

JOANNA MOORE,
Complainant,

FILE DATED

NOV 18 2011

v.

Indiana State Civil Rights Commission

BALLOON-A-WISH, LLC;
Respondent.

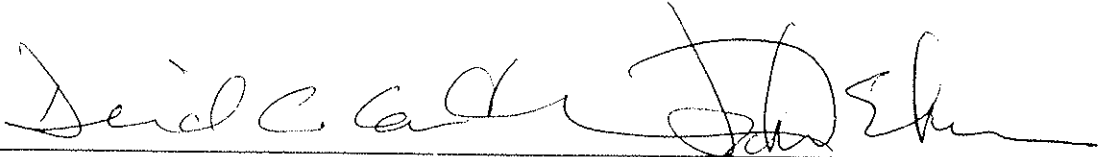
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On October 26, 2011, 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: 18 November 2011

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

Joanna Moore
1102 Northwood Drive
Rockville, IN 47872

Balloon-a-Wish, LLC
c/o Lori L. McCullar, Registered Agent
18 East Church Street
Brazil, IN 47834

and to be personally served on the following attorney of record:

Frederick S. Bremer, Esq., Staff Attorney
Indiana Civil Rights Commission
Indiana. Government Center North
100 North Senate Avenue, Room N103
Indianapolis, IN 46204-2255

JOANNA MOORE,
Complainant,
v.

BALLOON-A-WISH, LLC;
Respondent.

FILE DATED

OCT 26 2011

Indiana State Civil Rights Commission

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

A Hearing On Damages was held before the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") on January 26, 2011. Complainant, Joanna Moore ("Moore"), and the Court Reporter were present at Moore's residence in Rockville, Indiana. Moore was represented by counsel, Frederick S. Bremer, Esq., Staff Attorney. Counsel for Moore and the ALJ participated by telephone. Respondent – Balloon-A-Wish, LLC ("Balloon") – did not appear, by counsel or otherwise.

Opening statement was waived and Moore testified on her behalf. Closing argument was waived. The ALJ ordered that Moore file what she suggested that the ALJ enter as proposed findings of fact, conclusions of law, and order and the cause was taken under advisement. On January 26, 2011, Moore filed Complainant's Tender Of] Proposed Recommended Findings Of Fact, Conclusions Of Law And Order.

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

FINDINGS OF FACT

1. Moore is an adult female who has, at all material times, resided in the state of Indiana.
2. Balloon was, at all material times, an Indiana business. There has been no claim that Balloon did not employ 6 or more persons for wages or salary within the state at any material time.
3. Moore filed her complaint against Balloon on July 9, 2007, alleging employment discrimination based upon sex, alleging that she was terminated because of pregnancy and pregnancy-related conditions. COMPLAINT OF DISCRIMINATION (July 9, 2007) ("COMPLAINT").
4. On or about June 8, 2010, Balloon was properly served with an Amended Notice Of Initial Pre-Hearing Conference ("ANIPHC"), notifying Balloon of a July 19, 2010 Pre-Hearing Conference in this case to be held at 9:15 A.M. in Room 6 of the Conference Center on the first floor of the Indiana Government Center South at 302 West Washington Street in Indianapolis. The ANIPHC advised Balloon that "[a] party who fails to attend or participate in a Pre-Hearing Conference, Hearing, or other later stage of the proceeding may be held in default or the matter may be dismissed."
3. Balloon's copy of the ANIPHC was addressed to the individual listed in the records of the Secretary of State as the Registered Agent for Balloon by certified mail, return receipt requested. ANIPHC, page 3, APPLICATION, Exhibit B.
4. The ANIPHC was returned to the ICRC marked "Unclaimed". APPLICATION, Exhibit A.
5. Balloon did not appear or participate in the Initial Pre-Hearing Conference. FIRST PRE-HEARING ORDER (July 19, 2010).
6. On December 3, 2010, the ALJ entered and served his NOTICE OF PROPOSED DEFAULT ORDER ("NPDO"). The NPDO advised Balloon that it could file a written motion requesting that the proposed default order not be imposed and stating the grounds upon which it relied within 7 days after service of the NPDO, NPDO, ¶2. The NPDO also advised that if no such motion were filed, the ALJ MUST enter the proposed default order under IC 4-21.5-3-24(c). NPDO, ¶3.

7. Balloon did not file a written motion requesting that the proposed default order not be imposed.

8 On December 15, 2010, the ALJ issued his ORDER BY DEFAULT AND NOTICE OF HEARING ON DAMAGES.

9. Moore's complaint, as amended, was timely filed and alleges employment discrimination based upon sex, asserting that she was discharged by Balloon on June 14, 2007 because she was pregnant. COMPLAINT OF DISCRIMINATION (July 9, 2007).

10. As alleged in Moore's COMPLAINT, that must be accepted as true, on June 14 of 2007, Moore was sent home from work by Lori McCullar ("McCullar"), Balloon's owner and, a few days later, Moore received a letter from McCullar advising that Moore had been terminated. The owner had previously expressed concerns that either Moore or her child might get hurt and that Moore would be unavailable during the busy seasons of Thanksgiving and Valentine's Day.

11. Moore was terminated by Balloon because of sex.

12. At the time she was terminated by Balloon, Moore was in her probationary period and was earning \$7.00 per hour for working 84 hours every 2 weeks or \$294.00 per week, gross.

