

**STATE OF INDIANA
CIVIL RIGHTS COMMISSION**

**DOCKET NO. EMsh02060347
EEOC NO. 24FA00264**

ROXANNE DUGGER,
Complainant,

vs.

**JIMMY JOHN'S/ CPD
VENTURES, INC.;**
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 14, 2006, Robert D. Lange, Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC"), entered his Second Proposed Findings Of Fact, Conclusions Of Law, And Order ("the second proposed decision"). On August 29, 2006, Complainant, Roxanne Dugger ("Dugger"), filed Complainant's Objections To [Second] Proposed Findings Of Fact, Conclusions Of Law, And Order

Alpha Blackburn, Chairperson of the ICRC, presided over oral argument on Dugger's Objections on October 27, 2006. Other Commissioners present were Barry Baynard, David C. Carter (the Vice-Chairperson), Tehiji Crenshaw, John E. Garcia, and Charles Gidney. Commissioner Steven A. Ramos was absent. Dugger was represented by counsel, Frederick S. Bremer, Esq., ICRC Staff Attorney. Respondent – Jimmy John's/ CPD Ventures, Inc. ("CPD" or "the restaurant") – was represented by counsel, David M. Seiter, Esq. of the Cumberland firm of STRODTMAN & SEITER. Arguments of counsel were heard and the cause was taken under advisement.



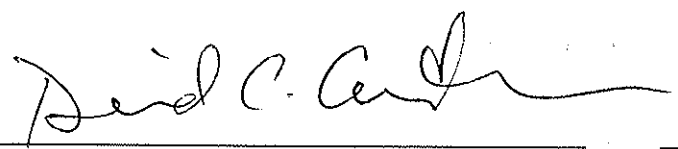

Having carefully considered the foregoing and being duly advised in the premises, the ICRC finds and rules as follows.

1. Dugger has not met the burden of an objecting party to demonstrate an error that affected the result.

IT IS, THEREFORE, ORDERED

1. Complainant's Objections To [Second] Proposed Findings Of Fact, Conclusions Of Law, And Order are **OVERRULED**.
2. The ICRC hereby adopts as its own the findings of fact, conclusions of law, and order proposed by the ALJ in the second proposed decision, a copy of which is attached hereto and incorporated by reference

INDIANA CIVIL RIGHTS COMMISSION

 _____ COMMISSIONER	 _____ COMMISSIONER
 _____ COMMISSIONER	 _____ COMMISSIONER

Dated: 27 October 2006

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

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

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FILE DATED

AUG 14 2006

Indiana State Civil Rights Commission

**SECOND 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 1, 2004. Complainant, Roxanne Dugger ("Dugger") – was present and was represented by counsel, Robin Clay, Esq., Staff Counsel with the ICRC. Respondent, Jimmy John's/ CPD Ventures, Inc. ("CPD" or "the restaurant"), was represented by counsel, Lawrence Strodman, Esq. and David M. Seiter, Esq. of the Cumberland firm of STRODTMAN & SEITER. Also present on behalf of CPD were Mary Lynk, a paralegal, and Peter Duque ("Duque"), President of CPD.

After opening statements were made, Dugger called Duque, herself, and Avery Dugger ("Avery") to testify on her behalf. During the presentation of Dugger's case, Complainant's Exhibit 1 ("CX_"), CX2, CX3, CX4, CX5, CX6, CX7, CX8, Respondent's Exhibit A ("RX_"), RXB, CX9, and RXC were admitted into evidence without objection.

After Dugger rested her case, CPD called Jason Adams ("Adams"), Jamie Howard, Bonnie Ballard, Megan Koerner, Nathaniel Cashion, Cindy Augsburger, Travis Frye, and Carol Duque ("Carol") to testify on its behalf. During the presentation of CPD's case, CX10, RXD, CX11, CX12, and CX13 were admitted into evidence without objection. Dugger's oral motion to keep the proceeding open and reconvene to take the testimony

of Dustin Harris ("Harris") was denied. Dugger elected not to present any evidence in rebuttal.

