▶	This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 06/16/06

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
RASHEED JOHNSON,	)	
	)	**Charge No.: 2005CF1332**
Complainant,	)	**EEOC No.: 21BA50352**
	)	**ALS No.: 05-296**
and	)	
	)	
AUTOZONE,	)	
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes before me following a public hearing on damages held on March 2, 2006, after the Commission entered a Default Order against the Respondent on August 24, 2005. Complainant appeared with his attorney. Respondent did not appear, nor did anyone on its behalf. A post-hearing order was entered on March 3, 2006, setting a schedule for post-hearing briefs and fee petitions. Respondent failed to submit an appearance and a post-hearing brief. Complainant submitted a fee petition on April 25, 2006. This matter is now ready for disposition.

Findings of Fact

The following findings of fact were derived from the record file in this case and from the events and evidence presented at the damages hearing.

1. Complainant filed Charge Number 2005CF1332 with the Illinois Department of Human Rights (the "Department") on November 4, 2004, alleging that Respondent discriminated against him based on his race (black) and his sex (male).

2. On July 11, 2005, the Department's Chief Legal Counsel entered a Default Order against Respondent.

3. On July 12, 2005, the Department filed a Petition for Hearing to Determine Complainant's Damages.

4. On August 24, 2005, the Commission entered a Default Order and referred the matter to the Administrative Law Section for a hearing on damages.

5. On November 18, 2005, an order was entered that set this matter for a status hearing on January 5, 2006.

6. On January 5, 2006, Complainant appeared, *pro se.* Respondent neither called nor appeared. An order was entered that set this matter for a status on January 18, 2006.

7. On January 18, 2006, Complainant appeared through counsel. Respondent did not appear. An order was entered on January 18, 2006 that set a damages hearing for March 2, 2006. Complainant's attorney was ordered to serve Respondent with a copy of the January 18, 2006 order at its last known address and file a proof of service with the Commission.

8. Complainant's attorney filed a proof of service with the Commission on January 18, 2006 certifying that he served Respondent with the January 18, 2006 order.

9. On March 2, 2006 Complainant and his attorney appeared. Respondent did not appear. Complainant presented his case on damages.

10. The record was closed.

11. On March 3, 2006 an order was entered that set a schedule for post-hearing briefs and a fee petition.

12. Respondent failed to file an appearance and a post-hearing brief.

13. Complainant filed a fee petition on April 25, 2006, requesting attorney's fees totaling $2,655.00, based on an hourly rate of $250.00 for Attorney Sigi M. Offenbach for 10.1 hours, and an hourly rate of $65.00 for the law clerk for 2 hours.

14. Since Respondent failed to file an appearance and submit a post-hearing brief, it waived its right to respond to the fee petition.

Conclusions of Law

1. Complainant is an "aggrieved party" and Respondent is an "employer," as those terms are defined in the Illinois Human Rights Act, 775 ILCS 5/1-103(B), and 5/2-101(B).

2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. In accordance with the Commission's August 24, 2005 Default Order, Respondent is liable for violations of the Illinois Human Rights Act that prohibit discrimination based on race and sex.

4. Complainant has demonstrated that he is entitled to back pay in the amount of $22,231.00.

5. Because of its failure to file an appearance, submit post-hearing briefs and respond to Complainant's fee petition, Respondent has waived the issue of fees.

6. Attorney Sigi M. Offenbach's hourly rate of $250.00 is reasonable.

7. The hourly rate of $65.00 for Attorney Sigi M. Offenbach's law clerk is reasonable.

8. The numbers of hours requested (10.1 hours for Attorney Sigi M. Offenbach and 2 hours for his law clerk) are reasonable.

9. Complainant has demonstrated that he is entitled to attorney's fees and costs in the amount of $2,655.00.

10. Complainant is entitled to prejudgment interest in accordance with the Illinois Human Rights Act and the Commission's procedural rules.

11. In light of the finding of liability against Respondent, it should be ordered to cease and desist from any discriminatory conduct based on race and sex.

Discussion

In accordance with the Commission's Default Order, this matter proceeded to a damages only public hearing. Complainant testified on his own behalf. Exhibit A, Complainant's Affidavit, was introduced and admitted into evidence.

