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Before The  
INDIANA CIVIL RIGHTS COMMISSION  
Indiana Government Center North  
Indianapolis IN 46206-6015

IN THE MATTER OF  
JANUARY 27, 2006 MONTHLY COMMISSION MEETING

(Including Oral Argument in The Matter of  
JAMES NGUYEN versus DELPHI CORPORATION)

Transcript of proceedings at a public  
meeting of the Commission held on January 27, 2006 at  
Conference Room C, Indiana Government Center South,  
Indianapolis, Indiana, Alpha Blackburn, Chairman, presiding.

ACCURATE REPORTING OF INDIANA  
12922 Brighton Avenue  
Carmel IN 46022

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PERSONS PRESENT:

ALPHA BLACKBURN, Chairman

David C. Carter

Stephen A. Ramos

Barry Baynard

Gregory Kellam Scott

Christine Cde Baca

Robert Lange

Eric Chandler

Debra Bluit

Da Mica O'Bryant

Stephen M. Tilden

Amy Mendoza

Ryan Marques

Ryan Marques

Barbara Dobbins

And during the argument in James Nguyen versus Delphi Corporation these persons were also present:

James Nguyen

Richard L. Darst

Jane Ann Himsel

1 [January 27, 2006. 2:19 p.m.]

2 ARGUMENT ON OBJECTIONS TO ALJ'S PROPOSED FINDINGS

3 MS BLACKBURN: Good afternoon. The Indiana civil  
4 Rights Commission is now in session.

5 As a result of objections filed by complainant to  
6 the proposed Findings of Facts and Conclusions of Law and  
7 Order, we're here to hold oral argument on said objection.

8 The case is James Nguyen, complainant, versus  
9 Delphi, respondent.

10 Let the record show that in attendance at this  
11 hearing are Commissioners Carter, Baynard, Ramos, and I am  
12 Alpha Blackburn, chair of the Commission.

13 For the record also, would anyone participating  
14 this morning in this hearing please introduce yourself for  
15 the record?

16 MR. DARST: My name is Richard Darst, and I  
17 represent James Nguyen, who is here today.

18 MS HIMSEL: I'm Jane Ann Himsel, H-I-M-S-E-L, and I  
19 represent Delphi Corporation.

20 MS BLACKBURN: Your name, again, is--

21 MS HIMSEL: Jane Ann Himsel, H-I-M-S-E-L.

22 MS BLACKBURN: Thank you.

23 If we can agree on the groundrules as we proceed,  
24 we'd like to allow fifteen minutes for--let's--excuse  
25 me--twenty minutes for your presentation of your arguments,

1 and five minutes each for rebuttal. We would like to allow  
2 ten minutes at the end, approximately, for commissioners to  
3 ask questions of the parties as well as the attorneys, or  
4 counsel, relating to the issues raised by the objections.

5 Is that agreeable to both of you?

6 MR. DARST: Yes.

7 MS HIMSEL: Yes.

8 MS BLACKBURN: All right. We'll proceed then with  
9 you, Mr. Darst.

10 MR. DARST: Thank you, Madam Chairperson and  
11 members of the Commission; Ms Himsel; staff.

12 Thank you for taking the time to hear this matter.  
13 I think everyone appreciates it.

14 The issue in this appeal is whether a federal court  
15 decision on federal law prevents or stops the administrative  
16 commission--the administrative law judge from proceeding to  
17 enforce state law in administrative proceedings. And we  
18 argue that the answer is no. The federal court decision on  
19 federal law cannot prevent the Commission from enforcing  
20 state law, especially in administrative proceedings.

21 What is the reason for that? The bottom-line  
22 reason is that the proceedings are different. Proceedings of  
23 the Commission are different than the proceedings of courts,  
24 either the trial court, state court, or the federal court,  
25 where the proceedings are just different, and they're

1 different than administrative proceedings.

2           This is-- The history of the case is that James  
3 Nguyen filed, without an attorney at first, his complaint  
4 with the Indiana Civil Rights Commission. The Commission  
5 then issued a finding of probable cause in his favor. And  
6 then Jim filed a--with me as his attorney, filed a proceeding  
7 in federal court, on the federal law, to proceed there to get  
8 relief for him under the federal law. The state law  
9 proceeding continued in the Commission before Judge Lange.  
10 And the parties and the judge stayed--the judge actually  
11 stayed the administrative proceedings until further  
12 proceedings on the federal side, which makes sense because  
13 the parties may get together, may resolve the matter, may not  
14 need hearings all the time before the Indiana Civil Rights  
15 Commission or the administrative law judge.

16           However, after a couple of years of it pending in  
17 the federal court on the federal law and the state court on  
18 the--or not state court--state administrative commission on  
19 the state side, the--let's see, the federal court issued a  
20 summary judgment on the federal law, and the administrative  
21 law judge stayed the proceedings I believe for a year,  
22 pending appeal. And then Delphi, the employer, filed  
23 bankruptcy proceedings for Chapter XI reorganization to  
24 reorganize their debts and hopefully get out of  
25 reorganization and continue in their business.

1           So the bankruptcy court issued, automatically, a  
2 stay of the court proceedings, which stayed the federal court  
3 proceedings in the federal court of appeal. And just before  
4 the last status conference, which I think was set in probably  
5 December of last year, just a month or two ago, the  
6 administrative judge issued an order on the state side,  
7 saying that he understood from case law that federal orders  
8 staying a court proceeding do not apply to an administrative  
9 proceeding because an administrative proceeding has different  
10 interests than a court proceeding. The different interests  
11 of the administrative proceeding is that the Commission has  
12 an interest in enforcement, an enforcement interest, which is  
13 not an interest that a federal court has. A federal court  
14 just says Yes/no, yes/no, something like that.

15           So the law recognizes that the Commission is  
16 different than a court. Different than either the state  
17 court or the federal court. The law recognizes that the  
18 Commission follows different rules. It not only follows  
19 different rules for enforcement proceedings, but also on the  
20 admission of evidence and things like that. So that is the  
21 difference between the Commission proceedings and the court  
22 proceedings.

