

**STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION**

GRISELDA FLORES ISIDORO,
Complainant,

vs.

JR INTERIOR TRIM AND JESUS
FERNANDEZ,

Respondent.

) ICRC No.: EMse16061276
) EEOC No.: 24F-2016-00753

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 .:

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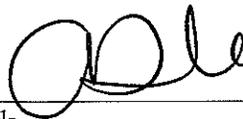
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MAY 03 2019

**OFFICE OF THE
ADMINISTRATIVE JUDGE**

INITIAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On March 18, 2019, the undersigned Administrative Law Judge (ALJ) for the Indiana Civil Rights Commission ("ICRC") conducted a Hearing on damages. Complainant, Griselda Flores Isidoro, appeared personally along with counsel for Complainant, Attorney Christopher E. Clark. Respondents JR Interior Trim and Jesus Fernandez did not appear in person or by counsel.

Complainant testified on her own behalf, and Complainant's Exhibit 1 was admitted without objection. The ALJ did not order briefing or the submission of proposed decisions before taking this matter under advisement.

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

FINDINGS OF FACT

1. Complainant is woman who resided and worked in Indiana during the time relevant to her complaint. (Complaint, Isidoro v. JR Interior Trim, et al., ICRC No.: EMse16061276).
2. Respondent JR Interior Trim is an Indiana-based company specializing in construction. Respondent Fernandez is the owner of Respondent JR Interior Trim. *Id.*; (Notice of Finding, Isidoro v. JR Interior Trim, et al., ICRC No.: EMse16061276).

3. Prior to May 2, 2016, Complainant was Respondent JR Interior Trim's employee, and during her employment, she was supervised by Respondent Fernandez. (Complaint, Isidoro v. JR Interior Trim, et al., ICRC No.: EMse16061276); (Transcript of Record at 15, Isidoro v. JR Interior Trim, et al., ICRC No.: EMse16061276).
4. Complainant filed a complaint with the Indiana Civil Rights Commission on June 29, 2016, in which she alleged that in early 2016, Respondent Fernandez began sexually harassing her at work and that on May 2, 2016, Respondent JR Interior Trim terminated Complainant's employment because of her sex. *Id.* The relevant text of her Complaint read:

On May 2, 2016, I was laid-off work. I believe I have been discriminated against on the basis of my sex, female, and sexual harassment. On the above mentioned date Respondent Owner, Jesus Fernandez, advised there was no work for me. I knew there was work, my coworkers informed me the address of the next job site. I let Respondent, Mr. Fernandez, know that my co-workers informed me that there is in fact work and he told me "I have work, just not for you, just go stay home or find another job." In 2016 Fernandez began sending me semi-nude and nude pictures of himself via text message when he and other workers went to Tennessee to work and I remained behind. On one occasion, I needed Respondent, Mr. Fernandez, to provide an Employment/Wage Letter for Child Care. Respondent Mr. Fernandez said he would give me the letter if I sent a picture. I felt pressured, I complied and send a regular photo of myself. Mr. Fernandez responded that he wanted an intimate photo. I was hesitant but I needed the letter so my son wouldn't lose his spot in day care, so I did send a photo of myself in underwear. Around the beginning March 2016, I was working on a home with Respondent, Mr. Fernandez and his brother Daniel while the rest of the crew worked elsewhere. I was working upstairs when Mr. Fernandez came upstairs and said to me "I waited a long time." He grabbed me between my legs, pushed me to the ground and tried to remove my pants. I screamed and tried to get away, but he proceeded to grab me until I broke free. I was afraid of losing my job, but no woman should tolerate what I have been subjected to. His behavior and conduct was very offensive and unwelcome and created a very hostile working environment. *Id.*

5. Respondents are currently defaulted due to the following:
 - a. On January 4, 2019, the ALJ properly served Complainant and Respondents with a Notice of Appointment of Administrative Law Judge and Notice of Status

Conference, scheduling a telephonic Prehearing Conference for January 17, 2019 at 1:00 PM.

