

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building, Third Floor
Des Moines, Iowa 50319

IOWA CIVIL RIGHTS COMMISSION)
)
v.) DIA No. 18ICRC0001
)
FRATERNAL ORDER OF EAGLES)
MANCHESTER AERIE NO. 3538 and)
ROBIN KEMPF,) **PROPOSED DECISION**
 Respondents.)

This case involves a complaint filed by Complainant Jennifer Banks with the Iowa Civil Rights Commission (the Commission) against Respondents Fraternal Order of Eagles Manchester Aerie No. 3538 and Robin Kempf. After an investigation, the Commission determined that probable cause existed with regard to Complainant's allegations that Respondent¹ discriminated against her in the area of employment based on race and sex and that Kempf retaliated against her. On August 1, 2017, the Commission filed a Statement of Charges and transferred the matter to the Department of Inspections and Appeals for a contested case hearing.

Hearing in this matter was held on December 7, 2017. Assistant attorney general Katie Fiala represented the Commission. Respondent was represented by Michael Noll, secretary. Kempf appeared and was self-represented. The following witnesses testified: Jennifer Banks; Debra Reth; Debra Stewart; Michael Noll; and Robin Kempf. Commission Exhibits 1 through 21 were admitted as evidence.

On December 6, 2017, the Commission filed a Motion to Amend Witness List of the Iowa Civil Rights Commission. The amended witness list included one additional witness, Tashawn Chazis. At hearing, the Commission represented that it did not intend to call Chazis. As the motion was moot, no ruling was made.

Arrangements were made at hearing to hold the record open until December 21, 2017 in order for the parties to submit post-hearing briefs if they wished to do so. The Commission timely submitted a post-hearing brief.

¹ All references to Respondent in this Proposed Decision refer to Fraternal Order of Eagles Manchester Aerie No. 3538. Respondent Robin Kempf will be referred to by last name.

FINDINGS OF FACT

Background

Respondent is a membership organization located in Manchester, Iowa that operates a bar and restaurant open to members and non-members. During the time period relevant to this contested case, Respondent employed more than four employees. As of August 2015, Respondent had approximately seven employees. (Stewart testimony; Exh. 4, 13).

Jennifer Banks, an African American woman, moved from Houston, Texas to Manchester, Iowa in December 2014. Banks did not know anyone in Manchester when she moved there. Upon arrival, she began looking for jobs. (Banks testimony).

Banks' first introduction to Respondent's bar and restaurant was through a friend and neighbor, Debra Reth, who was a member. Banks was at Respondent's bar with Reth and asked one of the bartenders, Pandora Ingles, for an application. Banks submitted the application the following day, on approximately August 19, 2015. (Banks testimony).

At the time she asked for the application, another patron who was present, Kempf, told her that he would not bother submitting the application. Kempf was a member of Respondent and held the position of inside guard, a one-year elected position.² Kempf told Banks that he did not think that Respondent would hire "any black people." Banks asked Kempf why he thought this, and he responded that he believed they were racist. (Banks testimony).

Job Posting and Selection Process

In September 2015, Respondent advertised to fill a 14 to 20 hour per week bartender position. Respondent was looking for someone to bartend Saturday nights, Sunday nights, and possibly Tuesday nights.

When Banks saw that Respondent was looking to hire a bartender, she called to check on the status of her application and spoke with Cory Davis, the bar manager. Davis told Banks that other applicants with better qualifications had been chosen for interviews. Banks was upset about her conversation with Davis and told her friend Reth what had happened. Reth then contacted a friend of hers who is the wife of Michael Noll, the secretary for Respondent,³ about the situation. Noll called Banks later that day to ask her to come in for an interview. Prior to Reth's call to Noll's wife, Noll had attempted to

² The inside guard is responsible for monitoring the door during membership meetings and checking membership cards in order for members to enter the meeting. (Noll testimony).

³ As secretary, Noll is also classified as a trustee under the club's bylaws. (Noll testimony).

call Banks to set up an interview, but he was not able to reach her at either of the numbers she provided on her application. (Banks, Noll testimony).

Banks interviewed for the bartender job on September 18 or 19, 2015. Her interview was with Noll, Davis, and Gary Miller, another trustee of Respondent. Among other questions, Banks was asked about her experience and how she would handle drunk patrons in the bar. (Banks, Noll testimony).