23           Now, answering a hypothetical question, I think if  
24 the parties had chosen to go to the state court and taken the  
25 Commission out of the picture, then that would be a different

1 situation, because there is law stating that a federal court  
2 summary judgment applies as res judicata to a state court  
3 proceeding. However, we did not take, neither one of us took  
4 the matter out of the Commission, and kept the matter before  
5 the Commission. And so the Commission is different than  
6 either a state court or a federal court because the  
7 Commission has the enforcement obligation, enforcement duty  
8 and responsibility, and that's what the federal cases have  
9 recognized when they say that a federal bankruptcy  
10 proceeding, and an order staying all other proceedings, does  
11 not affect the Commission, because the Commission has  
12 enforcement responsibility.

13 Now there is a possible argument that could be  
14 raised, which I would like to address before it is raised,  
15 that this is not a proceeding captioned as The Commission  
16 versus Delphi; it's captioned as the complainant versus  
17 Delphi, the respondent. I don't think that makes any  
18 difference, because that's the normal caption of any  
19 proceeding before the Commission, as far as I understand it,  
20 so this is an enforcement proceeding.

21 In the event that it is not an administrative  
22 enforcement proceeding, then the stay should apply to this  
23 proceeding just as it applied to the courts. But the stay,  
24 the judge ruled, does not apply to this proceeding. I  
25 believe the reason is that it's an enforcement proceeding.

1 And because it's an enforcement proceeding, it's a different  
2 type of proceeding than a court proceeding.

3 Now some of the evidence or indications that show  
4 how different it is are the federal court's summary judgment  
5 that the respondent submitted to the Commission with its  
6 brief in response to our objections. And when you look at  
7 that, it just totally disregarded what the Commission had  
8 done.

9 Now, if the federal court judgment was res judicata  
10 against the Commission, then the Commission judgment or  
11 finding should be res judicata against the federal court and  
12 the state court. If it's not res judicata--which is a tough  
13 issue to wrestle around--the federal court should at least  
14 give it consideration. The federal court should at least  
15 give a finding of the Commission of probable cause  
16 consideration when the federal court decides whether there's  
17 probable cause to proceed.

18 As a matter of fact, we don't even have to prove  
19 probable cause in the federal court; all we have to prove is  
20 just that there is a reason for a trial, that there is enough  
21 evidence for a trial. It's not even probable cause.

22 But instead of the federal court saying, "Yes, the  
23 Commission found probable cause, and therefore we are going  
24 to have a trial," the federal court really just ignored the  
25 finding of the Commission, ignored the evidence of the



1 Commission, and they submitted the evidence and the finding,  
2 and the evidence was backed up--or the finding was backed up  
3 by evidence of statements taken by the Commission of several  
4 employees at Delphi, who supported James Nguyen's statements  
5 of the fact that he was discriminated against because of his  
6 national origin, which is Vietnamese. His father supported  
7 the United States troops during the Viet Nam war and then was  
8 brought over to the United States, and Jim has spent most of  
9 his life here in the United States. But he suffered  
10 discrimination because of his national origin and has been  
11 called names like "Gook", and all kinds of names at Delphi.  
12 And the Commission took statements from other employees, who  
13 verified that that happened and supported Jim.

14           And so the Commission's finding was not only just a  
15 paper finding; it was a finding that was backed up by  
16 statements taken by the investigators, supporting Jim. Even  
17 supported by written evidence which was left on his tool  
18 wagon. And also on his work station. It says here, "If you  
19 don't read Japanese, tilt your head to the right."

20           And Jim was trying to do a good job, and they were  
21 calling him names and they were taking his tools. It even  
22 got so bad that he had to take a medical leave and was placed  
23 in the hospital for a heart condition. Now we can argue  
24 about whether it was a heart attack or a coronary attack or  
25 whatever, but it was a heart condition that he was placed in

1 the hospital for.

2           This is the kind of stuff that--excuse me; I'm  
3 tilting my head the wrong way-- You know, to some people,  
4 Japanese, Asian, Vietnamese is all the same. And so when you  
5 tilt your head this way, it says something that would be  
6 pretty offensive to an Asian person. And it indicated that--  
7 the oral statements that were made to him in his workplace.

8           And he was given the hard jobs, he was not given  
9 assistance, he was discriminated against for a long period of  
10 time. And the federal court just ignored what the Commission  
11 did. And how can they do that? As I said, they ignored the  
12 statements of the co-employees and said, "Oh, well, you know,  
13 to"--I don't know what they said, but they just basically  
14 ignored the statements. And how can that happen? I think  
15 the federal courts would say, "Well, because we're the  
16 federal court; we're different." And that is the heart of  
17 the matter. The Commission is different than the federal  
18 court.

19           Now, we have some practical problems. I would say  
20 that a simple solution is that the--as soon as Delphi gets  
21 out of reorganization and the federal appeal will proceed,  
22 either the state proceeding before the Commission, the  
23 enforcement proceeding will be stayed--for practical  
24 purposes, not for legal purposes--or it will proceed. And  
25 the practical questions arise that, if the law were such

1 that--and we are all trying to figure out what to do and what  
2 the best thing to do is. And you certainly have the public  
3 responsibility, and I certainly--we all certainly appreciate  
4 that. But all of us are still trying to figure out what to  
5 do also.

6 If any complainant from the ICRC goes to federal  
7 court and the federal court does what it does here, it really  
8 just basically ignores the ICRC finding and the evidence and  
9 the co-employee statements and goes off on its own, what does  
10 that-- And if that would stop the administrative law judge,  
11 stop the Commission from enforcing the law against  
12 discrimination under the state law and trying to change the  
13 employer for the better, what would that mean as a practical  
14 matter? Would all of us complainants have to insist upon a  
15 hearing before the Commission in every case before we went to  
16 federal court? I don't think that's a good practical  
17 solution either.