- b. On January 17, 2019, Attorney Christopher E. Clark ("Clark") appeared for Complainant at the Status Conference. Respondents were not present in-person or by counsel.
- c. The January 17, 2019 Status Conference was responsive to Complainant's Motion for a Trial Setting, filed on August 31, 2017, to which Respondents never responded.
- d. The Prehearing Order and Order on Motion for Trial Setting explicitly stated that Complainant, through Attorney Clark, intended to file an Application for a Default Order against both Respondents. Complainant filed Complainant's Motion for Default Judgment on February 19, 2019.
- e. No response was made to the ALJ's Prehearing Order and Order on Motion for Trial Setting or to Complainant's Motion for Default Judgment, and the Office of the Administrative Law Judge did not hear from Respondents any indication of their willingness to participate in the administrative process.
- f. In each notice sent by the undersigned ALJ and by the former ALJs, Respondents were notified that failure to attend or participate in a prehearing conference could result in being held in default.
- g. On March 4, 2019, the ALJ entered a Notice of Proposed Default that stated that a Default Order would be entered if Respondents did not file a written motion explaining why Default should not be entered within seven days of service of the Notice of Proposed Default. Specifically, the ALJ advised that "[i]f no such written motion is filed, ALJ Stephens Ryker MUST enter the proposed default order."
- h. On March 18, 2019, the ALJ conducted a Hearing, in accordance with Indiana Code 4-21.5-3-24(b), of which Respondents had notice. Respondents did not appear in person or by counsel.
- i. A copy of the Notice of Proposed Default was sent to Respondents by regular mail and by certified mail. When sent by regular United States mail, the ALJ has not received any returned mail from Respondents at the addresses listed on the

certificate of service for this Order. Delivery of the certified mail was attempted on March 9, 2019, and Respondents chose not to pick-up the certified mail from the post office. Accordingly, the certified mail was returned to sender. The ALJ has no reason to believe that Respondents did not receive a copy of the Notice of Proposed Default sent by regular mail or a copy of the Notice of Hearing.

- j. Respondents did not provide any written motion.
 - k. The ALJ entered an Order by Default and Notice of Hearing on Damages on March 29, 2019 because 1) Default was and is appropriate under IC 4-21.5-3-24(a)(3) and 2) Default was and is also appropriate under 910 IAC 1-6-1. The ALJ has no reason to believe that Respondents did not receive a copy of the Order by Default and Notice of Hearing on Damages sent by regular mail.
6. 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 Respondents, and no additional evidence is to be considered on the issue of liability.
7. At the time of her discharge by Respondents, Complainant was working forty (40) hours a week and was paid twelve (12) dollars an hour. (Transcript of Record at 28-29, *Isidoro v. JR Interior Trim, et al.*, ICRC No.: EMse16061276). She was without similar employment for four (4) months and one (1) week, the equivalent of seventeen (17) weeks. *Id.*
8. As a result of the sexual harassment, Complainant has faced depression, fear, anxiety, and isolation. *Id.* at 29-30, 34. Her emotional distress was severe and required ongoing medical treatment.¹ *Id.*
9. As a result of the sexual harassment, Complainant has paid out-of-pocket costs for damages to her personal property, for her medical bills, and for the interest on a loan she obtained to help her manage her finances between jobs. *Id.* at 32-36. Total, Complainant's demonstrated out-of-pocket losses are \$780.00:
- a. Pills and Medication: \$80.00;
 - b. Medical Treatment and Doctor's Appointments: \$700.00;

¹ Complainant's ongoing medical treatment included visiting a doctor once every six (6) weeks and taking prescription medication. *Id.* at 29 and 34.

Id. at 34. The costs associated with her car accident and the exact amount of the interest associated with the loan were not provided during Complainant's testimony. *Id.* at 32-34 and 36.

10. During her employment, Respondents did not provide Complainant with healthcare. *Id.* at 38.
11. Complainant's testimony is credible. Although she had notes before her during the Hearing, she rarely used them, and based on the behavior observed by the ALJ, the primary purpose of the notes was to assist her in translating her testimony from Spanish to English. Furthermore, her notes pertained only to the factual allegations and not to her damages. (Exhibit 1).
12. As stated in her March 17, 2016 complaint, Complainant is seeking all available remedies under the Indiana Civil Rights Law, IC 22-9. (Complaint, Isidoro v. JR Interior Trim, et al., ICRC No.: EMse16061276).
13. 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 sex. 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. "In construing Indiana civil rights law our courts have often looked to federal law for guidance." *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 839 (Ind. 2009).
3. Complainant and Respondents are persons subject to the Indiana Civil Rights Law because Complainant is an employee and Respondent JR Interior Trim is an employer. IND. CODE § 22-9-1-3(a),(h), and (i). As the owner of the company, Respondent Fernandez is an agent of Respondent JR Interior Trim, and Respondent JR Interior Trim is responsible for the actions of its owner. *Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 697 (7th Cir. 2001) ("...an employer may be held vicariously liable for the acts of those who can be considered an employer's proxy, such as a[n]...owner...") (internal citations and quotations omitted.) This is particularly true if an employer does not exercise reasonable care to prevent and correct sexual harassment. *Id.* at 698-99.
4. However, because Respondent Fernandez is not an employer as defined by the Indiana Civil Rights Law, he cannot be held personally liable for his conduct. *U.S. E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1280-1282 (7th Cir. 1995); *Gärner v. Knoll Bros. Quick*

Marts, 962 F. Supp. 1115, 1122 (N.D. Ind. 1997); *E.E.O.C. v. Homer*, No. 94 C 1209, 1995 WL 470266, at *3 (N.D. Ill. Aug. 4, 1995).

