



This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 08/10/06

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:)
)
CARMEN MARTINEZ,)
)
 Complainant,)
)
and)
)
BOTINQUEN RESTAURANT,)
)
 Respondent.)

**Charge No.: 2005CF1983
EEOC No.: 21BA50888
ALS No.: 05-515**

RECOMMENDED ORDER AND DECISION

This matter comes before me following a public hearing on damages held on May 18, 2006, after the Commission entered a Default Order against the Respondent on February 22, 2005. Complainant appeared with her attorney and had an interpreter. Respondent did not appear, nor did anyone on its behalf. This matter is now ready for disposition.

The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

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 2005CF1983 with the Illinois Department of Human Rights (the "Department") on January 6, 2005.

2. The charge alleges that Respondent discharged Complainant due to her sex (female) and national origin (Mexico).
3. On December 17, 2005, the Department's Chief Legal Counsel entered a Default Order against Respondent.
4. On December 19, 2005, the Department filed a Petition for Hearing to Determine Complainant's Damages.
5. On January 5, 2006, the Commission entered a Default Order and referred the matter to the Administrative Law Section for a hearing on damages.
6. On January 10, 2006, an order was entered that set this matter for a status hearing on February 22, 2006.
7. On February 23, 2006, Complainant appeared and requested time to retain an attorney. Respondent failed to appear. An order was entered that set this matter for a status hearing on March 22, 2006.
8. On March 22, 2006, Complainant appeared via an attorney. Respondent neither called nor appeared. An order was entered that set this matter for a damages hearing on April 24, 2006.
9. On March 27, 2006, an order was entered that indicated that it had come to the Commission's attention that the person who appeared on Respondent's behalf before the Department was disbarred in 2004. As such, the Commission ordered that all prior Commission orders in this matter were to be re-served on the Respondent at the Respondent's last known business address in the charge, that the public hearing date set forth on March 22, 2006 be stricken, and that a new status hearing be set for April 19, 2006. The Department was also ordered to be present at the next status hearing to provide its position on the matter.
10. At the April 19, 2006 status hearing, the Department indicated that it had no objection to the Commission proceeding to a damages hearing.

11. On April 19, 2006, an order was entered that set a damages hearing on May 18, 2006.
12. On May 18, 2006, Complainant appeared with her attorney, as well as an interpreter. Respondent failed to appear. Complainant presented her case on damages.
13. Complainant had been employed as a waitress for Respondent for six (6) or (7) years, and was discharged on January 6, 2004.
14. Initially, Complainant was paid both by check and cash. As of approximately two (2) years ago, Complainant was only paid in cash and did not receive checks or pay stubs.
15. During Complainant's last year of employment with Respondent, she worked six (6) days per week, and approximately six (6) to seven (7) hours per day.
16. Complainant was paid \$5.00 per hour and received \$200.00 per week in cash.
17. Complainant also earned \$120.00 per week in tips.
18. Complainant's total weekly income was \$320.00 per week.
19. Complainant has looked for other work since being discharged, both as a waitress and as a housekeeper, and has been unsuccessful.
20. At the end of Complainant's case, the record was closed.
21. On May 18, 2006 an order was entered that set a schedule for a fee petition and a response thereto.
22. Respondent failed to file an appearance and a response to the fee petition.
23. Complainant filed a fee petition on June 1, 2006, requesting attorney's fees totaling \$2,720.00, based on an hourly rate of \$340.00 for Attorney Joanne Kinoy for eight (8) hours.
24. Attorney Kinoy's current billing rate is \$400.00 per hour. However, in this matter, Attorney Kinoy is requesting a reduced hourly rate of \$340.00.

25. Attorney Kinoy was admitted to the State of Illinois Bar in 1977 and is a partner in the law firm of Kinoy, Taren & Geraghty, P.C., specializing in plaintiffs' civil rights litigation.

26. Complainant submitted affidavits of two (2) Chicago-area attorneys establishing that the requested hourly rate is consistent with rates for similarly qualified attorneys and is reasonable.

