

STATE OF INDIANA
INDIANA CIVIL RIGHTS COMMISSION

DATE FILED

MAY 10 2018

OFFICE OF THE
ADMINISTRATIVE JUDGE

NIKIA LUCAS,)
)
Complainant,)
vs.) Do. No. EMrt10110515
)
CR WORKS, INC.)
)
Respondent.)
_____)

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 27, 2017, a hearing was held before the undersigned Administrative Law Judge (“ALJ”) for the Indiana Civil Rights Commission (“ICRC”). Complainant, Nikia Lucas (“Lucas”), appeared by her counsel, Fredrick S. Bremer, a staff attorney with the ICRC, and Respondent, CR Works, Inc. (“CR Works”), appeared by its counsel, Michael E. Tolbert and Candace Williams, attorneys with Tolbert & Tolbert, LLC. Seated with Mr. Tolbert and Ms. Williams at the hearing was Sandra Dafiaghor (“Dafiaghor”), Director of CR Works, Inc.

The parties presented evidence and arguments in accordance with the rules and procedures of the Indiana Civil Rights Commission, as set forth in 910 IAC 1-11-1 *et seq.* In the course of the hearing, Respondent admitted into evidence Respondent’s Exhibit (“RX”) RX-A, RX-B, RX-C, RX-D, RX-E, RX-F, RX-G, RX-H, RX-I, RX-J, RX-K, RX-L, RX-M, RX-N, RX-O, RX-P and RX-Q all of which were admitted without objection.

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

PROCEDURAL HISTORY

On April 27, 2010, Nikia Lucas filed a complaint with the Commission against CR Works in which Lucas alleged CR Works had discriminated against her on the basis of sex. Subsequently, Lucas filed another complaint against CR Works with the Commission on May 10, 2010 in which Lucas alleged CR Works unlawfully retaliated against her for filing the April 27, 2010 complaint.

On June 25, 2012, a hearing was held before ALJ Robert D. Lange. However, before making a ruling on the case, ALJ Robert D. Lange resigned. On July 2, 2013, the Commission appointed Noell F. Allen as ALJ for the ICRC. Before ALJ Noell F. Allen rendered a decision on the case, she resigned. On October 4, 2016, the Commission appointed Doneisha L. Posey as ALJ for the ICRC.

A pre-hearing conference was conducted on January 23, 2017 with counsel for the Complainant, Fredrick S. Bremer, and Sandra Dafiaghor, Executive Director of CR Works, Inc. (collectively referred to as “the Parties”). The parties submitted their list of witness and exhibits on April 7, 2017. A final pre-hearing conference was held on April 7, 2017. ALJ Doneisha L. Posey presided over the hearing on April 27, 2017, which specifically addressed the issue of what relief Lucas should be awarded as a result of the retaliatory suspension of her employment at CR Works (CR Works, Inc. previously conceded that it would not dispute liability and that the only issue for Hearing was what relief should be awarded. See *First Pre-Hearing Order, September 14, 2011*). Respondent made an offer of proof challenging the exemption of liability evidence. T. 6-13 (2017).

FINDINGS OF FACT

1. The issue to be resolved in this case is what relief the Complainant, Lucas, should be awarded as a result of the retaliatory suspension of her employment at CR Works.
2. Lucas worked at CR Works as a housing coordinator. Transcript of Lucas Hearing at 141:1-3, *Lucas v. CR Works, INC.*, (2017) (No. EMrt10110115).
3. Prior to her pregnancy, Lucas earned \$12.00 an hour working 35 hours per week at CR Works. T 31:2-7 (2017). During that time, she additionally received a bonus biannually and paid vacation. T. 32:14-20 (2017).
4. On March 10, 2010, Lucas informed CR Works that she was pregnant and planned to take maternity leave before June 20, 2010. [See Exhibit “K” in T.] (2017).
5. Due to Lucas’ pregnancy, CR Works reduced Lucas’ hours to 21 hours a week at the pay rate of \$12 an hour. T. 32:5-13 (2017).
6. Lucas was expecting to take six weeks of unpaid maternity leave following the birth of her child in June of 2010. Transcript of Lucas Hearing at 29:10-16, *Lucas v. CR Works, INC.*, (2012) (No. EMrt10110115).
7. On April 30, 2010, after CR Works had received notice that Lucas had filed her initial April 27, 2010 complaint with the Commission, Mrs. Sandra Dafiaghor (hereinafter Diafaghor), Executive Director of CR Works, suspended Lucas’ employment with CR Works, effective May 1, 2010. [See Exhibit “L” in T.] (2017).
8. Following her suspension, Lucas was unable to secure employment until January 12, 2012 when she began working for Healthy Start as a case manager. T. 27:5-10 (2017). Her hourly rate at Healthy Start was \$14.42 an hour, and she worked 32 hours a week. T. 30:10-13 (2017).