18 So the-- Oh, I would like to address some of the  
19 authorities. The authorities that the defendant cited apply  
20 to courts--one court vis-a-vis another court--do not apply to  
21 a commission that has enforcement powers and enforcement  
22 responsibilities and different procedures, which are  
23 recognized by, for instance, the federal bankruptcy order,  
24 which does not stop the Commission.

25 And the respondent employer cited Wright and Miller

1 Section 4422 for--in support of its position. I thought,  
2 really, that this section supported us more than it did them.  
3 For instance, the first footnote recognizes problems in  
4 applying issue preclusion when you have varying burdens. And  
5 here we not only have just varying burdens; we have varying  
6 evidence, varying procedural rules, and varying standards of  
7 evidence.

8 To make a long story short on the Wright and Miller  
9 section, footnote 23 at the end--it's just about the last one  
10 near the end--recognizes in the Seventh Circuit case--which  
11 is the circuit that covers our state in the federal court--  
12 recognizes that there was a difference between the trial to a  
13 jury and a trial to the judge--which we call it a court--  
14 difference between a court trial and a jury trial in the same  
15 case, because there is a different standard for the admission  
16 of evidence. That's footnote 23. And the case is Snider  
17 versus Consolidation Coal Company. And that did not even  
18 involve an administrative commission that is enforcing--has  
19 enforcement responsibilities administratively, but rather a  
20 court, and it recognizes that when there are different  
21 standards for the admission of evidence, the one proceeding  
22 does not stop the other proceeding because they are  
23 different.

24 Thank you.

25 MS BLACKBURN: Thank you very much.

1           And now, if you, Miss Himsel, would like to provide  
2 rebuttal first? Or your case?

3           MS HIMSEL: I can do the two together.

4           MS BLACKBURN: All right.

5           MS HIMSEL: This is about the legal doctrine of  
6 collateral estoppel. I am not aware--I'm sorry, I don't--I  
7 mean res judicata, of which collateral estoppel is a part. I  
8 have not seen--and I am not telling you there is not, because  
9 I certainly have not read every case in the country, but I  
10 have researched this issue very thoroughly, and I have not  
11 seen a single bit of legal precedent that would support the  
12 argument Mr. Darst just made, that this legal doctrine--which  
13 he admits, if he had chosen to proceed in state court and  
14 then gone to the federal court and the federal court had made  
15 its decision earlier, the state court would indeed be  
16 estopped from proceeding, but he says it's different because  
17 it's a commission.

18           That doesn't make sense. And the reason it doesn't  
19 make sense is because this doctrine has a very particular  
20 purpose that's crystal clear from Indiana case law. And the  
21 purpose is to prevent parties from relitigating the same  
22 dispute. It doesn't matter whether you're doing it twice in  
23 state court or in state court and then in federal court, or  
24 in federal court and then to the Commission; you don't get a  
25 second bite at the apple. You choose your forum, you

1 litigate your matter, and if it's the same claim and the  
2 issues are decided in the federal court, that decision bars  
3 the action of the state court or a state commission. That's  
4 the basis of the legal doctrine.

5 Now let me differentiate for you between "claim  
6 preclusion" and "issue preclusion", which is also called  
7 "collateral estoppel". And I'm going to try very, very hard  
8 not to say "collateral estoppel" again, but if I do, forgive  
9 me. We're talking about claim preclusion and issue  
10 preclusion.

11 Claim preclusion applies if the following four  
12 factors are met. And this is what Judge Lange said. A court  
13 of competent jurisdiction has entered a final judgment. That  
14 final judgment was on the merits. If the same claim or a  
15 claim that could have been raised in this situation, it's the  
16 same claim; the same parties, or those in privity to them.  
17 Here we have the same parties: Mr. Nguyen and his former  
18 employer, Delphi. If those four things are in place, claim  
19 preclusion applies and prevents the parties from relitigating  
20 the same matter in a different forum, whatever that forum is.  
21 So let's look at it piece by piece.

22 No question that the federal district court was a  
23 court of competent jurisdiction to decide issues of  
24 employment discrimination; no question about that.

25 There's a summary judgment that's been issued on

1 the merits. That's a final decision. And Indiana case law  
2 teaches us that the pendency of an appeal doesn't make any  
3 difference until--if and until it's reversed. What you have  
4 to look at is where the law is right now. And right now you  
5 have a final judgment from the federal district court. The  
6 fact that it's pending on appeal is not even pertinent to  
7 this discussion; it's final until something else happens.  
8 And you have every right, and indeed you should act on the  
9 judgment as it stands right now. I believe that all of you  
10 have been given copies of my brief, and I cite a good bit of  
11 case law, state and federal, supporting that point.

12 This was unquestionably--prong number three--the  
13 same claim: He raised national origin discrimination with  
14 the Commission, with harassment as an element of that; he  
15 went to the federal court, and he claimed national origin  
16 discrimination, harassment based on national origin, as part  
17 of that discrimination allegation.

18 Contrary to what Mr. Darst is telling you, the  
19 federal court did indeed look at what happened in this  
20 commission. He says that he looked at the statement that Mr.  
21 Nguyen submitted to this commission. I believe that's on  
22 page 1. About page 9, he goes through and sets out all the  
23 elements of what Mr. Nguyen's charge was before the  
24 Commission. The federal court knew what they were. He  
25 accepted affidavits of a good many of the people who

1 testified before this Commission. In the federal court  
2 record, a certified copy of everything that happened in this  
3 commission, your entire record was submitted; it was there  
4 before the District Court. I can't tell you any more than  
5 what's in the District Court's opinion about whether he  
6 considered it, but it was there.

7           Competent court; final judgment; same claim; same  
8 parties. That's it. The summary judgment standard doesn't  
9 matter, different damages don't matter. Final judgment has  
10 been enforced; you're not allowed to litigate the same claims  
11 again. That's claim preclusion. It's just that simple. And  
12 there is no law suggesting that it doesn't apply to this  
13 commission. Any more than--any different than--that it would  
14 apply here any differently here than it would apply in a  
15 state court. There's no logic in that at all, and no law to  
16 support it.