5. Discriminatory practices includes practices that exclude "...a person from equal opportunities because of ...sex..." 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.*
6. 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). 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." *Id.*
7. 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).

8. In order to establish a *prima facie* case of hostile workplace sexual harassment, Complainant must demonstrate that the employer's "...sexually demeaning behavior [was] so severe or pervasive as to alter the terms and conditions of employment." *Thayer v. Vaughan*, 798 N.E.2d 249, 257 (Ind. Ct. App. 2003), *on reh'g in part*, 801 N.E.2d 647 (Ind. Ct. App. 2004). Respondent Fernandez set different terms and conditions for Complainant based on sexual favors, he physically harassed her at work and in her home, and he cultivated a demeaning and hostile workplace. Respondent JR Interior Trim unlawfully discriminated against Complainant when Respondent Fernandez sexually harassed Complainant in her place of employment and Respondent JR Interior Trim allowed the conduct as well as terminated Complainant's employment because of the ongoing sexual harassment. Complainant has established a *prima facie* case of sex discrimination by a preponderance of the evidence against Respondent JR Interior Trim.
9. Complainant has proven that she lost wages as a proximate result of Respondent JR Interior Trim's unlawful discrimination with respect to her discharge in May of 2016.
10. However, Complainant has not established that her emotional distress, medical bills, her bills resulting from damage to her property, and the interest owed on her loan should properly be considered "...wages, salaries, or commissions..."
11. Complainant is entitled to wages that were lost as a direct result of Respondent JR Interior Trim'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 was only unemployed for seventeen weeks before she found similar employment where she was payed a similar wage.
12. Complainant's lost wages resulting from Respondent JR Interior Trim's unlawful discrimination, to which she is entitled, are \$8,160.00, as calculated below:
 - a. Hours a week (40) X number of weeks (17) = 680 hours
 - b. Hours unemployed (680) X hourly rate (\$12.00) = \$8,160.00
13. Complainant is presumptively entitled to pre-judgment interest on her back pay to compensate Complainant for the "loss of the use of the money." *Wilson v. AM Gen. Corp.*,

979 F. Supp. 800, 802 (N.D. Ind. 1997). 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. *Id.*

- a. Three years have passed between Complainant's discharge on May 2, 2016 and the issuance of this Order.²
- 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: 2.43³
- 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. $\$8,160.00 \times [1 + (0.0243/1)]^{(1 \times 3)} = \$8,769.44$

- ii. Total Prejudgment Interest is $\$609.44^4$.

14. 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).

² Total days between dates/ days in a year
 $1096/365 = 3.002$

³ Interests obtained from <https://www.federalreserve.gov/releases/h15/>.

⁴ The prejudgment interest is calculated by subtracting the damages award (\$8,769.44) from the final amount computed with interest (\$8,160.00)

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

ORDER

1. The Complaint against Respondent Fernandez is DISMISSED with prejudice.
2. Respondent JR Interior Trim must cease and desist from condoning sexual harassment on the part of its employees and shall cease and desist its unlawful discriminatory practice of terminating the employment of employees who are the subject of sexual harassment.
3. Respondent JR Interior Trim shall deliver to the Indiana Civil Rights Commission's Director of Alternative Dispute Resolution and Compliance, as escrow agent, a check made payable to Griselda Flores Isidoro for the amount of her lost wages and prejudgment interest: eight thousand, seven hundred sixty-nine dollars and forty-four cents (\$8,769.44). 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, in consultation with Complainant's Attorney of Record, shall deliver the check to Griselda Flores Isidoro within fifteen (15) business days of its receipt.
4. If Respondent JR Interior Trim is currently operating, Respondent JR Interior Trim 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, draft, implement, and distribute a sexual harassment policy to each employee;
 - c. 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;
 - d. 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, including Respondent Jesus Fernandez, shall attend and successfully complete employment discrimination training that has been previously approved by the Indiana Civil Rights Commission's Executive Director. The training(s) completed shall not be fewer than three (3) hours in length.

- e. Within 180 days of the issuance of a final order, Respondent Fernandez shall attend and successfully complete employment discrimination training that has been previously approved by the Indiana Civil Rights Commission's Executive Director. The training(s) completed shall not be fewer than fifteen (15) hours in length.
5. Within thirty-five (35) days of the issuance of a final order, Respondent JR Interior Trim shall report to the Indiana Civil Rights Commission's Director of Alternative Dispute Resolution and Compliance the completion of paragraphs 3(a), 3(b), and 3(c).
 6. Within ninety (90) days of the issuance of a final order, Respondent JR Interior Trim shall submit a proposed training that will satisfy paragraph 3(d) and 3(e) 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 JR Interior Trim is not operating at the time that a final order is issued and Respondent recommences operations within the next five (5) years, Respondent JR Interior Trim 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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