Oral closing arguments were made. The ALJ took the cause under advisement and ordered the parties to submit what they suggested that he enter as proposed findings of fact, conclusions of law, and order on or before September 20, 2004. This deadline was later extended to October 5, 2004. ORDER (September 9, 2004).

Dugger's motion to reconsider the ruling on Harris' testimony was denied. ORDER (September 9, 2004).

On October 5, 2004, CPD filed its [Suggested Proposed] Findings Of Fact, Conclusions Of Law And Judgment. Also on October 5, 2004, Dugger filed Complainant's [Suggested] Proposed Findings Of Fact, Conclusions Of Law, And Order.

On December 14, 2004, 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 first proposed decision"). On December 28, 2004, Respondent – Jimmy John's/ CPD Ventures, Inc. ("CPD" or "the restaurant") – filed its Written Objections To The "Proposed Findings Of Fact, Conclusions Of Law, And Order". On February 11, 2005, Complainant, Roxanne Dugger ("Dugger"), filed Complainant's Brief In Response To Respondent's Objections To The ALJ's Proposed Findings Of Fact, Conclusions Of Law, And Order.

After hearing oral arguments, the ICRC issued its Order in which it remanded the matter to the ALJ to consider address the following issues:

- A. How many hours per week should Complainant be deemed to have lost at CPD as a result of her termination?;
- B. How long a period of time was it reasonable for Complainant to remain unemployed after her termination? In addressing this issue, it is appropriate to consider both the maximum, and the average, time allowable for receipt of unemployment compensation in Indiana.

A Hearing was held before the ALJ to consider those issues on July 6, 2005. Dugger was present and was represented by counsel, Robin Clay, Staff Counsel with the ICRC. CPD was represented by counsel, David M. Seiter, Esq. of the Cumberland firm of STRODTMAN & SEITER. Duque was also present on behalf of CPD.

After opening statements were made, Dugger testified on her own behalf. During the presentation of Dugger's case, CX1, CX2, CX3, CX4, RXA, and RXB were admitted into evidence without objection.

After Dugger rested her case, the restaurant called David Gardner Gibson ("Gibson") and Duque. After closing arguments were heard, the parties were ordered to file what they suggest that the ALJ enter as proposed findings of fact, conclusions of law, and order.

On July 26, 2005, CPD filed its [Suggested Proposed] Findings Of Fact, Conclusions Of Law, And Judgment (*sic*). On July 27, 2005, Dugger filed Complainant's [Suggested] Proposed Findings Of Fact, Conclusions Of Law, And Order.

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

FINDINGS OF FACT

1. The issues to be resolved in this case are (1) whether Dugger was constructively discharged, or otherwise adversely affected, as a result of unlawful sexual harassment for which CPD is responsible; and (2) if so, what relief should be awarded. AMENDED FIRST PRE-HEARING ORDER ¶9 (December 24, 2003).
2. Dugger is an adult woman who has resided, at all material times, in the state of Indiana.
3. CPD is a corporation doing business in the state of Indiana, associated with a franchise operating sandwich shops. CPD is located in Mooresville, Indiana and its

owners are Duque, who acted as the manager, and his wife, Carol. CPD employed, at all relevant times, 6 or more persons for wages or salary.

4. The restaurant opened on April 19, 2002. At that time, the restaurant employed approximately 20 employees. Shifts consisted of 6 to 8 people. Most of these employees were teenagers working after school hours.

5. In late April of 2002, Dugger was hired as a sandwich maker. She worked the morning shift.

6. Avery, Dugger's brother, was also employed at the restaurant as a sandwich maker and delivery driver.

7. During the period that Dugger was employed at CPD, approximately one month, Duque and Adams, the assistant manager, engaged in a variety of conduct of a sexual nature, directed at Dugger, including sexual jokes, degrading gestures, and touching intimate body parts. This conduct is summarized below.