13. Moore was to receive a raise to \$8.00 per hour when she completed her probationary period, which would have been at the end of July in 2007.

14. After being dismissed by Balloon, Moore found another position with Aqua Liberty Pool & Spa ("Aqua"), a seasonal enterprise that sells swimming pools, shortly before the birth of her son on December 29, 2007. This entailed a week or so of training in late 2007 and starting work in March of 2008.

15. Had she not been terminated by Balloon because of sex, Moore would have earned, by the end of 2010, a total of \$61,993.26, gross. Calculations are shown below:

06/14/07 to 07/29/07 42 hrs./wk x \$7/hr. x 6.29 wks = \$ 1,849.26

07/29/07 to 13/31/10 42 hrs./wk. x \$8/hr. x 179 wks. = 60,144.00

TOTAL \$61,993.26

16. Moore earned \$4,161.00 in wages, gross, from Aqua in 2008 and similar amounts in 2009 and 2010. Thus, she has earned wages totaling \$12,483.00, gross, since her termination from Balloon.

17. Moore seeks to have unemployment compensation that she received deducted from her lost wages and, for that reason, it will be so deducted. She received such compensation in amounts set out below:

| | |
|--------------|--------------------|
| 2007 | \$4,034.00 |
| 2008 | 5,581.00 |
| 2009 | 5,581.00 |
| 2010 | <u>5,581.00</u> |
| TOTAL | \$20,777.00 |

18. There is no evidence that, at any material time, Moore rejected a better paying job that she was offered, or failed to seek a better paying job that she could have obtained.

19. As a result of Balloon discharging Moore because of sex, Moore lost, by the standard she has requested for measuring damages, a total of \$28,733.26, gross in wages.

20. Moore has not sought interest.

21. 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. Moore and Balloon are each a "person", as that term is defined in section 3(a) of the Indiana Civil Rights Law, IC22-9-1-1 *et. seq.* ("the ICRL"), IC 22-9-1-3(1).
3. Balloon is an "employer", as that term is defined in the ICRL. IC 22-9-1-3(h), IC 22-9-1-3(i).
4. The ICRC's Rule 6.1 (1) provides, in material part, that "[w]hen a party has failed to plead or otherwise defend as provided by this article", that party is in default. 910 IAC 1-6-1(1).
5. Default is appropriate under 910 IAC 1-6-1(1).
6. Default is appropriate under IC 4-21.5-3-24(a)(2).
7. The ALJ was required to conduct further proceedings after default without the participation of Respondents. IC 4-21.5-3-24(d).

8. The effects of an order by default include that the allegations of the complaint are deemed admitted.
9. What constitutes a discriminatory practice is set out in the following subsection of the ICRL:
 - (1) "Discriminatory practice" means:
 - (1) The exclusion of a person because of equal opportunities because of ... sex ..Every discriminatory practice relating to ... employment ... shall be considered unlawful unless it is specifically exempted by this chapter. IC 22-9-1-3(l).
10. Balloon committed an unlawful discriminatory practice by discharging Moore because of sex. Because there is no applicable exemption in the ICRL, that failure to hire was unlawful.
11. If the ICRC finds that a person has committed an unlawful discriminatory practice, it shall issue an order requiring the person to cease and desist from that practice and to take further affirmative action as will effectuate the purposes of the ICRL. Such an order may include restoring Complainant's losses incurred as a result of the discriminatory treatment. IC 22-9-1-6(k)(A).
12. Moore has proven that she sustained lost earnings that were the proximate result of the proven unlawful discriminatory practice.
13. The burden of proof on the issue of mitigation of damages is on the wrongdoer. *Colonial Discount Corp. v. Berkhardt*, 435 N.E. 2d 65 (Ind. App.1982).
14. Administrative review of this proposed decision may be obtained by any interested and affected person who is not in default by the filing of a writing specifying with reasonable particularity each basis for each objection within 15 days after service of this proposed decision. IC 4-21.5-23-29(d).
15. Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

ORDER

1. Balloon shall cease and desist from excluding persons from equal employment opportunities on the basis of sex.
2. Balloon shall deliver to Moore a check payable to Moore in the amount of \$733.26 minus deductions required by law and/or agreement, within 30 days of the effective date of this Order.
3. Balloon shall deliver a copy of the check to the ICRC within 30 days of the effective date of this Order.
4. This Order shall take effect immediately after it is approved and signed by a majority of the members of the ICRC, unless it is modified by the ICRC pursuant to IC 4-21.5-3-31(a), stayed by the ICRC pursuant to IC 4-21.5-3-31(b), or stayed by a court of competent jurisdiction.

Dated: 26 October 2011



Robert D. Lange
Administrative Law Judge

To be served by first class mail this 26th day of October, 2011 on the following parties:

Joanna Moore
1102 Northwood Drive
Rockville, IN 47872

Balloon-A-Wish, LLC
c/o Lori L. McCullar, Registered Agent
18 East Church Street
Brazil, IN 47834

and to be personally served this 26th day of October, 2011 on the following attorney of record:

Frederick S. Bremer, Esq., Staff Attorney
Indiana Civil Rights Commission
Indiana Government Center North
100 North Senate Avenue, Room N103
Indianapolis, IN 46204-2255

and to be served this 26th day of October, 2011 by electronic mail on the following:

Indiana Civil Rights Commission
c/o Jamal L. Smith, Executive Director