

**STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION**

CHARLES ERVIN,
Complainant,

vs.

U & ME LOGISTICS,

Respondent.

) ICRC No.: EMra16031074
) EEOC No.: 24F-2016-00401

DATE FILED
JUN 24 2019
ICRC
COMMISSION

FINAL ORDER

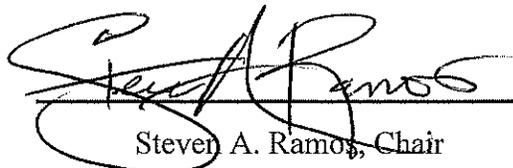
On May 3, 2019, Hon. Caroline A. Stephens Ryker, Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") issued her Initial Findings of Fact, Conclusions of Law, and Order ("Order"). The Parties had opportunity to object to the Order; neither Party objected. With no objection or intent to review on record, the Commission shall affirm the Order. IC 4-21.5-3-29. After consideration of the record in this matter and the Order,

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 June 21, 2019



Steven A. Ramos, Chair

Indiana Civil Rights Commission

Certificate of Service

Served by Certified Mail on the Following on this 24 day of JUNE, 2019:

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c/o Nellie Townsend
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Indianapolis, IN 46218
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U and Me Logistics
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Indianapolis, IN 46168
Certified Mail # **9214 8901 0661 5400 0139 5683 54**

U&ME Logistics
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Plainfield, IN 46168
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With courtesy copies going to:

Frederick S. Bremer, Esq.; ICRC Staff Attorney
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MAY 03 2019

OFFICE OF THE
ADMINISTRATIVE JUDGE

INITIAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On February 5, 2019, the undersigned Administrative Law Judge (ALJ) for the Indiana Civil Rights Commission (“ICRC”) conducted a Hearing on damages. Complainant, Charles Ervin, appeared personally by telephone with counsel in support of the Complaint, Attorney Frederick S. Bremer, appearing in person and in support of the public interest on behalf of Complainant. Respondent U & ME Logistics did not appear in person or by counsel.

Complainant testified on his own behalf, and Complainant’s Exhibits 1, 2, and 3 were admitted without objection. Complainant’s Exhibits 4 and 5 were identified, but they were not offered and were not admitted. The ALJ ordered the submission of a suggested decision which was due 30 days after the transcript was made available. 910 IAC 1-11-3. The transcript was made available on March 22, 2019, and suggested decisions were due on April 21, 2019. None were submitted, and the ALJ took the matter under advisement.

Having carefully considered the foregoing and being duly advised in the premises, the ALJ finds in favor of Complainant and proposes that the Commission enter the following as findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Complainant is an African American man who resided and worked in Indiana during the time relevant to his complaint. (Complaint, Ervin v. U & ME Logistics, ICRC No.: EMra16031074).
2. Respondent is an Indiana-based company specializing in transportation. (Notice of Finding, Ervin v. U & ME Logistics, ICRC No.: EMra16031074).
3. Prior to February of 2016, Complainant was Respondent's employee. (Complaint, Ervin v. U & ME Logistics, ICRC No.: EMra16031074).
4. Complainant filed a complaint with the Indiana Civil Rights Commission on March 17, 2016 which read:

On 2/28/2016, I was forced to quit. I believe I have been discriminated against on the basis of race, African American because: my employer required me to take a drug test before getting my pay check. My similarly situated non African American co-workers are no subject to this requirement. Respondent subjected me to less favorable treatment. *Id.*

5. On September 19, 2017, the Indiana Civil Rights Commission issued a Notice of Finding that determined there was "...probable cause to believe an unlawful discriminatory practice has occurred." (Notice of Finding, Ervin v. U & ME Logistics, ICRC No.: EMra16031074).
6. Respondent is currently defaulted due to the following:
 - a. On September 26, 2017, former ALJ John F. Burkhardt (ALJ Burkhardt) properly served the Parties with a Notice of Appointment of Administrative Law Judge; And Notice of Initial Prehearing Conference, scheduling a telephonic Initial Prehearing Conference on October 31, 2017 at 2:00 PM.
 - b. On October 31, 2017, Attorney Frederick S. Bremer ("Bremer") appeared for Complainant. Respondent was not present in-person or by counsel.
 - c. On November 2, 2017, ALJ Burkhardt properly served all Parties with a Prehearing Order & Notice of Continued Prehearing Conference, setting a telephonic Prehearing Conference on November 20, 2017 at 12 PM.
 - d. On November 20, 2017, Attorney Bremer appeared on behalf of Complainant, and Complainant was also personally in attendance. Respondent was not present in-person or by counsel. Attorney Fred Cline ("Cline") appeared for the limited

purpose of expressing that he no longer represented Respondent and that he would be withdrawing as counsel for Respondent.

