

STATE OF INDIANA
CIVIL RIGHTS COMMISSION

DOCKET NO. EMra09090328
EEOC NO. 24FA900331

KARL MASON,
Complainant,

FILE DATED

JUL 22 2011

v.

GG TRUCKING, INC.;
Respondent.

Indiana State Civil Rights Commission

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On June 17, 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: 22 July 2011

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Indiana State Civil Rights Commission

**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 July 29, 2010. Complainant, Karl Mason ("Mason"), was present and was represented by counsel, Frederick S. Bremer, Esq., Staff Attorney. Respondent – GG Trucking, Inc. ("GGT") – was represented by counsel, David W. Hamilton, Esq. of the Indianapolis firm of ROWE & HAMILTON. Also present on behalf of GGT were George E. Grigsby ("Grigsby"), the owner and Robert Daniel Smith ("Smith" or "Danny"), General Manager and Dispatcher.

Opening statements were made and Mason called the following witnesses: Carla Cobb ("Cobb"); Carl E. Turentine, Jr. ("Turentine"); himself, and Smith. During the presentation of Mason's case, Respondent's Exhibit 3 ("RX_") was offered but not admitted into evidence; Complainant's Exhibit F ("CX_"), CXG, CXA, CXB, CXC, CXD, CXE, and RX1 were admitted into evidence without objection; and CXH and RX4 were admitted into evidence over objection.

After Mason rested his case, GGT called Smith, Ray Carver ("Carver"), Heather Doll ("Doll"), and Grigsby to testify on its behalf. During the presentation of GGT's case, RX2, RX3, and RX5 were admitted into evidence without objection.

Mason elected not to present any evidence in rebuttal and closing arguments were waived. The ALJ ordered that the parties file what they suggest that the ALJ enter as proposed findings of fact, conclusions of law, and order on or before September 15, 2010 and that they could file briefs on or before the same date and the cause was taken under advisement. The deadline was later extended to October 15, 2010.

On October 15, 2010, Mason filed his Tender Of Findings Of Fact, Conclusions Of Law, And Order As Proposed By Complainant. Also on October 15, 2010, GGT filed its [Suggested] Proposed Findings Of Fact, Conclusions Of Law, And Judgment (*sic*).

Having carefully considered all of 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. The issues in this case are whether Mason was denied employment by GGT because of race and, if so, what relief should be awarded. FIRST PRE- HEARING ORDER ¶8 (April 6, 2010), SECOND PRE-HEARING ORDER ¶3 (July 20, 2010).
2. Mason is an African American male who was 40 years old at the time of the Hearing and who has resided, at all material times, in the state of Indiana.
3. GGT is a minority owned dump truck business that was started in 2005. At the time of the hire that is at issue here, GGT operated approximately 18 trucks and employed 17 persons, 14 African Americans and 3 Caucasians. By the time of the Hearing, GGT was down to 11 trucks and no one had been hired since the hire at issue here on or about August 4 of 2009.
4. In what seems as though it would be a common practice in the business, GGT had a number of employees on staff who reported to work at GGT's on a regular basis at 6:00 A.M. The dispatcher, Smith, would assign drivers to cover the contracts and jobs that GGT had for that day. Qualified drivers could show up at this time and might

be assigned a job that day if there were more jobs than drivers or if one or more drivers were absent that day.

5. For a period of time in 2009, Mason was one of those drivers and, as a result, he talked to Smith, who had been GGT's dispatcher and general manager for about 3 years and who is also an African-American, on a number of occasions. Not surprisingly, since Mason was then unemployed, he brought up the subject of employment. Smith had Mason complete an application, which he did on or about July 12 of 2009. CXA, RX1. Mason was interviewed by Smith at about this time, and Smith found nothing wrong in the interview. On the other hand, a review of Mason's application found gaps in Mason's employment history that concerned Smith. Further, Smith noticed when reviewing Mason's driving record that Mason had either continued to drive while his license was suspended or the application was inaccurate. Finally, Smith contacted one of Mason's prior employers and received a less-than-sterling report.

6. According to that application for employment at GGT, Mason began working as a dump truck driver in 2000 at Stone & Rhodes, working there until the end of 2003. He also worked in that capacity for a few months at Oatts Trucking in 2007 and again for Stone & Rhodes in the last half of 2007. CXA For approximately 5 of those years, though, Mason's driver's license was suspended. RX1.