17           The other piece of res judicata is issue  
18 preclusion. It's something different than claim preclusion.  
19 Issue preclusion is when you are talking about a particular  
20 issue that, again, has been ruled on in a different forum,  
21 and the purpose of the doctrine is to prevent its  
22 relitigation in a subsequent forum. Okay.

23           Here we have the strange, and sort of I think  
24 unique situation, where the issues and claims are more or  
25 less the same; in other words, the same--you have got the



1 exact same claims; the issues that arise under those claims  
2 are the same. So I think issue preclusion applies here too.

3 Mr. Darst would argue to you that the summary  
4 judgment standards are different in state and federal courts,  
5 the summary judgment standards are different here than  
6 they're--here in this commission, were Judge Lange to grant a  
7 summary judgment with this commission's approval, that  
8 summary judgment would be granted on state court grounds, not  
9 federal court grounds; the state standard would apply, not  
10 the federal court standards would apply. We don't argue with  
11 that.

12 In Tom versus Volda--and this case I think is very  
13 important--the Indiana Court of Appeals rejected the argument  
14 that Mr. Darst is making here in a situation where what was  
15 being argued was issue preclusion. I think it's an easy case  
16 to look at; the facts are pretty clear. In Tom, the  
17 plaintiff was the mother of an individual who had  
18 unfortunately been killed by a police officer in a chase.  
19 She filed a civil rights action in the federal court, with  
20 pendent state law claims. The federal court determined a  
21 number of issues in that action. Some of the issues included  
22 whether the officer had used the appropriate level of force;  
23 whether the officer, at what stage of the proceedings she had  
24 the right to use her gun--a whole lot of issues, issues that  
25 would clearly be pertinent to the state claims as well as the

1 federal claims. But all the federal court decided was the  
2 federal claim; it dismissed the state claims and refused to  
3 exercise pendent jurisdiction. So the state claims went back  
4 to the state court. And the defendant said, with regard to  
5 all those issues of fact and law that the federal court  
6 decided when resolving the federal claim, that claims  
7 preclusion applied. And the plaintiff argued, "No, wait a  
8 minute! It was a different burden! It was a summary judgment  
9 proceeding, a different burden on all these issues."

10 Probably relied on Wright and Miller; I don't know that.  
11 Different burden applied; different burden. And the Indiana  
12 Court of Appeals said, "Huh-uh. No, it doesn't matter."  
13 What matters, here, in their opinion, is that the plaintiff  
14 chose to proceed in the federal forum, received a judgment  
15 from the federal court first.

16 That's exactly what happened here: Mr. Darst  
17 started this case here; he had every right to continue here  
18 if he wanted to; he had every right to go to state court if  
19 wanted to. He chose, after the probable cause finding, to go  
20 on to federal court. The federal court issued a forty-one  
21 page summary judgment on all the same issues, on all the same  
22 claims, finding in favor of Delphi, and both claims  
23 preclusion and issue preclusion, the entire doctrine applies.

24 There is nothing for this commission to decide at  
25 this point. There is nothing to decide; it's been decided by

1 the federal court.

2 I'll be happy to take any questions if you'd like  
3 me to do that.

4 MS BLACKBURN: We will reserve that to the end--

5 MS HIMSEL: Fine.

6 MS BLACKBURN: --if you don't mind, and give the  
7 complainant the chance for any surrebuttal.

8 MR. DARST: Thank you.

9 Taking the last point first, Tom versus Voida was  
10 first of all--Miss Himsel is correct--a case in two courts,  
11 which does not involve an administrative enforcement  
12 proceeding before an administrative commission.

13 Secondly, Tom versus Voida involved the same claim,  
14 and that was basically an excessive force claim that was  
15 brought in federal court, and then the same excessive force  
16 claim brought in the state court. And the Court said there  
17 is a difference between a burden of proof on summary judgment  
18 in federal court and state court, but not enough to make it  
19 different on that kind of claim. So that did not involve a  
20 claim on a federal statute and then a state statute. That  
21 was on the federal--believe it was a 1983--section 1983, 42  
22 United States Code, Section 1983 claim, where the complainant  
23 or plaintiff was trying to bring the same claim in one court  
24 and in another court, which we do not have here.

25 And in addition to that difference of the burden--

1 different burden of proof on summary judgment, we also have  
2 the differences of the enforcement responsibility of the  
3 Commission and the enforcement proceeding. We also have the  
4 difference in the admission of evidence, which in the Seventh  
5 Circuit case of Snider versus Consolidated Coal, which Wright  
6 and Miller spoke to, which is pretty well recognized, that if  
7 there is a different standard for the admission of evidence  
8 in one proceeding it does not prevent another proceeding.  
9 Somewhat similar to that is the example that I raised in the  
10 objections, that when someone is acquitted in a criminal  
11 case, that he can still be sued in a civil case on the same  
12 thing. And they always claim that that's unfair, but that's  
13 permitted by law because the standards are different.

14           And here we have several different standards that  
15 are different: The admission of evidence, the procedures,  
16 the burden of proof, and the enforcement obligation or  
17 responsibility of the Commission. So all of those are  
18 different.

19           We also have-- These are not the same claims; they  
20 are different, and under different statutes. And the  
21 respondent had asked us to look at the summary judgment of  
22 the District Court. And I did scan pages 1 and 9, which she  
23 had referred to. And I believe what the District Court did  
24 was say that the complainant filed a complaint--I'm not even  
25 sure that it mentioned the Commission, but did file an

1 administrative complaint, and did have other people, other  
2 employees who were speaking on his behalf. But I don't think  
3 there was even any place that I could find in the summary  
4 judgment that even said the word "finding of probable cause",  
5 or even referred in other words to the finding of probable  
6 cause of the Commission, or referred to the statements taken  
7 by the Commission, or the evidence.