- e. On November 20, 2017, ALJ Burkhardt properly served on all Parties a Prehearing Order, stating that Respondent had failed to appear at the November 20, 2017 telephonic Prehearing Conference and that Respondent was no longer represented by Attorney Cline.
- f. Attorney Cline filed a Motion to Withdraw Appearance on November 22, 2017, serving all Parties, in which he explained that Respondent was no longer in operation as a business. He also included Respondent's last known addresses: 1) 2296 Bluewood Way, Plainfield, IN 46168 and 2) 2551 Commercial Drive, Plainfield, IN 46168. The Motion to Withdraw Appearance was granted on November 29, 2017 by ALJ Burkhardt.
- g. In each notice sent by ALJ Burkhardt, Respondent was notified that failure to attend or participate in a prehearing conference could result in being held in default.
- h. On November 27, 2017, Complainant, by counsel, filed Complainant's Application for Order of Default ("Application"), to which Respondent did not respond.
- i. On October 22, 2018, the undersigned ALJ entered a Notice of Proposed Default that stated that Default would be entered if Respondent did not file a written motion within seven (7) days of service of the Notice of Proposed Default explaining why Default should not be entered. Specifically, the ALJ advised that "[i]f no such written motion is filed, ALJ Stephens Ryker MUST enter the proposed default order."
- j. Respondent U & ME Logistics received the Notice of Proposed Default, by certified mail, at 2296 Bluewood Way, Plainfield IN 46168 on October 24, 2018.
- k. Respondent did not provide a written motion, and the ALJ entered an Order of Default on November 14, 2018 because: 1) Default was appropriate under IND. CODE § 4-21.5-3-24(a)(3) and 2) Default was appropriate under 910 IAC 1-6-1.

7. The facts alleged in Complainant's Complaint of discrimination, in the Indiana Civil Rights Commission's Notice of Finding, and in Complainant's sworn testimony at the Hearing are deemed admitted by Respondent, and no additional evidence is to be considered on the issue of liability.
8. At the time of his discharge, Respondent had not fully paid Complainant for two completed jobs. Respondent agreed to pay Complainant \$600.00 for the first job, but Respondent paid Complainant only \$300.00. (Transcript of Record at 11, 18-19, 33-35, Ervin v. U & ME Logistics, ICRC No.: EMra16031074). Respondent agreed to pay Complainant \$1,800.00 for the second job, and Respondent did not make any payments towards that balance. *Id.* Importantly, Respondent told Complainant that he would only be paid in full for the first job if he completed the second job. *Id.* at 33-34.
9. While completing the second job, Complainant was ticketed because the registration on Respondent's truck, which he was driving, was expired. *Id.* at 19-24. Complainant provided Respondent with a copy of the \$600.00 ticket, which Respondent did not pay. *Id.* As a result, Complainant's license was suspended, and Complainant paid the \$600.00 ticket and \$200.00 reinstatement fee to have it reinstated. *Id.* The price of Complainant's car insurance also increased from \$130.00 monthly to \$200.00 monthly. *Id.*
10. Complainant became employed after his constructive discharge in a similar position where his income was equivalent to his income while working for Respondent. *Id.* at 9.
11. As stated in his March 17, 2016 Complaint, Complainant is seeking all available remedies under the Indiana Civil Rights Law, IC 22-9. (Complaint, Ervin v. U&ME Logistics, ICRC No.: EMra16031074).
12. Any Conclusions of Law that should be deemed a Finding of Fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Indiana Civil Rights Commission has jurisdiction over "sufficiently complete" complaints of discrimination in employment on the basis of race. 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 Indiana Civil Rights Law because Complainant is an employee and Respondent is an employer. IND. CODE § 22-9-1-3(a),(h), and (i).

3. Discriminatory practices include practices that exclude "...a person from equal opportunities because of race..." 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. To establish discrimination on the basis of race, Complainant must prove that 1) he was a member of a protected class, 2) he was meeting his employer's expectations, 3) he suffered an adverse action, and 4) he was treated less favorably than other employees on the basis of his protected class. *Logan v. Caterpillar, Inc.*, 246 F.3d 912, 919 (7th Cir. 2001); *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 839 (Ind. 2009) ("In construing Indiana civil rights law our courts have often looked to federal law for guidance.") "Constructive discharge occurs when an employee's job becomes so unbearable that a reasonable person in that employee's position would be forced to quit." *Williams v. Waste Mgmt. of Illinois*, 361 F.3d 1021, 1032 (7th Cir. 2004). Despite Complainant performing the requested work, Respondent refused to pay Complainant for his work unless he performed a drug test, which was not asked of Caucasian employees and was used as a pretext to deny him the wages he had earned. A reasonable person would seek other employment if not paid by his or her current employer. Accordingly, Complainant has established his *prima facie* case of race-based employment discrimination by a preponderance of the evidence.
5. 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 "... to restore complainant's losses incurred as a result 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, "...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).