9. During Lucas' time of unemployment, she received unemployment from CR Works. T. 36-37 (2017). Additionally, while she was unemployed, Lucas routinely submitted five job applications a week and volunteered at various places in hopes of transitioning into a paid position. T. 38:2-19 (2017).
10. On December 6, 2010, CR Works sent Lucas a letter that stated Lucas' suspension was lifted and she was to report to the Hammond office on December 13, 2010. [See Exhibit "M" in T.] (2017). She was able to return to her original job as housing coordinating making \$12 an hour but this time for 30 hours per week. T. 65:6-21 (2017).
11. However, Lucas did not report back to CR Works nor did she respond to the letter lifting her suspension. T. 66:12-21 (2017). Lucas contends that she did not return to CR Works because she was afraid of working with Dafiaghor. T. 67:3-10 (2017).
12. At the time Lucas' suspension was lifted, Dafiaghor was primarily working out of the Gary office, and alternatively, Lucas was informed that she would be working out of the Hammond office. T. 151:5-8 (2017). Additionally, Dafiaghor has never physically attacked her; however, Lucas contends Dafiaghor has verbally attacked her. T. 67:16-23 (2017).
13. Lucas is seeking damages for back pay and emotional distress and requests reinstatement. T. 46-47 (2017).

CONCLUSION OF LAW

1. ICRC has jurisdiction over the subject matter and the parties.
2. Lucas and CR Works are each a "person" as the term is defined in IC 22-9-1-3(a).

3. The Commission has the power to “prevent any person from discharging, expelling, or otherwise discriminating against any other person because the person filed a complaint, testified in any hearing before this commission, or in any way assisted the commission in any matter under its investigation.” IC 22-9-1-6(g). Among these powers, the Commission has jurisdiction over retaliation claims that are equated in the Indiana Civil Rights Law (“ICRL”) to discrimination cases. *M.C. Welding & Machinery Co. v. Kotwa*, 845 N.E.2d 188, 193 (Ind. App. 2006).
4. Additionally, the Commission shall hold hearings on retaliation claims and require the person responsible for the discriminatory retaliation to “take further affirmative action as will effectuate the purposes” of the ICRL to restore Complainant’s losses incurred as a result of discriminatory treatment, as the Commission may deem necessary to assure justice. IC 22-9-1-6(j).
5. The Commission’s specified remedial actions to restore Complainant’s losses include reinstatement and monetary damages, such as back pay. *Indiana Civil Rights Com. V. Midwest Steel Div. of Nat’l Steel Corp.*, 450 N.E.2d 130, 140 (Ind. App. 1983).
6. The Commission is authorized to award damages to the Complainant for emotional distress losses incurred as a result of discriminatory treatment. *Indiana Civil Rights Commission v. Alder*, 714 N.E.2d 632, 637 (1999). Because the ALJ declined to award emotional distress damages, the ALJ did not reach the legal issue of whether or not emotional distress damages could be awarded in a retaliation case where the retaliation complaint is an outgrowth of an employment case.
7. The United States Supreme Court held that “absent special circumstances, the rejection of an unconditional job offer ends the accrual of potential back pay liability.” *Graefenhain v.*

Pabst Brewing Co., 870 F.2d 1198, 1202 (7th Cir. 1989) (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 241 (1982)). However, the accrual of damages is not merely terminated if the Complainant refuses an unreasonable offer of reinstatement. *Id.* An employee is not required to return to work for an employer that discriminated against him or her because returning to the same employer could be considered demeaning and employers cannot simply escape liability by allowing employees to return once the employee has fallen out of the protected category. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982); *Knox Cty. Ass'n for Retarded Citizens, Inc. v. Davis*, No. 93A02-1701-EX-141, 2018 WL 1833607, at *14-16 (Ind. Ct. App. Apr. 18, 2018). However, the facts in the present case are distinguished from those scenarios because Lucas has requested to have her employment reinstated, which illustrates that Lucas would not have found a return to work for CR Works demeaning and that she failed to mitigate her damages.