8           Now the summary judgment did attack additional  
9 affidavits that we submitted, just on making general, broad  
10 statements, saying, well, basically the employees didn't know  
11 what they were talking about. But I think that's something  
12 that the Commission does not ignore. When other employees do  
13 see what's happening to an employee, it's very important to  
14 the Commission, I believe, to see if it's verified by other  
15 employees or if it's just one person who is making this  
16 claim, whether he's making it up or imagining it or whatever.  
17 If other employees-- And these were not Vietnamese  
18 employees, of course, coming forward and saying, "Yes, this  
19 was happening to James."

20           And his name is pronounced--he asked his employees,  
21 other employees to pronounce it "Win". I guess it's  
22 "Nu-win", and shortened, Americanized, he pronounces it  
23 "Win". So the other employees said, "Yes, Jimmy Win's, you  
24 know, being discriminated against and being harassed. I  
25 mean, my gosh, his tools were taken."

1           The federal court said, "Well, he didn't say that  
2 he couldn't ask other people for tools." But that's not  
3 nondiscrimination. Jimmy Nguyen did go around--James Nguyen  
4 did go around-- And perhaps "Jimmy" is a diminutive term, so  
5 I shouldn't use that, but other employees have used that--  
6 James Nguyen went around and did try to do his job the best  
7 he could by borrowing tools from other employees, but the  
8 harassment finally caused him to have to take medical leave,  
9 which he did, and so it was a serious problem. But the  
10 federal court did not recognize the evidence. And they said  
11 they're different. And that's the whole reason why the  
12 Commission can proceed and is not bound by the federal court.

13           If that were the case, if both were--if there was  
14 no difference, then a decision by the Commission would bind  
15 the federal court. And if we went and did that with the  
16 federal court, the Court would say, "Oh, but the Commission's  
17 different!" Well, you know, that's our point here: It is;  
18 there is a difference.

19           So either-- And the respondent has said, the  
20 employer has said, "Well, there shouldn't be two bites at the  
21 apple." Well, does that mean that, if we prevailed at the  
22 Commission, that the employer cannot get a second bite with  
23 the federal court? Now, that has not been accepted, because  
24 both have said it's different. And that's the whole reason  
25 why the complainant should be able to proceed and not be

1 stopped by something that happened in the federal court.

2           The employer also said that the fact that there's  
3 an appeal does not make a difference. I think that would be  
4 legally true if they were not--there was not a difference in  
5 the different proceedings. For instance, if res judicata  
6 actually did apply, then it wouldn't matter if something was  
7 on appeal. But it does matter as a practical matter, because  
8 what are we going to do--you know, if and when the Court of  
9 Appeals reverses, are we going to come back and start all  
10 over again? That's not a good proceeding. And then what do  
11 we do in the next case, and the next case, and the next  
12 hundred cases? Are we going to have to say, "I can't go to  
13 federal court on the federal remedies yet, because I have to  
14 have all of my hearings before the Commission, the  
15 administrative judge; otherwise the judge will be stopped, or  
16 the employer will claim the judge is stopped by the federal  
17 court."

18           So there is a difference. I think that the Seventh  
19 Circuit decision of Snider shows that there's a difference; I  
20 think that the federal order staying all court proceedings  
21 but not staying the enforcement proceedings shows that  
22 there's a difference. And so the federal court proceedings  
23 would not stop the Commission proceedings. Thank you.

24           MS BLACKBURN: Thank you very much.

25           I'll give you another five minutes, Miss Himsel.

1 MS HIMSEL: It's Friday afternoon, and I don't  
2 think I'll take my full five minutes.

3 We haven't heard a single--about a single case; I  
4 am not aware of a single case that would suggest that the  
5 legal doctrine of res judicata in a federal court decision  
6 does not apply to the decisions of this commission. There is  
7 no support for that argument. The case he cites has  
8 absolutely nothing to do with an administrative action of any  
9 kind. Mr. Nguyen could have gone on in this forum; he could  
10 have gone to the state court. He chose to go to federal  
11 court. He fully and fairly litigated his claims. The Court  
12 ruled against him. We are not here to reargue the facts, to  
13 decide whether or not Judge Tinder was right. The only  
14 question is whether the doctrine of res judicata applies, and  
15 all of the pertinent authority would suggest very strongly  
16 that it does. Judge Lange was right, and I would ask you to  
17 enter his order and dismiss this matter at this time.

18 MS BLACKBURN: Thank you very much.

19 Is there any questions that remain, Commissioners,  
20 that you would like to pose to either party?

21 [There was no audible response.]

22 MS BLACKBURN: Hearing none, I want to thank you  
23 for participating in this hearing. You'll be apprised of the  
24 decision of the Commission.

25 [The meeting was recessed at 2:55 p.m.]



1 [January 27, 2006. After recess, at 3:16 p.m.]

2 COMMISSION MEETING

3 MS BLACKBURN: Good afternoon.

4 The Indiana Civil Rights Commission is now in  
5 session.

6 I would like a motion to adopt the minutes from  
7 October.

8 MR. CARTER: So moved.

9 MR. BAYNARD: Second.

10 MS BLACKBURN: All in favor?

11 Anyone opposed?

12 Thank you.

13 Next I'd like Judge Scott to please introduce our  
14 next presenter.

15 MR. SCOTT: Yes.

16 Chair and commission, the next presenter is  
17 actually a new member of the staff, Eric Chandler. And Eric  
18 is a graduate from IUPUI. He has roots here in the  
19 community. And we are very pleased to have him on board. He  
20 replaces Ed Hess, who left us about three months ago to take  
21 on adventures with the installation at Fort Ben Harrison.  
22 And that gave us an opportunity. We are very pleased to have  
23 Eric.

24 And he will give very short financial report today  
25 because he has only been on board a short period of time, but

1 I would like for him to be able to at least make a statement  
2 to you regarding the financial condition of the Commission.

3 MS BLACKBURN: Welcome.

4 MR. CHANDLER: Thank you.

5 First of all, let me say I am glad to be here, and  
6 honored to be here today.

7 As far as the financial management for the Civil  
8 Rights Commission, I have met with Zachary Jackson, who is  
9 our auditor, last week with regards to our accounts and  
10 books. We have done some reconciliation with regards to our  
11 SDO account, which is reconciled and what not. He's looked  
12 through the books and things and talked things over with me,  
13 and has no immediate concerns on anything, and he's satisfied  
14 with the shape and condition that our accounts and books are  
15 currently in.