6. The terms "...wages, salary, or commissions..." are not defined by the Indiana Civil Rights Law. *Id.* When a term is undefined, the Indiana Code dictates that words should be given their "...plain, or ordinary and usual..." meaning and that technical terms shall be given their technical meaning. IND. CODE § 1-1-4-1. According to Black's Law Dictionary, "wages" are:

Payment for labor or services...based on time worked or quantity produced; specif[ically], compensation of an employee based on time worked or output of production. Wages include every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, bonuses, and the reasonable value of board, lodging, payments in kind, tips, and any similar advantage received from the employer.

WAGE, Black's Law Dictionary (10th ed. 2014). The Indiana Court of Appeals has explained that "...the losses referred to in this statute are pecuniary losses which can be proved with some degree of certainty...where that violation results in actual pecuniary loss." *Indiana Civil Rights Comm'n v. Holman*, 177 Ind. App. 648, 653–54 (1978), disapproved of by *Indiana Civil Rights Comm'n v. Alder*, 714 N.E.2d 632 (Ind. 1999)(on other grounds).

7. Importantly, the Indiana Civil Rights Law does not define "wages" as "back pay" or "front pay," and instead, its broad phrasing allows for an expansive definition that would include any wages lost because of an adverse action of an employer.¹ IND. CODE § 22-9-1-6(j); *but see, Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 850 (Ind. 2009)("For our purposes 'lost wages' are synonymous with 'backpay.'")(Defining lost wage in the context of IND. CODE § 22-9-1-12.1(c)(8) and without explicitly considering damages other than back pay.) The refusal of an employer to reimburse an employee for company expenses when the reimbursement is an employer's typical practice and the refusal is based solely on the employee's race can reasonably be considered a reduction in the employee's wages because the employee would otherwise have received the reimbursement as compensation for the work performed. An inclusive definition of wage is compatible with the Indiana Civil Rights Law's mandate to construe the Indiana Civil Rights Law "...broadly to effectuate its

¹ Alternatively, Title VII of the Federal Civil Rights Act of 1964 defines damages available in employment discrimination cases with the use of technical legal terms like "back pay." *Compare* IND. CODE § 22-9-1-6(j) and 42 USC § 2000e-5.

purpose” because a less inclusive interpretation of the law could bar the recovery of monetary damages even when discrimination has occurred. IND. CODE § 22-9-1-2(g).

8. Complainant has proven that he lost wages as a proximate result of Respondent’s unlawful discrimination with respect to his constructive discharge in February of 2016. At the time Complainant was constructively discharged, partial balance for job one, which was conditioned on the completion of job two, and the complete balance for job two were unpaid. However, Complainant has not established that an increase in his insurance payments should properly be considered “...wages, salaries, or commissions...”
9. Complainant is entitled to wages that were lost as a direct result of Respondent’s unlawful discrimination, with deductions made for any earnings Complainant made during the relevant time frame. *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). Complainant’s wages are calculated to the date of the hearing. *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 850 (Ind. 2009). As Complainant was employed with Respondent at the time he was not being paid and he found similar work quickly after his discharge, no additional earnings are deducted. *Id.*
10. Complainant’s lost wages resulting from Respondent’s unlawful discrimination, to which he is entitled, are \$2,700.00, as calculated below:
 - a. Job 1: \$300.00
 - b. Job 2: \$1,800.00
 - c. Failed Reimbursements: \$600.00
 - d. Total: \$300.00 + \$600.00 + \$1,800.00=\$2,700.00
11. An Indiana Small Claim Court, in 49K08-1603-001864, has already awarded damages to Complainant for the second job he performed for Respondent in the amount of \$1,800.00 plus costs. (Exhibit 3.) The Indiana Civil Rights Commission does not have the jurisdiction to disturb, amend, or change the Small Claim’s Court’s order. *Fishers Adolescent Catholic Enrichment Soc’y, Inc. v. Elizabeth Bridgewater ex rel. Bridgewater*, 23 N.E.3d 1, 3 (Ind. 2015) (“The Legislature may delegate authority to an administrative agency through a valid statute that sets out a reasonable standard to guide that discretion, but the agency exercises such authority subject to the confines of its enabling statute.”); IND. CODE § 22-9-6.