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 February 22, 2006 Default Order, Respondent is liable for violations of the Illinois Human Rights Act that prohibit discrimination based on sex and national origin.

4. Complainant has demonstrated that she is entitled to back pay in the total amount of \$40,000.00.

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

6. Attorney Joanne Kinoy's hourly rate of \$340.00 is reasonable.

7. The number of hours requested (8 hours) is reasonable.

8. Complainant has demonstrated that she is entitled to attorney's fees and costs in the amount of \$2,720.00.

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

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

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 1, a document prepared by Complainant that contains back pay information, 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. Ambiguities 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 Amerienviromental, Inc.**, ___ Ill. HRC Rep. ___ (2001CE1961, Feb. 23, 2004).

Complainant testified that she was a waitress for Respondent for seven (7) years. (Tr. at 10). She was terminated on January 6, 2004. (Tr. at 11). When she started working for Respondent, she was paid both by check and cash. (Tr. at 11). As of approximately two (2) years ago, Complainant was only paid in cash and did not receive checks or pay stubs. (Tr. at 12). During Complainant's last year of employment with Respondent, she worked six (6) days per week, and approximately six (6) to seven (7) hours per day. (Tr. at 12). Complainant was paid \$5.00 per hour and received \$200.00 per week in cash. (Tr. at 12-14). Complainant also earned \$120.00 per week in tips. (Tr. at 14). Thus, Complainant's total income was \$320.00 per week. (Tr. at 14). Complainant testified that she has looked for other work since being discharged, both as a waitress and as a cleaning person, and has been unsuccessful. (Tr. at 15-16).

Based on Complainant's unrefuted testimony, I recommend that Complainant be awarded back pay in the total amount of \$40,000.00 (weekly income of \$320.00 times 125 weeks from her date of termination, January 6, 2004, until the date of the public hearing, May 18, 2006.)

Attorney's Fees

As permitted by the order entered on May 18, 2006, Complainant's attorney timely submitted her fee petition on June 1, 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)**. 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)**.

In support of her fee petition, Complainant submitted an affidavit and resume of her attorney, Joanne Kinoy. Complainant also submitted the affidavit of Attorney Steve Seliger and Attorney Jennifer Soule attesting to the reasonableness of an hourly rate of \$325.00 in 2003, and from Steve Saltzman attesting to the range of \$375.00 to \$475.00 as reasonable hourly rates in 2006. Complainant's attorney is claiming an hourly rate of \$340.00 per hour. This is a reduced rate from her normal billable rate of \$400.00 per hour. Attorney Kinoy is an experienced civil rights litigator who has been practicing for over 28 years. Thus, even without Respondent's waiver of fee petition objections, this rate is reasonable, and in accordance with Commission's recent orders on attorney's fees. Complainant's attorney further lists eight (8) hours spent on Complainant's case. 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 should be awarded \$2,720.00 for attorney's fees in this matter.

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.

Reinstatement

Reinstatement is presumptively the relief sought and given in employment discrimination cases under the Illinois Human Rights Act. **Vera and Partylite Gifts, Inc.**, ___ Ill. HRC Rep. ___ (2001CF2540, Jan. 23, 2003). Complainant, however, failed to request reinstatement, and such relief is not recommended.

Cease and Desist

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 discrimination based on sex and national origin in the future. See **Magraff and Alexopolis**, ___ Ill. HRC Rep. ___ (1990CN0209, Nov. 8, 1993).

Recommendation

It is recommended that the Commission:

- (1) award Complainant back pay in the amount of \$40,000.00;
- (2) award prejudgment interest on the back pay award in accordance with the Illinois Human Rights Act and Commission's procedural rules;
- (3) order Respondent to pay Complainant's attorney's fees in the amount of \$2,720.00; and
- (4) order Respondent to cease and desist from any discrimination based upon sex and national origin in the future.

HUMAN RIGHTS COMMISSION

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

ENTERED: June 27, 2006