16 I have gone through earlier today and put together  
17 a financial packet and what-not with regards to the  
18 information and balances and what-not on account, and those I  
19 would guess we will be distributing to everybody at the  
20 February meeting. I have copy for everybody, so that they  
21 can review them if there's any questions with regards to  
22 them. And that's pretty much about it.

23 MS BLACKBURN: Thank you very much.

24 MR. CHANDLER: You're welcome.

25 MS BLACKBURN: Next on our agenda is New Business.

1           And I'd like to introduce to the Commissioners and  
2 staff assembled the executive director of the Commission on  
3 Hispanic and Latino Affairs, Miss Amy Mendoza.

4           MS MENDOZA: Thank you.

5           And I wanted to start off by first of all thanking  
6 all of you for having me here. It's certainly a pleasure  
7 to be with you. I see some familiar faces, and some that  
8 I don't know. I look forward to working with you this year  
9 and establishing a greater--greater work between the  
10 Hispanic/Latino Commission and the Civil Rights Commission.  
11 I also wanted to thank Judge Scott and Christine for inviting  
12 me to be here. They are on my commission and serve that  
13 commission very well.

14           What I am here to talk to you about today is the  
15 Indiana Commission on Hispanic and Latino Affairs. And what  
16 Ryan, my assistant, is going to do is pass out to you some  
17 brochures about our commission, which will give you a pretty  
18 good overview on who we are and when we were established, and  
19 what we plan to do in this year and upcoming years.

20           Basically, our commission was established in 2003  
21 by Executive Order. And there were previous interim  
22 commissions that reported to the Governor and to the  
23 Legislature in previous years.

24           We have three main duties as a commission. The  
25 first is to identify and research issues affecting the

1 Hispanic/Latino communities, and we do that through public  
2 forums that we have around the state. This past year we had  
3 about ten forums, which are town-hall style meetings in which  
4 we present the community an overview of the Commission in  
5 English and Spanish, and we also take time for the community  
6 to inform us about what the issues are in their local area.

7 So that's one of the ways that we do our first  
8 charge.

9 Our second charge, as you will see in the brochure  
10 here, is to promote understanding and cooperation between  
11 different communities and States. And how do we do that?  
12 Well, through education. Very, very important to the  
13 Commission.

14 One of the current programs that we're doing, that  
15 we started last year and that we continue to do every year,  
16 is the Commission's Hispanic/Latino History Project, which  
17 consists of a timeline, a pictorial display of firsts  
18 throughout the state for the Hispanic/Latino community. And  
19 every year that project is updated and travels around the  
20 different counties during Hispanic Heritage Month. So that's  
21 one of the ways that we have been doing our second charge.

22 Another way that we do that is through making  
23 presentations to different commissions, as yourself. Also  
24 participating in different state-wide conferences and events  
25 to show people that we are working together with different

1 communities.

2           The third charge is to report to the Governor and  
3 to the Legislature on different issues concerning the  
4 Hispanic/Latino community. We do have a statute which  
5 details what issues we are to report on, and it's basically  
6 any issue that is of any interest in the community, in  
7 Indiana. That's any community in Indiana. And we do that  
8 through annual reports to the Governor and to the  
9 Legislature. This year, hopefully it will be finished by the  
10 beginning of February, and that will be the Commission's  
11 first annual report, which will have our findings,  
12 recommendations, and hard data and hard facts about the  
13 Hispanic/Latino community in the state.

14           We do keep up with legislation, federal and State.  
15 Our commissioners are pretty well informed of the issues  
16 going on at that level. And I wanted to point out some bills  
17 to you. We have, also, our chart of bills that we're keeping  
18 abreast of this session, and if you want copies, they are  
19 available in the back. But there are a lot of bills that are  
20 introduced every session that would specifically target the  
21 Hispanic/Latino community, directly or indirectly. So those  
22 kinds of bills we are keeping an eye on. And there are some  
23 bills in this chart that we are establishing great importance  
24 of, because they do have a negative impact on the  
25 Hispanic/Latino community. And one of them will be 1383. And

1 I believe you all have a copy of your own bills that you're  
2 keeping an eye on, and it is in there also. I'm not sure what  
3 page.

4 But 1383 does have another bill in the Senate that  
5 is just like it, and basically what this does is, it  
6 restricts public assistance to illegal aliens. And the issue  
7 with that bill is the language, how they word that. They  
8 would do checks on individuals that they suspect to be  
9 illegally in State of Indiana or in the country. And it  
10 doesn't really define how a person would suspect that or  
11 validate that. So bills like that, the Commission is keeping  
12 an eye on.

13 There are some several driver certificate bills  
14 that have been introduced in this session but that have not  
15 gone through and have failed. So in particular the driver's  
16 license issue is of great importance to the Commission,  
17 because it is one of the--the top issue that we hear as we  
18 travel around the state. So what we have done about the  
19 driver's license issue is that last year we wrote a report to  
20 the Governor and to the Legislature with some solutions on  
21 how to resolve the issue. And we have examined it from both  
22 sides; the opponents and the proponents of the issue have a  
23 balance in the report. We just finished the report this  
24 morning, the second report to the Governor and to the  
25 Legislature, and the Commission will vote on it next week.

1 And that also--what that report does is, it addresses the  
2 current political and state climate regarding the driver's  
3 license issue, and it puts more recommendations on how to  
4 solve the issue in the State of Indiana.

5 If you are not aware of it, basically the issue is  
6 that of documentation. A lot of people cannot obtain a visa  
7 with a passport and an I-94 stamp and also a Social Security  
8 number. And it's not just immigrants who are here illegally,  
9 but also legal immigrants who, because of their status,  
10 cannot obtain certain documents that are needed for a  
11 driver's licence. So that's one of the hot issues that we  
12 are targeting, but it's certainly not the only issue.