12. 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. v. Davis*, 100 N.E.3d 291, 311 (Ind. Ct. App.), *aff'd on reh'g*, 107 N.E.3d 1111 (Ind. Ct. App. 2018). Prejudgment interest is calculated from the date of the dismissal to the date of the issuance of this order. *Knox Cty. Ass'n for Retarded Citizens, Inc. v. Davis*, 100 N.E.3d 291, 312 (Ind. Ct. App.), *aff'd on reh'g*, 107 N.E.3d 1111 (Ind. Ct. App. 2018). 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.² *Id.*

- a. A total of 1160 day, or 3.17 years, have passed between Complainant's discharge on February 28, 2016 and the issuance of this Order.³
- b. The week of April 22, 2019 through April 26, 2019, the interest rates for a 1-year constant maturity Treasury yield as published by the Board of Governors of the Federal Reserve System were: 2.46, 2.43, 2.42, 2.42, and 2.41. To obtain the average, the combined total (12.14) is divided by 5, resulting in a total of: 2.43⁴
- c. 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. For the present case, the calculations are shown below:

- i. $\$2,700.00 - \$1,800.00 = \$900.00$
- ii. $\$900.00 \times [1 + (0.0243/1)]^{(1 \times 3.17)} = \971.17
- iii. Total Prejudgment Interest is $\$71.17^5$.

² All final values are rounded to the second decimal place.

³ Total days between dates/ days in a year

$1160/365 = 3.19$

⁴ Interests obtained from <https://www.federalreserve.gov/releases/h15/>.

⁵ The prejudgment interest is calculated by subtracting the damages award (\$900.00) from the final amount computed with interest (\$971.17)

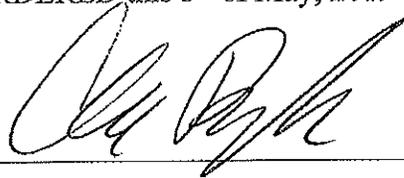
13. Administrative review of this initial decision may be obtained by Parties who are not in default by the filing of a writing specifying with reasonable particularity each basis for each objection within fifteen (15) days after service of this initial decision. IND. CODE § 4-21.5-3-29(d).
14. Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

ORDER

1. Respondent shall cease and desist from providing different terms and conditions of employment to employees based on employees' races and from unlawful discriminatory behavior that could result in the constructive discharge of employees.
2. Respondent shall deliver to the Indiana Civil Rights Commission's Director of Alternative Dispute Resolution and Compliance, as escrow agent, a check made payable to Charles Ervin for the amount of his lost wages: nine hundred seventy-one dollars and seventeen cents (\$971.17). The Indiana Civil Rights Commission is located at 100 North Senate Avenue, Room N300, Indianapolis, IN 46204, and the office can be contacted at (317) 232-2600. The Indiana Civil Rights Commission shall deliver the check to Charles Ervin within fifteen (15) business days of its receipt.
3. Respondent shall comply with the order issued in Small Claims Court case number 49K08-1603-001864, resulting in a judgment of \$1,800.00 plus costs. (Exhibit A.)
4. If Respondent is currently operating, Respondent shall take the following steps:
 - a. Within 30 days of the issuance of a final order, draft, implement, and distribute to each employee a non-discrimination and equal employment opportunity policy;
 - b. Within 30 days of the issuance of a final order, maintain and post statements of a non-discrimination and equal employment opportunity policy in a public area within Respondent's business location;
 - c. Within 180 days of the issuance of a final order, each of Respondent's managers and any employee named in the Indiana Civil Rights Commission's Notice of Finding shall attend and successfully complete an employment discrimination training that has been previously approved by the Indiana Civil Rights Commission's Executive Director. The training must be a minimum of two (2) hours in length.

5. Within thirty-five (35) days of the issuance of a final order, Respondent shall report to the Indiana Civil Rights Commission's Director of Alternative Dispute Resolution and Compliance the completion of paragraphs 3(a) and 3(b).
6. Within ninety (90) days of the issuance of a final order, Respondent shall submit a proposed training that will satisfy paragraph 3(c) to the Indiana Civil Rights Commission's Director of Alternative Dispute Resolution and Compliance for the Executive Director's review.
7. In the event that Respondent is not operating at the time that a final order is issued and Respondent recommences operations within the next two (2) years, Respondent shall take all actions required in paragraphs 4, 5, and 6, with deadlines commencing from the date that Respondent recommences operation.
8. This Order shall take effect immediately after it is approved and signed by a majority of the members of the Commission, unless modified by the Commission pursuant to IND. CODE § 4-21.5-3-31(a), stayed by the Commission pursuant to IND. CODE § 4-21.5-3-31(b), or stayed by a court of competent jurisdiction.

SO ORDERED this 3rd of May, 2019



Hon. Caroline A. Stephens Ryker
Administrative Law Judge,
Indiana Civil Rights Commission
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Anechita Eromosele, Docket Clerk
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