7. In July of 2009, Doll, a Caucasian, had been continuously employed as a dump truck driver since 2004. She was then employed as a dump truck driver at Van Sickle Trucking but was not getting as much work as she would have liked. Doll had noticed that GGT's trucks were working more regularly than most, primarily at the downtown Marriott, and she sought out GGT and put in an application on or about July 30, 2009. RX2.

8. At about this time, it had been determined to hire another driver, and Smith also interviewed Doll. Smith found Doll to be of excellent character and to have an impeccable work record. Smith offered Doll a position to begin on August 3, 2009 and she accepted. No one else participated in the decision to hire Doll.

9. August 3, 2009 was a Monday and Doll's first day. As was customary, she was sent out with a regular driver. She was permitted to drive and, at some point during the day, the contractor called Smith and requested that she be assigned there on a regular basis.

10. Mason also drove on August 3, the first time he had done so, driving a truck normally assigned to a senior employee, Grady Curry ("Curry"), who was not available for that day.

11. August 4 was Smith's birthday and it was his custom to take that day off. The day before, he made the driving assignments for the next day. He assigned Doll the same assignment as before, in part because she was a regular employee and in part in keeping with an industry practice to send drivers who had been requested by contractors. Mason was not assigned because neither Curry nor any other regular driver was unavailable.

12. Grigsby, who is the owner of GGT and an African American, arrived at 6:00 on the morning of August 4, a practice that was not typical for him except on Smith's birthday, when he was present because Smith was absent. Grigsby unlocked the doors and passed out the job assignments that Smith had decided upon the previous day.

13. When Mason noticed that he had not been assigned to a truck and that Doll had, he confronted Grigsby, asking why he was sending her out but not him (Mason).

Versions of how Grigsby responded vary.

A. Mason says that Grigsby responded that "don't know drivers tell me how to run my company" and that "I need some white people in here". The testimony of Cobb and Turentine attempts to corroborate Mason's on this point and both did testify that they heard this conversation and that Grigsby had told Mason something like he needed some white people.

B. Grigsby says that he asked Mason who he was and, after Mason told him, he looked through the tickets (showing who was assigned what trucks) and told Mason "I don't have one for you". Grigsby denies saying he needed white people or anything like that.

14. Mason has not proven by a preponderance of the evidence that race was a factor in the decision to hire Doll but not Mason. The evidence supporting Mason's claim to that effect – that Grigsby said something along the lines of "I need some white people around here" – although corroborated to some extent by Cobb and Turentine, is ultimately unpersuasive.

A. Smith, not Grigsby, made the decision to hire Doll and not Mason.

B. Cobb testified that she overheard this conversation at about 12:30 on a day when she had worked at Eli Lilly for a contractor identified as Simmons and that Turentine was present at the time. She relies, in part, on a handwritten log that she wrote showing that she worked at Lilly that day with that contractor.

CXH. There are a number of problems, in no particular order, with this testimony that call its credibility into question. First, GGT's records (RX3) show that Cobb did not work that day. Second, the contractor at Lilly was Shiel-Sexton, according to Smith and Grigsby, both of whom should know. Finally, Mason, Grigsby, and Turentine all agree that the only conversation involving Mason and Grigsby occurred at about 6 in the morning.

C. Turentine's description of the incident included the detail that Smith was in the office, a detail that is clearly incorrect since the only reason that Grigsby was there that morning was that Smith was not there.

Although none of these discrepancies, individually, is sufficient to definitively establish that Mason's account is not credible, collectively, they raise enough doubt that it is impossible to say that Mason's version of events is more credible than Grigsby's.

15. GGT introduced evidence of a legitimate, nondiscriminatory reason for choosing to hire Doll instead of Mason, that being that their applications indicated that she would likely be a more reliable employee than Mason. This was because Mason's application for employment at GGT (CXA) seemed to indicate that Mason had driven for prior employers while his CDL was suspended. Even if this were written off as confusion of the dates – and there is nothing in the record to indicate that GGT should have considered that or that it did not consider that because of race – this could only, at best,

improve the situation from "driving while suspended" to "suspended". While the latter is less of a problem than the former, it is still a problem.