A. Duque grabbed Dugger's breast while in the hallway between his office and a supply shelf. She responded by hitting him in the crotch area with a bottle of cleanser. Dugger did not perceive this incident as horseplay.

B. Duque asked Dugger to come to his house to get in the hot tub, get naked and have some drinks. Carol was out of town attending a wedding. Dugger declined.

C. Duque held a cucumber in his genital area and asked Dugger "Do you want to suck it?"

D. On another occasion, Duque threatened to grab Dugger's breast. Dugger had pinched his arm after he had called her a name. Dugger began running from Duque and ended up running into a counter, bruising her arm. Dugger made it clear to Duque on this occasion, and others, that she did not want him touching her.

E. Duque and Adams constantly made sexual jokes.

F. On more than one occasion, Adams touched Dugger on her buttocks. One time, Adams had been making sexual jokes and he smacked Dugger on the buttocks and flipped her with a towel. She responded by kicking him in the crotch

area, and he laughed. Duque witnessed some of the incidents when Adams inappropriately touched Dugger, and Duque's response was always to laugh.

G. Once, Adams brought a bottle of lotion to work. He told Dugger that he wanted to put the lotion all over her body.

8. These events were all unwelcome to Dugger, and she repeatedly told Duque and Adams to stop. Neither stopped.

9. The only sexual harassment policy CPD had was the following sentence in the work rules:

The following list represents examples of conduct that may require disciplinary action. This list is not all inclusive. Other actions may result in disciplinary action as well.

...

27. Sexual harassment of co-workers or customers.

CX2.

10. Duque had previously worked as an assistant manager and manager of a Jimmy John's restaurant in Avon, Indiana. He did not receive any sexual harassment training while at Avon.

11. When Duque became a franchise owner, he attended a one week training in Illinois, but did not receive sexual harassment training there, either.

12. Similarly, Adams never received any sexual harassment training while in Mooresville.

13. Neither Duque nor Adams nor anyone else conducted sexual harassment training for employees of CPD.

14. The only procedure for reporting sexual harassment was an open door policy allowing employees to report problems directly to the manager/owner (Duque).

15. Dugger made complaints directly to Duque and Adams, with no apparent effect.

16. Dugger considered the unwelcome conduct of a sexual nature by Duque and Adams to be sufficiently severe and pervasive to be more than horseplay or isolated coarse conduct, but instead to be sexual harassment creating a hostile working environment.

17. The conduct of Dugue and Adams was sufficiently severe and pervasive that a reasonable person would have felt that it altered her working conditions.

18. On May 24, 2002, Duque yelled at Dugger for not taking the bread out of the oven. At this point, Dugger decided that she could not take the stress of working in that environment any longer.
19. While the last incident was not, in its content, related to unwelcome conduct of a sexual nature, it is clear that Dugger's stress was primarily a result of that conduct and that a reasonable person in those circumstances would have felt compelled to resign, rather than continue to endure the sexual harassment.
20. Approximately 4 days after resigning, Dugger filed a police report with the Mooresville Police Department. CX7, CX8. Avery went with her and also made a statement. *Id.* About 2 weeks after that, Dugger filed this complaint with the ICRC. CX6.
21. At the time Dugger left CPD, she was earning \$7.00 per hour. She was a part-time employee. RXA.
22. Ignoring the week during which Dugger was constructively discharged, she averaged 31.96 hours per week at the restaurant. CX4. Thus, she lost \$223.72 per week for each week that she was unemployed as a result of the constructive discharge by CPD.
23. Dugger claims that she promptly sought other employment through a temporary service and by filling out applications at other companies. While she has named two temporary services, she has produced no documentary evidence of any job applications and could not name any employers with whom she sought work.
24. CPD has shown that jobs of the type that Dugger had held were readily available in the area. It is reasonable to conclude that, with reasonable effort, Dugger could have obtained comparable employment within 13 weeks.
25. Dugger lost a total of \$2,908.36, gross, (\$223.72 per week x 13 weeks) in wages as a result of being constructively discharged by CPD. Although this period of time is both longer than suggested by CPD and shorter than that suggested by Dugger, it appears appropriate in the circumstances.
 - A. This period allows Dugger some time to recover from the emotional turmoil of the constructive discharge.
 - B. It takes into account that Dugger's most recent employment lasted about a month, which might make prospective employers wary of hiring her.