On Banks' job application for Respondent, she listed two prior employers: the Time Out Lounge in Houston, Texas; and the Hilton Hotel in Houston, Texas. Banks was employed at the Time Out Lounge as a bartender from 2007 to 2015 and at the Hilton Hotel as a receptionist from 2000 to 2007. Banks was laid off from her job at the hotel when it closed and she left her job at the Time Out Lounge to move to Iowa. Regarding special qualifications for the job, Banks wrote, "I have 20 years of customer service exp[.] I[']m a peoples [sic] person[.] I enjoy making people smile and lift them up when there [sic] down. I also have bartending exp 12 years I[']m a team leader and always on time." At the time of her application, Banks had significant customer service experience. Additionally, she had experience during her prior employment as a bartender dealing with rowdy and intoxicated patrons. (Exh. 7; Banks testimony).

According to Noll, Respondent's trustees wanted to hire a male bartender because of problems that Respondent had been having with crowd control. Noll testified at hearing that they needed someone with a "deeper, stronger voice." Miller strongly asserted during the hiring process that they needed a "male presence" in the bar. Noll acknowledged at hearing that Ingles, a female who bartended at night, handled crowd control well. (Noll testimony).

The trustees, including Noll and Miller, met to discuss the applicants. Noll did not check anyone's references. Noll felt that Banks was qualified as far as he could tell. The other trustees deferred to Noll and Miller with regard to hiring for the bartender position since they conducted the interviews. While Davis was involved with the interview process as the bar manager, he did not have much say in the final hiring decision. Initially, Noll and Miller decided upon a male candidate who they later learned did not have legal authorization to work in the United States. Their second choice, who they ended up hiring, was Tim Olson, a white male. (Noll testimony).

On his job application, Olson listed as employment experience four years in the United States Marine Corps, ending in 2013, one year as a line operator at a manufacturing plant, and current employment as a self-employed roofing contractor. Olson noted that he was "let go" from his position at the manufacturing plant. In answer to a question about any special qualifications for the job, Olson responded, "good at dealing with drunk individuals." (Exh. 5).

After the interview, Noll told Banks that they would contact her within approximately three days. Banks did not hear within the three days and continued going in every other day and asking about the hiring decision for approximately two weeks. Banks ultimately learned that she did not get the job when she went into the bar to have lunch. She saw Davis at the bar and he told her that they had hired Olson. Banks was aware that Olson had no bartending experience and she asked Davis why he got the job. Davis told Banks that Olson would be a better fit because he was a man and could handle drunk patrons. (Banks testimony).

At some point after Davis told her she did not get the job, Banks ran into Kempf again at the bar. While they were outside smoking, Kempf told Banks that Respondent would not hire her because they do not want black people working in the bar. Banks recorded this conversation on her phone without Kempf's knowledge. (Banks testimony).

Civil Rights Commission Complaint

On or about October 15, 2016, Banks filed a complaint with the Commission alleging that Respondent discriminated against her on the basis of race. The complaint was subsequently amended to add an allegation of sex discrimination against Respondent and an allegation of retaliation against Kempf. (Exh. 1-3).

During the Commission's investigation of Banks' race discrimination complaint, Noll, Davis, and Miller all cited sex as the reason that Banks was not hired. Noll indicated in response to a question about why Banks was not hired, "We felt better hiring a man because we were having problems with fighting." (Stewart testimony; Exh. 14).

Events after Complaint was Filed

As Respondent's secretary, Noll was responsible for handling incoming mail. He received a copy of the complaint that the Commission mailed to Respondent. Noll read the complaint aloud at a subsequent membership meeting. Kempf was present at the meeting. In the complaint, Banks recounted a conversation with Kempf in which she alleged that Kempf told her that Respondent would never hire any black people to work at the club and that he had heard many people using racial slurs around the club. After Noll read the complaint at the membership meetings, several members expressed that they wanted to bar Banks from the club. Kempf was not one of the members calling for Banks to be barred from the club. Noll informed the members that this would be retaliation. Banks was not barred from the club. (Noll testimony; Exh. 1).

Banks went back to Respondent's bar in December 2015, after filing her complaint, with Reth and another friend. During that trip, Kempf approached Banks and was very upset that she had tape recorded the conversation in which he told her that she was not hired because she was black and because Respondent's members were racist. Kempf called Banks a "black bitch" and "fucking cunt" and told her that he knew where she lived.

Ingles, who was tending bar that night, ejected Kempf from the bar. (Banks, Reth testimony).

Damages

The starting wage for the bartender position Banks applied for was \$7 per hour, with the possibility of up to \$7.50 per hour with bonuses. Ingles, who worked as a bartender Wednesday through Sunday nights, reported that she also earned approximately \$50 in tips each weekend night and \$10 to \$20 in tips each weekday night. (Stewart testimony).

After Respondent did not hire her for the bartender position, Banks felt disrespected and hurt. She believed she was qualified for the job based on her previous bartending and customer service experience. She was depressed and experienced a loss of confidence. After the incident with Kempf in December, Banks testified that she was scared for her life and barricaded her door at night. She did not feel comfortable leaving her building. (Banks testimony).