16. Mason has not proven by a preponderance of the evidence that the asserted reason was a pretext for discrimination because of race, either by showing that the asserted reason is unworthy of credence, by showing that any similarly situated Caucasians were treated more favorably, or otherwise.

17. GGT did not fail to hire Mason because of race.

18. 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. Mason and GGT are each a "person" as that term is defined in section 3(a) of the Indiana Civil Rights Law, IC 22-9-1-1 *et. seq.* ("the ICRL"). IC 22-9-1-3(a).
3. Section 6(k) of the ICRL authorizes the ICRC to award relief if it finds an unlawful discriminatory practice.
4. Section 3(l) of the ICRL provides, in material part, as follows:
 - (l) "Discriminatory practice" means:
 - (1) the exclusion of a person from equal opportunities because of race ...
 - ...
 - Every discriminatory practice relating to ... employment ... shall be considered unlawful unless it is specifically exempted by this chapter.
IC 22-9-1-3(l).
4. Generally, cases decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.* ("Title VII") are entitled to great weight in the interpretation of the ICRL. *Indiana Civil Rights Commission v. Culver Educational Foundation*, 535 N.E.2d 112 (Ind. 1989).
5. The most obvious method of establishing intentional discriminatory intent in the employment setting is to introduce evidence that can be interpreted as an

acknowledgment of discriminatory intent on the part of the employer or its agents.

Indiana Civil Rights Commission v. Southern Indiana Gas & Electricity Company, 648 N.E.2d 676 (Ind. Ct. App. 1995).

6. Mason has not proven by a preponderance of the evidence that GGT's decision not to hire him was a result of discriminatory intent. The evidence that Mason offered as "direct evidence" was (a) not evidence of the intent of the person who made the decision and (b) not more persuasive than the evidence to the contrary.

7. In the absence of sufficiently credible direct evidence of unlawful discrimination, a case can be made with circumstantial evidence. This involves the 3 stage process enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). That process requires that Complainant establish a prima facie case of discrimination that Respondent may rebut by introducing one or more legitimate business reasons for the adverse action. Complainant may then show those reasons to be pretexts for unlawful discrimination. *St. Mary's Honor Center v. Hicks*, 507 U.S. 906 (1993).

8. In this case, it can be assumed that Mason has proven a prima facie case, since it will not affect the outcome if that assumption is incorrect.

9. GGT has introduced evidence of a legitimate business reason for its decision not to hire Mason, that being that it believed Doll would be a more reliable employee than Mason.

10. Mason has not proven that the asserted reason for not hiring him was a pretext for unlawful discrimination because of race.

11. GGT did not refuse to hire Mason because of race.

12. GGT did not commit an unlawful discriminatory practice against Mason.

13. If the ICRC finds that a person has not committed an unlawful discriminatory practice, it must dismiss the complaint as against that person. IC 22-9-1-3(m).

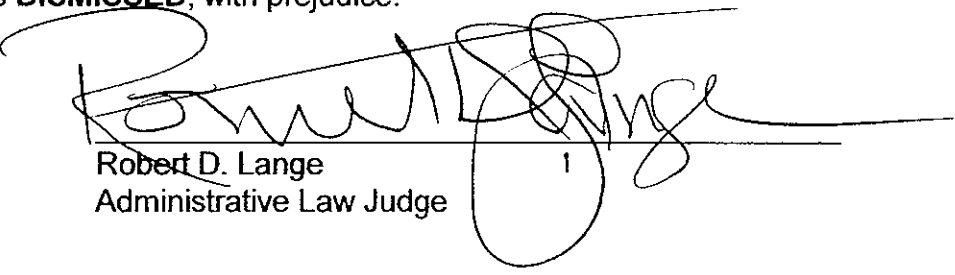
14. Administrative review of this proposed decision may be obtained by the filing of a writing identifying with reasonable particularity each basis of each objection within 15 days after service of this proposed decision. IC 4-21.5-3-29(d).

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

ORDER

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

Dated: 17 June 2011



Robert D. Lange
Administrative Law Judge

To be served by first class mail this 17th day of June, 2011 on the following parties and attorneys of record:

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