C. It is less than the maximum period (26 weeks) allowable for collecting unemployment compensation. CX1.

26. Dugger has also lost the use of the income she would have earned from CPD. Awarding interest is the way to compensate someone for the loss of use of money to which the person was entitled. Calculated as simple interest at the rate of 8%, compounded annually, Dugger is entitled to interest, up to the date of the Hearing, in the amount of \$791.20, calculated as follows:

2002	$\$2,908.36 \times .08 \times 31/52$ (31 weeks)	\$138.71
2003	$\$3,047.07 \times .08$	243.77
2004	$\$3,290.84 \times .08$	263.27
2005	$\$3,554.11 \times .08 \times 26.6/52$ (26.6 weeks)	<u>145.45</u>
TOTAL		\$791.20

27. 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. Dugger and CPD 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. CPD is an "employer". IC 22-9-1-3(h),(i).
4. What constitutes an unlawful discriminatory practice is set out in the following subsection of the ICRL:

- (l) "Discriminatory practice" means:
 - (1) the exclusion of a person from 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).

5. 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).
6. Sexual harassment is a form of sex discrimination prohibited by Title VII. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 40 FEP Cases 1822 (1986). So too is sexual harassment a form of sex discrimination prohibited by the ICRL.
7. This is not a case of sexual harassment of the *quid pro quo* variety where some benefit, or the lack of some detriment, is promised in return for sexual favors. Instead, what is claimed is sexual harassment of the hostile environment variety.
8. For sexual harassment of the hostile environment variety to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Meritor*.
9. To be actionable, the conduct must adversely affect the work performance and well-being of both the particular plaintiff and a reasonable person. *Saxton v. American Telephone & Telegraph*, 10 F.3d 526, 63 FEP Cases 625 (7th Cir. 1993), *Brooms v. Regal Tube Co.*, 881 F.2d 412, 50 FEP Cases 1499 (7th Cir. 1989).
10. Circumstances to be considered in assessing whether the environment was hostile include "the frequency of the discriminatory conduct, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 63 FEP Cases 225, 228 (1993).
11. Dugger has proven by a preponderance of the evidence that she was the victim of unlawful sexual harassment.
12. Subjecting an employee to a hostile environment based upon sexual harassment to the point of requiring that employee to resign to avoid the hostile environment excludes that employee from equal opportunities because of sex and is a discriminatory practice under section 3(l) of the ICRL. Because there is no applicable exemption for such a practice, it was unlawful. IC 22-9-1-3(l).
13. CPD committed an unlawful discriminatory practice against Dugger.

14. Section 6(k) of the ICRL governs the ICRC's authority upon the finding of an unlawful discriminatory practice and provides that, among its powers and duties, the ICRC

... shall state its findings of fact after a hearing and, if the commission finds the person has engaged in an unlawful discriminatory practice, shall cause to be served on this person an order requiring the person to cease and desist from the unlawful discriminatory practice and requiring the person to take further affirmative action as will effectuate the purposes of his chapter, including but not limited to the power:

(A) 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(k).

15. Dugger has proven out of pocket losses that were the proximate result of the proven unlawful discriminatory practices.

16. The loss of the use of wages is a part of the loss that a discriminatee incurs when the wages are lost. Thus, the awarding of interest to compensate for the loss of the ability of the victim to use the wages wrongfully denied is within the authority of the ICRC.

17. Interest should be awarded at an annual rate of 8%, compounded annually. This is the rate provided for in IC 24-4.6-1-103, a statute that is appropriate to consult in the absence of a more specifically applicable statute. *Indiana Insurance Company v. Sentry Insurance Company* 437 N.E.2d 1381 (Ind. App. 1982).