Banks continued to try to find work in Manchester, but she believes no one would hire her because of this incident. She applied at gas stations, a grocery store, Dollar General Store, and the hospital. She was offered a job at Walmart in early September 2016, but did not accept as she had already made plans to relocate to Indianapolis. Banks did not feel safe in Manchester and wanted to start over in a bigger city with family around. She moved from Manchester to Indianapolis on September 12, 2016. (Banks testimony).

CONCLUSIONS OF LAW

A. Sex Discrimination

Under the Iowa Civil Rights Act of 1965 (“ICRA”),

1. It shall be an unfair or discriminatory practice for any:
 - a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability of such applicant or employee, unless based upon the nature of the occupation.⁴

While Iowa courts and this tribunal are not bound by federal cases construing federal discrimination statutes when interpreting and applying the ICRA, the Iowa Supreme

⁴ Iowa Code § 216.6(1).

Court has recognized that the ICRA only establishes a general proscription against discrimination, therefore the Court has looked at times to corresponding federal statutes as a guide in applying the state Act.⁵

As an initial matter, it is important to note that while the Statement of Charges in this case alleged that Banks' sex *and* race were motivating factors in Respondent's decision not to hire her, the Commission has not set forth any argument that Respondent's failure to hire Banks was based on her race in its post-hearing brief. Likewise, the evidence does not support a conclusion that Respondent failed to hire Banks because of her race.

The Commission can establish a claim of intentional discrimination through either direct or indirect evidence. Direct evidence may include remarks by a decisionmaker that show a specific link between a discriminatory bias and the adverse employment action, sufficient to support a finding that the bias motivated the action.⁶

In this case, the two individuals who were primarily tasked with the hiring decision, Noll and Miller, both expressed that they did not hire Banks, despite her experience, because the trustees wanted to hire a male bartender due to recent concerns regarding crowd control. This is direct evidence of discrimination; the decisionmakers explicitly stated that they intended to and did hire a man and discounted the application of Banks because she was not a man.

An employer may discriminate on the basis of sex only where sex is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business. The bona fide occupational qualification defense requires an employer to show objective, verifiable requirements that concern job-related skills.⁷ Respondent did not provide any specific evidence of crowd control issues that had occurred at the bar or any evidence regarding the reasons for the trustees' belief that a male bartender would be better able to handle these issues than a female bartender. While Noll testified that Respondent needed someone with a "deeper, stronger voice" he acknowledged at hearing that the female bartender who worked Wednesday through Sunday nights handled crowd control well. Under these circumstances, Respondent has not shown that sex was a bona fide occupational qualification for the bartending position. The Commission has proven that Respondent committed an unfair or discriminatory practice in refusing to hire Banks because of her sex.

⁵ *Goodpaster v. Schwan's Home Service, Inc.*, 849 N.W.2d 1, 9 (Iowa 2014) (citing *Casey's General Stores v. Blackford*, 661 N.W.2d 515, 519 (Iowa 2003) and *Loras College v. Iowa Civil Rights Comm'n*, 285 N.W.2d 148, 147 (Iowa 1979)); see also *Vivian v. Madison*, 601 N.W. 2d 872, 873 (Iowa 1999).

⁶ *Doucette v. Morrison County, Minn.*, 763 F.3d 978, 985-86 (8th Cir. 2014).

⁷ *International Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201-02 (1991).

B. Retaliation

The ICRA also prohibits retaliation under certain circumstances:

It shall be an unfair or discriminatory practice for:

...

2. Any person to discriminate or retaliate against another person *in any of the rights protected against discrimination by this chapter* because such person has lawfully opposed any practice forbidden under this chapter, obeys the provisions of this chapter, or has filed a complaint, testified, or assisted in any proceeding under this chapter.⁸

The Commission argues that the statements Kempf made after Banks filed her employment discrimination complaint with the Commission constitute prohibited retaliation and are actionable under ICRA. While the statements that Kempf made were certainly offensive to Banks, as they would have been to any reasonable person, and resulted in her feeling threatened, the ICRA does not establish a general civility code for personal interactions. The undersigned is unaware of any case law, and the Commission has not cited any, that permits such an expansive reading of the ICRA. The ICRA prohibits retaliation only with regard to the rights protected under Iowa Code Chapter 216; those rights include employment, housing, public accommodation, education, and consumer credit transactions.⁹ None of these areas was implicated in Kempf's interaction with Banks; there was no materially adverse action related to the rights protected by the ICRA.¹⁰ The Commission has not proven that Kempf's statements constituted retaliation under the ICRA.