13 As a commission, of course we do recognize that the  
14 Hispanic/Latino community is very, very diverse. Not all  
15 immigrants are third and fourth generation, like myself,  
16 speak different languages, are professionals, and some of  
17 them are not professionals; and education levels differ. All  
18 of that will be addressed in our annual report, which will  
19 come out this year. So you can see a lot of information in  
20 that report, and of course if you all just want a copy of  
21 that, feel free to contact me for that.

22 Also, another thing that I wanted to bring to your  
23 attention is that the Hispanic/Latino Commission is working  
24 very well with the Civil Rights Commission. We have been  
25 thinking of ways to address another hot issue that we see in

1 the community all the time. And that's the issue of  
2 tensions between the Hispanic/Latino community and the  
3 African-American community. And I think in recent years,  
4 from my experience, I can say that it has been unspoken,  
5 untouched for a while. And I'm not saying by the State, but  
6 by the communities themselves. A lot of regional communities  
7 have diversity commissions, have minority commissions or  
8 groups, but they haven't been as active as they could be. So  
9 what we have done is that we have met a little bit, along  
10 with Juana Watson and Tony Kirkland, to discuss how we can  
11 come up with some kind of program or state-wide initiative to  
12 address this issue. And although nothing is finalized yet,  
13 what we did come up with is to have regional discussions, or  
14 implement some kind of regional program which would  
15 eventually become a State program on how to promote  
16 understanding between those communities. We thought the best  
17 way to do it, at least so far, would be through regional  
18 discussions between groups. And of course the first step is  
19 to identify the issue in its entirety first. And also  
20 identify those groups that have already been working on this  
21 issue for a little while, because we do want to have their  
22 participation.

23           So that's the Commission. We are addressing a lot  
24 of different issues, but I don't want to take up too much  
25 time from your meeting. And I wanted to thank you for having



1 me here today. If you have any questions, please feel free  
2 to ask.

3 MS BLACKBURN: Does anybody have questions for Miss  
4 Mendoza?

5 MR. RAMOS: I would definitely like to see the  
6 report when it comes out; that would be of interest.

7 And on the black and Hispanics, are there some best  
8 practices out there that you have worked out, that--within  
9 the State of Indiana or other states?

10 MS MENDOZA: In terms of best practices, we are  
11 looking at model programs in the state, that different  
12 communities have, and there are quite a few that we've  
13 identified. And those will be in our annual report also.  
14 There are a few programs in Goshen and Lake County and here  
15 in Indianapolis that have been very effective, not only in  
16 their success but how they have measured their success. And  
17 those will be discussed in the report also.

18 MS BLACKBURN: I didn't hear when the report is to  
19 be issued. Do you have a guesstimate?

20 MS MENDOZA: Yes. We are working very hard on it,  
21 so that we want it to be perfect. But it will be issued in  
22 February, at our commission meeting.

23 MS BLACKBURN: All right. Thank you very much.

24 You may remain, if you'd like, for the rest of the  
25 meeting, or feel free to leave if you want to.

1           Next we have some consent-- No, we don't have  
2 consent agreements this month. But we do have some findings  
3 of fact, conclusions of law and order for vote and approval.

4           I would ask that I have a motion to approve the  
5 findings of fact listed in our agenda today. They are  
6 Crittendon versus Mary Sprigler and Lockwood Apartments;  
7 Santos versus Precision Properties, LLC, Paul Primavera &  
8 Associates, Inc., and Bennett Built, Inc.; Miller and Miller  
9 versus Elkhart Mobile Home Park, Richard Walker, and Jeff  
10 Makimaa; FHC versus Precision Properties, LLC, Paul Primavera  
11 & Associates, Inc., and Bennett Built, Inc.; Stewart versus  
12 Gerhard Odenthal Realty.

13           A motion to approve the findings of fact.

14           MR. BAYNARD: So moved.

15           MR. CARTER: Second.

16           MS BLACKBURN: All in favor?

17           Anyone opposed?

18           Thank you.

19           Other Orders: We did hear oral argument today in  
20 the case of Nguyen versus Delphi. Nguyen spells his name  
21 N-G-U-Y-E-N.

22           What is your recommendation with regards to that  
23 case?

24           MR. CARTER: Madam Chair, I move that we continue  
25 the case until the other Commissioners have an opportunity to

1 review it before we vote on it.

2 MS BLACKBURN: All right. And do I hear a second  
3 to that recommendation?

4 MR. RAMOS: Second.

5 MS BLACKBURN: And all in favor?

6 Thank you very much.

7 There are a number of cases that the director  
8 and/or deputy director have decided are no probable cause  
9 cases. There are thirty-three of them, and they have been  
10 dismissed.

11 We have eleven cases that we recommend be dismissed  
12 due to lack of jurisdiction. May I have motion to approve  
13 those?

14 MR. CARTER: So moved.

15 MR. BAYNARD: Second.

16 MS BLACKBURN: All in favor?

17 Anyone opposed?

18 And a failure to cooperate or to locate in two  
19 cases. May I have a motion to dismiss those?

20 MR. BAYNARD: So moved.

21 MR. RAMOS: Second.

22 MS BLACKBURN: All in favor?

23 Anyone opposed?

24 And cases withdrawn due to settlement, consent  
25 agreement, or mediation agreement number seventeen. May I

1 have a motion to dismiss those?

2 MR. RAMOS: So move.

3 MR. CARTER: Second.

4 MS BLACKBURN: All in favor?

5 Anyone opposed?

6 Thank you.

7 It's hereby moved that the finding of probable  
8 cause in the following cases be approved: They are Jessie  
9 versus ReMax Leaders; Richards versus Muncie, Indiana;  
10 Wilkerson versus ReMax Leaders. May I have a motion to  
11 approve those?

12 MR. RAMOS: So moved.

13 MR. CARTER: Second.

14 MS BLACKBURN: All in favor?

15 Anyone opposed?

16 Next we will have reports from commissioners on  
17 complaint appeals. And we'll start with Commissioner  
18 Baynard.