18. 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). CPD has met its burden of showing that there is a reasonable chance that the complainant might have found a comparable position. *Sheehan v. Donlen Corporation*, 173 F.3d 1039, 79 FEP Cases 540 (7th Cir. 1999).

19. 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).

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

ORDER

1. CPD shall cease and desist from subjecting employees to a hostile environment because of sexual harassment.
2. CPD shall deliver to the ICRC one or more cashier's checks payable to the ICRC, as escrow agent for Dugger, in amounts totaling \$3,699.56. Of this total, \$2,908.36 shall be subject to deductions required by law and/or agreement.
3. The proprietor of CPD and supervisory personnel shall attend a professionally developed seminar approved by the ICRC's Executive Director addressing the recognition, elimination, and treatment of unlawful sexual harassment. CPD shall obtain the Executive Director's approval of the seminar no later than 180 days after the effective date of this Order and shall have attended the seminar no later than 300 days after the effective date of this order. Proof of attendance shall be filed with the ICRC.
4. CPD shall post and maintain, on bulletin boards normally used to disseminate employee information, a bold print statement of policy on non-discrimination. Such statement shall include the following:

It is the policy of Jimmy John's/ CPD Ventures, Inc. to provide equal employment opportunity to all individuals regardless of race, religion, color, sex, disability, national origin or ancestry. This equal employment opportunity refers to all applicable company practices, including employee recruiting, hiring, transferring, training, promoting, disciplining, terminating, and all other conditions or privileges of employment.

The selection of persons for positions at Jimmy John's/ CPD Ventures, Inc is to be based on the qualifications and abilities required in the job.

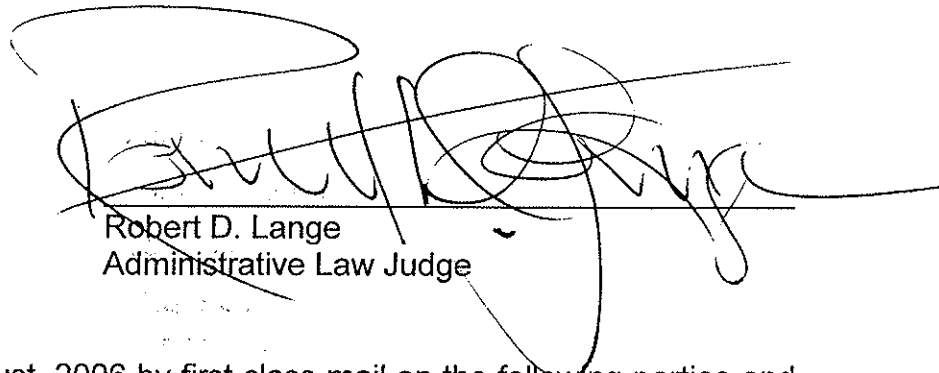
Further, it is the policy of Jimmy John's/ CPD Ventures, Inc to expand and increase efforts of the company to promote the realization of equal employment opportunity through a positive and continuing program.
5. CPD shall notify, in writing, all supervisory personnel and departmental managers of the policy set out in paragraph 4 of this Order. This Notice shall make it clear to the supervisory personnel and departmental managers that any deviation from these policies

and procedures will be cause for disciplinary action, up to and including possible discharge.

6. CPD shall report, in writing, to ICRC, when the undertakings outlined in paragraph numbers 3 through 5 of this Order have been accomplished. The report will describe the manner in which the undertakings were carried out, and include copies of the documents required by this Order. This report shall be submitted not later than December 29, 2005.

7. 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 under 4-21.5-3-31(b), or stayed by a court of competent jurisdiction.

Dated: 14 August 2006



Robert D. Lange
Administrative Law Judge

To be served this 14th day of August, 2006 by first class mail on the following parties and attorneys of record:

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