

STATE OF INDIANA
CIVIL RIGHTS COMMISSION

DOCKET NO. PAra04110592

KIMBERLY REED,
Complainant,

vs.

MIKE'S EXPRESS CAR
WASH,

Respondent.

FILE DATED

JAN 26 2007

Indiana State Civil Rights Commission


FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On December 7, 2006, Robert D. Lange, Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC"), entered his Proposed Findings Of Fact, Conclusions Of Law, And Order ("the proposed decision").

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

Having carefully considered the foregoing and being duly advised in the premises, the ICRC hereby adopts as its own the findings of fact, conclusions of law, and order proposed by the ALJ in the proposed decision, a copy of which is attached hereto and incorporated herein by reference.

INDIANA CIVIL RIGHTS COMMISSION


COMMISSIONER


COMMISSIONER


COMMISSIONER


COMMISSIONER

Dated: 26 January 2007

To be served by first class mail on the following party and attorneys of record:

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STATE OF INDIANA
CIVIL RIGHTS COMMISSION

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KIMBERLY REED,
Complainant,

VS.

DEC 07, 2006

MIKE'S EXPRESS CAR
WASH,
Respondent.

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

A Hearing was held before the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") on September 6, 2006. Complainant, Kimberly Reed ("Reed"), was present and was represented by counsel, Gregory P. Gadsen, Esq., of the Indianapolis firm of LEE, COSSELL, KUEHN & LOVE, LLP. Respondent, Mike's Express Car Wash ("Mike's"), was represented by counsel, John R. Maley, Esq. and Shannon M. Shaw, Esq. of the Indianapolis firm of BARNES & THORNBURG, LLP. Also present on behalf of Mike's was Joe Rice ("Rice"), Director of Human Resources for Mike's. An oral motion to sequester witnesses was made by Mike's and there was no objection by Reed. The motion was granted and witnesses were instructed not to discuss the case or their testimony until the Hearing had been completed.

After opening statements were made, Reed called Steve Jefferson ("Jefferson") and then testified on her own behalf. During the presentation of Reed's case, Respondent's Exhibit 1 ("CX_"), RX2, and Complainant's Exhibit 2 ("CX_") were admitted into evidence without objection, and CX3 and CX4 were admitted into evidence over

objection. After Reed rested her case, Mike's moved to dismiss, a motion that was denied. Mike's elected to present further evidence, calling Rice, Manny Perez ("Perez"), and Jarrett Fox ("Fox") as witnesses. During the presentation of Mike's case, RX5, RX6, RX7, RX8, and RX9 were admitted into evidence over objection. Reed elected not to present any evidence in rebuttal. Oral closing arguments were made and the cause was under advisement. The ALJ ordered the parties to submit what they suggested that he enter as proposed findings of fact, conclusions of law, and order on or before October 6, 2006. The ALJ also ordered that briefs, though optional, were to be filed on or before October 6, 2006.

On October 6, 2006, Mike's filed Respondent's Suggested Proposed Findings Of Fact, Conclusions Of Law, And Order and Respondent's Brief In Support Of Its Proposed Findings Of Fact And Conclusions Of Law.. Also on October 6, 2006, Reed filed Complainant's Suggested Proposed Findings Of Fact, Conclusions Of Law, And Order.

Having carefully considered the evidence and the arguments of counsel, and being duly advised in the premises, the ALJ proposes that ICRC enter the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The issues to be resolved are: (1) whether the conduct of the employee of Mike's was racially discriminatory; (2) whether Mike's is vicariously liable for its employee's conduct; and (3) what relief should be awarded. FIRST PRE-HEARING ORDER #9 (July 12, 2006).
2. Reed is an African-American adult female who has resided, at all material times, in the state of Indiana.
3. Mike's is a business that operates car washes in and around central Indiana. One of those car washes, the one involved in this case is located on State Road 135 in Greenwood, Indiana.