19 MR. BAYNARD: Yes, Madam Chair.

20 In the case of Raves versus Miller Carpet, I would  
21 recommend to the Commission that we uphold the director's  
22 finding of no probable cause.

23 MS BLACKBURN: May I have a motion to accept that  
24 recommendation?

25 MR. CARTER: So moved.

1 MS BLACKBURN: And a second.

2 MR. RAMOS: Second.

3 MS BLACKBURN: All in favor?

4 Anyone opposed?

5 Thank you.

6 Commissioner Carter.

7 MR. CARTER: In the cases of Egwunyenga versus  
8 Carrier Corporation and Hammonds versus AMA Property  
9 Management, I recommend we sustain the no probable cause  
10 finding of the director.

11 MS BLACKBURN: May I have a motion to accept that  
12 recommendation?

13 MR. BAYNARD: So moved.

14 MR. RAMOS: Second.

15 MS BLACKBURN: All in favor?

16 Anyone opposed?

17 Next, Commissioner Garcia. Do we have a report?

18 MS DOBBINS: No.

19 MS BLACKBURN: Not yet.

20 I will then assign to commissioners cases to review  
21 on appeal.

22 Commissioner Baynard, Miller versus German Township  
23 Water District.

24 Carter, Kouroupis versus Indy Office Solutions,

25 LLC.

1           Commissioner Ramos, Czanderna versus Terre Haute  
2 Housing Authority.

3           And I will review Hoffman versus Cunningham  
4 Optical, Hoffman versus Lenscrafters.

5           Next on our agenda we will have an administrative  
6 update and the director's report.

7           MR. SCOTT: Thank you, Chair Blackburn.

8           As you know, we had the Martin Luther King, Jr.  
9 Indiana Holiday Celebration on January 12, and we had a very  
10 well-attended program. We had approximately eight hundred to  
11 a thousand individuals in attendance in the rotunda of the  
12 State Capitol. And it was really just a wonderful program.

13           And what has already been distributed to the  
14 Commissioners are reports that appear in the local media  
15 regarding that program. We were very pleased. The Governor  
16 and Lt. Governor both were in attendance. We also had a  
17 number of guests from throughout the community who attended.  
18 And we were very, very pleased with the turnout.

19           And in fact I recall walking into the rotunda  
20 around eleven o'clock with Debra and seeing this sea of  
21 chairs and remarking to her, "If half of them are full by the  
22 time the program starts, I will be happy." Well, amazingly,  
23 all of the chairs were occupied at that point in time, and so  
24 it really was a good program.

25           But more important than a good program was the

1 opportunity to discuss, remember, recall, and acknowledge the  
2 legacy that Dr. King has provided for this nation.

3 So that was a very good program.

4 And according to members of the staff, it was the  
5 highest-attended program that the Commission and the Martin  
6 Luther King, Jr. Indiana Holiday Commission have sponsored.

7 And then also I just wanted to report that I had  
8 the wonderful occasion of traveling to Terre Haute and giving  
9 a keynote address during the holiday luncheon by which they  
10 observed the King Holiday. There was a very good turnout,  
11 and a lot of people expressed an interest in the Commission  
12 and passing their regards to the Commission, and hoping that  
13 they have an opportunity to either attend a meeting here or  
14 discuss other matters.

15 And I think that would cover my report. I believe  
16 the deputy director has a report as well.

17 MS Cde BACA: Regarding the case processing and  
18 statistical report, you have that in your packet. We had--  
19 We currently have pending actually four hundred and ninety-  
20 seven cases as of the case inventory, which is a discrepancy  
21 from the database inventory that you have on your report.  
22 That has four hundred and eighty-six as the cases, the number  
23 of open cases that we have. There are eleven additions that  
24 have not yet been added to that database. So I will make  
25 sure that on next month's report that is rectified.

1           With regard to the ADR units, out of the eleven  
2 cases that were mediated during the month of December we had  
3 eight successful settlements, and during the year 2005 we had  
4 eighty-five complaints that were settled through mediation.

5           That is it for my report.

6           MS BLACKBURN: Excellent.

7           I want to make note of something that came to our  
8 attention in the second session. And that is the reduction  
9 in the number of appeals that probably has resulted from a  
10 more extensive response to complainants in explaining  
11 adequately to them the reasons why their cases have not  
12 risen to the level that this Agency can seek probable cause  
13 for them and defend probable cause for them. And I want to  
14 compliment all who have contributed to that eventuality,  
15 because I think that it speaks well of our high level of  
16 diligence in communicating with the public.

17           So thanks very much for that.

18           I want to ask if there are any announcements prior  
19 to closing the meeting.

20           We are adjourned.

21           [The meeting was adjourned at 3:40 p.m.]  
22  
23  
24  
25



1 STATE OF INDIANA ]  
] SS:  
2 COUNTY OF MARION ]

3 C E R T I F I C A T E :

4 I, DAVID R. OESTERREICH, the undersigned Court  
5 Reporter and Notary Public residing and maintaining offices  
6 in the City of Indianapolis, Indiana, do hereby certify:

7 That at the time and place described above in this  
8 transcript, I reported to the best of my ability in machine  
9 shorthand all of the words spoken by all parties in  
10 attendance during the course of the subject proceedings,  
11 including objections, if any, made by all counsel present;

12 That I later reduced my shorthand notes into the  
13 foregoing typewritten transcript form, which typewritten  
14 transcript is a true record of the testimony and/or  
15 statements given by those individuals indicated herein;

16 That I am not a relative or employee or attorney or  
17 counsel of any of the parties, nor am I a relative or an  
18 employee of such attorney or counsel, and that I am not  
19 financially interested in this action.

20 IN WITNESS WHEREOF I have affixed my Notarial Seal  
21 and subscribed my signature below on this 31st day of  
22 January, 2006.



[Seal]

23 David R. Oesterreich  
24 Notary Public  
25 County of Residence: Marion  
My Commission expires on August 28, 2008