8. Accordingly, while Lucas stated that her refusal to return to CR Works was based on the fear she felt to work with Dafiaghor, she also admitted that she would have returned to work for CR Works at the Gary's location. Testimony confirms that Dafiaghor could be at both the Gary and Hammond locations. T. 99-101 (2017). Therefore, the principal reason for her refusal to return to work was the location of the office and not her alleged fear, which she did not prove was strong enough to prevent her from returning to work.
9. Furthermore, while the terms and conditions of the offer were different from Lucas' previous employment terms with CR Works, it is also true that these differences were based on an objective condition with which CR Works was presented at that time. CR Works had a new contract in Hammond for the program called HRP (Homeless

Prevention and Rapid Rehousing), and it needed to provide housing coordinators in Hammond at that time T. 94:5-14 (2017). Also, all the people who worked in CR Works could be moved to different offices depending the clients' needs. T. 98-99 (2012).

10. Also, the reduced amount of hours in CR Works' offer (30 hours a week rather than 35 hours per week that Lucas was working before the discriminatory retaliation) was justified because at the time of the offer, the housing coordinator position was set up to work 30 hours a week according to the HRP grant application. T. 111- 112 (2012). Although, CR Works had other employees who were working for 35 hours, those employees were not in the same housing coordinator position as Lucas. Instead, those employees had two types of jobs that, when combined, allowed them to work 35 hours a week. T. 101-102 (2012).
11. Therefore, Lucas's refusal to return to CR Works was an unreasonable refusal that ended the accrual of the CR Works' back pay liability on December 13, 2010.
12. In the period between April 30, 2010 and December 13, 2010 when she had the opportunity to return to CR Works, Lucas used reasonable diligence to find suitable alternative employment. This is evident by her submission of the appropriate number job applications required per week for her unemployment and by her engagement in volunteer work in the hopes of securing employment. T. 38:2-19 (2017).
13. Lucas did not find employment until January 12, 2012 when she began working for Healthy Start at \$14.42 an hour for 32 hours a week. T. 30:10-20 (2017).
14. Lucas testified that the suspension affected her emotionally. T. 41:13-15 (2017). Lucas became depressed and contends her depression affected her pregnancy as well as caused her son to have delayed speech. T. 42-44 (2017).

15. However, Lucas' physician did not find that her son's developmental issues were caused by her suspension. T. 49: 4-14 (2017).
16. Additionally, Lucas did not seek medical treatment or counseling for her depression. T. 113:2-7 (2017).
17. Lucas contends she did not return to CR Works after she received the letter because she was afraid to work with Dafiaghor. T. 67:3-10 (2017). However, now Lucas requests to be reinstated to CR Works. T. 47:10-15 (2017).
18. Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

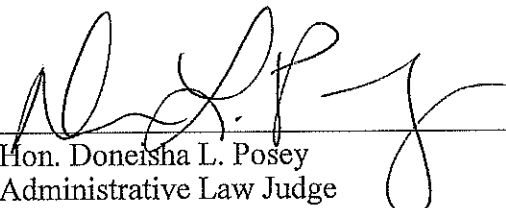
ORDER

Based upon the foregoing findings of fact and conclusion of law, it is hereby order that:

1. CR Works shall deliver to Lucas within thirty (30) days after the effective date of this Order, a check made payable to her in the amount of eleven thousand one hundred fifty-four dollars (\$11,154.00). The sum corresponds to the amount Lucas would have earned working but for CR Works' retaliation. This amount is adjusted appropriately to allow for the six weeks period Lucas requested for maternity leave.
 - a. Due to the discrepancies in Lucas' hour per week rate, Lucas' back pay is calculated based on her 2009 averaged yearly income.
 - b. In 2009, Lucas was paid twenty-six thousand three hundred sixty-four dollars (\$26,364.00), which equates to five hundred seven dollars (\$507.00) a week.
 - c. There are roughly 28 weeks between Lucas' date of suspension on May 1, 2010 and CR Work's offer of reinstatement on December 13, 2010. After six (6) weeks

of unpaid maternity leave is subtracted, Lucas was unemployed in 2010 for a total of 22 weeks.

- d. The ALJ declines to award a bonus because there is insufficient proof of Lucas routinely receiving a bonus as well as a dispute between parties as to the amount of Lucas' bonus.
2. Lucas' claim for emotional distress is DENIED because she did not prove that the suspension accomplished the emotional distress that she alleged.
3. Lucas' request for the right of reinstatement is DENIED because she unreasonably refused to return to work on December 6, 2010.
4. This order shall be effective once it is approved and signed by a majority of the members of ICRC unless it is modified by ICRC pursuant to IC 4-21.5-3-31(a), stayed by ICRC pursuant to IC 4-21.5-3-31, or stayed by a court of competent jurisdiction.



Hon. Doneisha L. Posey
Administrative Law Judge
Indiana Civil Rights Commission
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Certificate of Service

Served this 10 day of May by U.S. Mail on the following:

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