4. As of October 2004, Reed had been a satisfied customer of Mike's for nearly 20 years. She had never used the facility on State Road 135 before October 5, 2004 when the incidents occurred that are the subject of this complaint.
5. On that date, Reed went to the Greenwood Mike's and purchased a car wash at shortly after noon.
6. After her car, a Chrysler PT Cruiser, went through the wash, Reed determined that the system's dryers had not fully dried her car and pulled into a cleaning station. She took a few towels from the courtesy station to dry her car by hand. A customer was entitled to one towel at no additional charge and could purchase more for a quarter each.
7. Fox, the manager, had noticed Reed take extra towels and approached her while she was drying her car. What happened during the conversation with Reed and Fox is the essence of this dispute.
8. Reed's contention is that Fox spoke to her in language that was vile, abusive, and racist. She claims that Fox accused her of stealing towels, called her a "fucking black bitch" twice, told her he had called the sheriff on her, and told her to "get the fuck off the lot". According to Reed, Fox left once and then returned, the entire confrontation lasting 15 to 20 minutes, and continuing until she left the facility.
9. In support, Reed offers the testimony of Jefferson, a family friend who she testified that she called on her cell phone, reporting to him that she was at Mike's. Jefferson testified that he could hear a loud, angry and threatening male voice in the background and Reed responding.
10. Reed also offers as support the fact that, in early 2002, Fox had been disciplined for using racial slurs in casual conversations with coworkers. This included referring to customers of African-American descent as "jigs" and "niggers", stating that Martin Luther King Day is "nigger day", and stating that if certain African-American employee of Mike's would come down to Greenwood, that they would get shot because of their color. For this behavior, Fox was issued a warning that "if any such behavior continues, it will lead to termination". CX3. Clearly, this evidence suggests Fox is a suspect character, as a person who can use these terms when he thinks they will not be repeated is more likely to

be able to use them in a confrontation with an African-American customer. On the other hand, the warning from Mike's provides an additional motivation for forbearance.

11. Reed's version of the events is contradicted by the surveillance tape¹. That is RX6. This tape (still pictures triggered by motion, bearing a date and time) shows Reed arrive at the cleaning station and get a handful of towels. Soon, Fox approached Reed by her car at the cleaning station and left after 12 seconds. A large truck blocks the camera for about 40 seconds and when her car is again visible, Fox is not at her car.

12. In fact, the tape shows Reed drying her car off – by herself – for about 11 minutes, starting about 30 seconds after Fox left. While the view of her car is intermittently blocked by other cars entering the wash for a little more than a total of a minute and a half, the times during which her car is blocked do not remotely approach the time she claims that Fox was "getting in her space" and yelling abusive and racist things at her. When Reed gets in her car and leaves the facility, there is nobody near her.

13. In the absence of evidence suggesting that the tape was doctored, it is impossible, on this record, to conclude that Reed has proven by a preponderance of the evidence that she was denied equal access to the use of the facilities at Mike's.

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

CONCLUSIONS OF LAW

1. The ICRC has jurisdiction over the subject matter and the parties.
2. Reed and Mike's are each a "person" as that term is defined in the Indiana Civil Rights Law, IC 22-9-1-1 *et. seq.* ("the ICRL").
3. The ICRL defines "public accommodation" as "... any establishment that caters or offers its services or facilities or goods to the general public". IC 22-9-1-3(m).

¹ The tape was apparently not provided to the investigator, since it was not discussed in the Notice Of Finding.

4. Mike's offers its services to the general public and, as a result, is a public accommodation.
5. What constitutes an unlawful discriminatory practice is set out in the following subsection of the ICRL:
 - (l) "Discriminatory practice" means:
 - (1) the exclusion of a person from equal opportunities because of race ;

...

Every discriminatory practice relating to ... public accommodations ... shall be considered unlawful unless it is specifically exempted by this chapter.
IC 22-9-1-3(l).
6. Reed has not proven by a preponderance of the evidence that Mike's excluded her from equal opportunities because of race.
7. Mike's did not commit an unlawful discriminatory practice against Reed.
8. If the ICRC finds that a person has not committed an unlawful discriminatory practice, it must dismiss the complaint as against said person. IC 22-9-1-6(m).
9. Administrative review of this proposed decision may be obtained by the filing of a writing identifying with reasonable particularity each basis of each objection within 15 days after service of this proposed decision. IC 4-21.5-3-29(d).
10. Any Finding Of Fact that should have been deemed a Conclusion Of Law is hereby adopted as such.

ORDER

1. Reed's complaint is **DISMISSED**, with prejudice.

Dated: 07 December 2006


Robert D. Lange
Administrative Law Judge

To be served by first class mail this 7th day of December, 2006 on the following party and attorneys of record:

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and to be personally served this 7th day of December, 2006 on the following:

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