot be awarded front pay. (Tr. 203:19-205:23.)

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

ORDER

1. Complainant Yufen (He) Dusan's race discrimination claim is not properly before the Commission and cannot be considered.
2. Complainant Yufen (He) Dusan's national origin discrimination claim against Respondent Belterra Casino is DISMISSED with prejudice.
3. Respondent Belterra Casino shall cease and desist from discriminating against its qualified employees on the basis of disability by failing to provide reasonable accommodations.
4. Respondent Belterra Casino shall deliver to the ICRC's Director of Alternative Dispute Resolution and Compliance, as escrow agent, a check in the amount of seventy-six thousand, five hundred eighty-three dollars and forty-one cents **($76,583.41)**, made payable to Yufen Dusan. The ICRC shall deliver the check to Complainant Yufen (He) Dusan within fifteen (15) days of receipt. Respondent Belterra Casino shall deliver a photocopy of the check to each attorney of record and the Docket Clerk on the same day that the check is served on the ICRC.
5. Within 180 days of the effective date of this Order, Respondent Belterra Casino's current Human Relations Managers and current Risk and Safety Managers who work or are involved with Respondent's transitional duty program shall attend a professionally developed training, approved in advance by the Executive Director of the ICRC, on the topic of employment discrimination on the basis of disability. The training shall last no less than three (3) hours and may be done in installments, as needed. Proof of completion must be filed with the ICRC's Director of Alternative Dispute Resolution and Compliance within 200 days of the effective date of this Order.
6. Within 90 days of the effective date of this Order, Respondent Belterra Casino shall draft and submit for the Executive Director of the ICRC's approval internal guidance for providing reasonable accommodations to employees within the context of the transitional duty program, paying special attention to the closing procedures for the program. The internal guidance must follow the legal standards set out in this Order. Respondent Belterra Casino shall implement the final policy within 150 days of the effective date of this order.

7. Respondent Belterra Casino shall post equal employment opportunity and non-discrimination statements in conspicuous places on its premises and websites.
8. This Order shall take effect immediately after approved and signed by the majority of the members of the Commission, unless it is modified by the Commission pursuant to IC 4-21.5-3-31(a); stayed by the Commission pursuant to IC 4-21.5-3-31(b), or stayed by a court of competent jurisdiction. Once approved and signed by the majority of the members of the Commission, any party aggrieved by the Commission's decision may seek judicial review with the Indiana Court of Appeals within thirty (30) days following the date of notification of the Commission's final decision.

SO ORDERED this 24th day of May, 2019

Hon. Caroline A. Stephens Ryker
Administrative Law Judge
Indiana Civil Rights Commission
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255
Anehita Eromosele, Docket Clerk
317/234-6358
aneromosele@icrc.in.gov

Certificate of Service

Served by certified mail this 24 day of May, 2019 on the following:

Yufen He Dusan
15 Village Drive
Apartment 104 Lawrenceburg, IN 47025 **9214 8901 0661 5400 0138 4806 57**
Certified Mail #

Belterra Casino
Attn: LaDonna F. Johnson
1408 State Road 156 **9214 8901 0661 5400 0138 4807 49**
Florence, IN 47020-9488
Certified Mail #

Kroger Gardis & Regas, LLP
Attn: Joseph C. Pettygrove and Sarah v. Bowers
111 Monument Circle, Suite 900 **9214 8901 0661 5400 0138 4811 11**
Indianapolis, IN 46024-5125
jpettygrove@kgrlaw.com
Certified Mail #

And personally served on the following:

Michael C. Healy, Esq.; Staff Counsel
Indiana Civil Rights Commission
Indiana Government Center North
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255
mhealy@icrc.in.gov

Naa Adoley Azu
ADR & Compliance Director
Indiana Civil Rights Commission
100 North Senate Avenue, Room N300
Indianapolis, IN 46204
317.232.2637
nazu@icrc.in.gov

Docket Clerk

STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION

YUFEN (HE) DUSAN Complainant,	)	ICRC No.: EMha13101544 EEOC No.: 24F-2014-00051
VS.	)	DATE FILED
	)	MAY 28 2019
BELTERRA CASINO, Respondent,	)	OFFICE OF THE ADMINISTRATIVE JUDGE

AMENDMENT TO INITIAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The presiding Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC"), Caroline A. Stephens Ryker, issued an Initial Findings of Fact, Conclusions of Law, and Order ("Order") on May 24, 2019. The Order is hereby amended to include the following information concerning administrative review:

Administrative Review

Before the Findings of Fact, Conclusions of Law, and Order issued on May 24, 2019 can become a final order in this proceeding pursuant to Indiana Code 4-21.5-3-29, administrative review may be obtained by parties not in default by the filing of a writing that identifies with reasonable particularity the basis for each objection **within fifteen (15) days after the service of the May 24, 2019 Order**. IND. CODE § 4-21.5-3-29(d). Subject to Indiana Code 4-21.5-3-1, the filing of a document in proceedings before the ICRC can be completed by mail, personal service, fax, or electronic mail to:

Docket Clerk
C/o the Indiana Civil Rights Commission
100 North Senate Avenue, Room N300
Indianapolis, IN 46204
Fax: (317) 232-6580
Email: anermosele@icrc.in.gov

A party shall serve copies of any filed item on all parties. IND. CODE § 4-21.5-3-17(c).

SO ORDERED this 28th day of May, 2019

Hon. Caroline A. Stephens Ryker
Administrative Law Judge
Indiana Civil Rights Commission
100 North Senate Avenue, Room N300
Indianapolis, IN 46204-2255
Anehita Eromosele, Docket Clerk
317/234-6358
aneromosele@icrc.in.gov

Certificate of Service

Served by certified mail this 28 day of May, 2019 on the following:

Yufen He Dusan
15 Village Drive
Apartment 104 Lawrenceburg, IN 47025
Certified Mail # **9214 8901 0661 5400 0138 5334 83**

Belterra Casino
Attn: LaDonna F. Johnson
1408 State Road 156
Florence, IN 47020-9488
Certified Mail # **9214 8901 0661 5400 0138 5339 95**

Kroger Gardis & Regas, LLP
Attn: Joseph C. Pettygrove and Sarah v. Bowers
111 Monument Circle, Suite 900
Indianapolis, IN 46024-5125
jpettygrove@kgrlaw.com
Certified Mail # **9214 8901 0661 5400 0138 5341 45**

And personally served on the following:

Michael C. Healy, Esq.; Staff Counsel
Indiana Civil Rights Commission
Indiana Government Center North
100 North Senate Avenue, Room N300
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mhealy@icrc.in.gov

Naa Adoley Azu
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Docket Clerk