Back Pay

The first element of damages to be considered is back pay. Often, a calculation of back pay can be somewhat speculative. Any ambiguity in this process must be resolved in favor of a prevailing complainant, and against the discriminating employer, since the employer's wrongful act gave rise to the uncertainty. **Clark v. Human Rights Comm'n**, *141 Ill. App. 3d 178, 183, 490 N.E.2d 29, 95 Ill. Dec. 556 (1st Dist. 1986).* This principle must be rigorously followed when a respondent has failed to participate in the case in any way. **Taylor and Amerienvironmental, Inc.,** ___ *Ill. HRC Rep.* ___ *(2001CE1961, Feb. 23, 2004).*

I find that Complainant's testimony, along with his tendered affidavit (admitted as Exhibit A), suffice to sustain his burden. Since Respondent did not appear at the public hearing, there is no evidence to refute Complainant's testimony and Exhibit A.

On the last day of Complainant's employment with Respondent (October 25, 2004), Complainant was working full time (40 hours per week) and earning $10.50 per hour. He was not able to obtain employment for the remainder of 2004. As such, his lost wages in 2004 were $4,200.00. In January 2005, Complainant found a job at Walgreen's making $7.35 per hour, but only worked an average of twenty-two (22) hours per week. He received a raise to $7.91 per hour in November 2005. Accordingly, his lost wages in 2005 were $13,850.00, which reflects the salary that he would have made with Respondent's job, minus the salary he received at Walgreen's Pharmacy. In 2006, Complainant's lost wages to the date of this Recommended Order and Decision (May 1,

2006) total $4,181.00, which reflects Complainant's salary at Respondent, less the salary he made at Walgreen's Pharmacy.

In total, Respondent should be ordered to pay Complainant back pay in the amount of $22,231.00.

Pre-Judgment Interest

Respondent should also be ordered to pay Complainant interest on the back pay as contemplated by Section 8A-104(J) of the Human Rights Act (735 ILCS 5/8A-104(J)) and calculated as provided in Section 5300.1145 of the Commission's procedural rules.

Attorney's Fees

As permitted by the order entered on March 3, 2006, Complainant's attorney timely submitted his fee petition on April 25, 2006. In considering petitions for the award of attorney's fees and costs, the Commission requires that any award be fair and reasonable. The most common measure of fees remains the charging of a set rate per hour for work performed in consideration of the client's matter at hand, and multiplying that figure by the number of hours expended. The standard for determining the proper fee award by the Commission is found in **Clark and Champaign National Bank**, *4 Ill. HRC Rep. 193 (1982).*

Just as with the general briefing for this matter after public hearing, Respondent chose not to file a timely response. Since no response was filed, all issues related to the petition are waived. **Marta Leseiko and Chase/Ehrenberg & Rosene, Inc.,** ___ *Ill. HRC Rep. (2000CF1882, Mar. 23, 2004).* Here, Complainant's attorney is claiming an hourly rate of $250.00 per hour for himself and $65.00 per hour for his law clerk. Even without Respondent's waiver of fee petition objections, these rates are reasonable and in accordance with Commission's recent orders on attorney's fees. Complainant's attorney further lists 10.1 hours spent on Complainant's case by him and 2 hours by his law clerk. All of the hours specified in the petition appear to be reasonable under any standard of

evaluation, but will likewise be accepted as uncontested by Respondent. Therefore, Complainant's attorney should be awarded $2,655.00 for his representation of Complainant in this matter.

Discussion of Other Relief – Cease and Desist

Complainant has requested lost health insurance benefits. The amount he seeks is the amount Respondent would have paid to its health insurance carrier for Complainant's coverage. If Complainant had been on Respondent's payroll, he would not have received those payments himself. Rather, he would have received the insurance coverage purchased by those payments. Complainant has not alleged that he incurred any medical expenses that would have been covered under the Respondent's health insurance plan. If Complainant is awarded the amount of the health insurance payments made by Respondent to its insurance carrier, he will be better off than if he had been employed. Such a result is inconsistent with the Illinois Human Rights Act and is not recommended. *See* **Caraway and City of Kankakee Fire and Police Commissioners**, ___ *Ill. HRC Rep.* ___ *(1988CN2969, May 5, 1997).*

Although reinstatement is presumptively the relief sought and given in discrimination cases under the Illinois Human Rights Act, Complainant did not request such relief, and under the circumstances, no such relief is recommended.

However, since a Default Order has been entered and there has been a finding of liability against the Respondent, it is recommended that Respondent be ordered to cease and desist from any race and sex discrimination in the future.

Recommendation

It is recommended that the Commission: (1) award back pay in the amount of $22,231.00; (2) award prejudgment interest on the back pay award in accordance with the Illinois Human Rights Act and the Commission's procedural rules; (3) award

attorney's fees and costs in the amount of $2,655.00; (4) and order Respondent to cease and desist from any race and sex discrimination in the future.

HUMAN RIGHTS COMMISSION

BY: _____
REVA S. BAUCH
DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: May 1, 2006