C. Damages

Under the ICRA, a respondent who is found to have engaged in a discriminatory or unfair practice shall be ordered to cease and desist from the discriminatory or unfair practice and to take necessary remedial action. Remedial action includes, but is not limited to, payment to the complainant of damages for an injury caused by the discriminatory practice, including actual damages, court costs, and reasonable attorney fees.¹¹ In this case, the Commission seeks damages for Complainant's lost wages and emotional distress, as well as an order that Respondent undergo training on the anti-discrimination provisions of the ICRA for employers.

⁸ Iowa Code § 216.11 (emphasis added).

⁹ See Iowa Code §§ 216.6, 216.6A, 216.7, 216.8, 216.8A, 216.9, 216.10, 216.11, 216.11A.

¹⁰ To the extent that Banks perceived Kempf's statements as threatening, she was not without recourse. She could have made a complaint to police regarding Kempf's actions. The record does not indicate whether Banks did so.

¹¹ Iowa Code § 216.15(9).

1. Lost Wages

The Commission seeks an award of \$12,740 for lost wages for Banks. Actual damages under the ICRA include damages for lost wages.¹²

The Commission requests that lost wages be calculated from October 1, 2015 through September 12, 2016, or approximately 49 weeks. In calculating the damages request for lost wages, the Commission used the \$7.00 per hour starting wage multiplied by 20 hours per week, which was the stated maximum amount of hours that the position entailed per week, to arrive at a weekly salary of \$140. In addition, the Commission calculated lost tips at \$120 per week: \$50 per weekend night, for a total of \$100 per week, and \$20 per weekday night. Over 49 weeks, this equals \$12,740. The Commission's calculations are supported by the evidence in the record. Respondent did not submit any evidence to refute the Commission's evidence regarding wages or tips for the position at issue, nor did it raise the issue of mitigation of damages or present any evidence regarding mitigation. Under these circumstances, an award of \$12,740 in lost wages is appropriate.

2. Emotional Distress

The Commission seeks an award for damages in the amount of \$20,000 for emotional distress suffered by Banks. The Iowa Supreme Court has recognized that emotional distress damages are allowed under the ICRA.¹³ An award of emotional distress damages is appropriate even without a showing of physical injury, severe distress, or outrageous conduct.¹⁴ The Iowa Supreme Court has held that the adequacy of the award in a particular case depends upon the unique facts of the case.¹⁵

In *City of Hampton v. Iowa Civil Rights Commission*,¹⁶ the Iowa Supreme Court found that the Commission abused its discretion in making an award of \$50,000 for emotional distress in a case where there was a "relatively small amount of evidence supporting the award and [a] total lack of any medical or psychiatric evidence to support it." In that case, the Court reduced the damages for emotional distress to \$20,000. The Court also catalogued other cases in which emotional distress damages ranging from \$5,000 to \$15,000 had been approved under the ICRA.¹⁷

¹² See, e.g., *Hamer v. Iowa Civil Rights Com'n*, 472 N.W.2d 259, 265 (Iowa 1991).

¹³ *Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Commission*, 394 N.W.2d 375, 383 (Iowa 1986).

¹⁴ *City of Hampton v. Iowa Civil Rights Commission*, 554 N.W.2d 532, 537 (Iowa 1996) (citing *Hy-Vee Food Stores, Inc., v. Iowa Civil Rights Commission*, 453 N.W.2d 512, 526 (Iowa 1990)).

¹⁵ *Lynch v. City of Des Moines*, 454 N.W.2d 827, 836-37 (Iowa 1990) (internal citations omitted).

¹⁶ 554 N.W.2d 532, 537 (Iowa 1996).

¹⁷ *Id.*

In this case, the only testimony regarding emotional distress came from Banks herself and it was limited. It is also important to note that much of the distress that Banks identified came not from the fact that Respondent did not hire her, but rather from the threats and offensive conduct that Kempf directed toward her. As discussed above, Kempf's conduct did not violate the ICRA, therefore the impact of this conduct on Banks cannot be considered in determining any emotional distress award. After carefully considering the evidence, the testimony Banks offered regarding feeling unsafe and threatened related directly to Kempf's conduct and not to Respondent's decision not to hire her as a bartender. The feelings Banks identified as a result of the failure to hire were depression and loss of self-confidence. Under these circumstances, Banks is entitled to an award for emotional distress damages in the amount of \$2,500.

3. Training

Finally, the Commission seeks an order requiring Respondent to undergo training on the anti-discrimination provisions of the ICRA for employers. Specifically, the Commission requests that Respondent's trustees and any supervisory staff participate in two hours of anti-discrimination training approved by the EEOC or the Commission.

The ICRA provides that the Commission may require Respondent to take necessary remedial action to carry out the purposes of the ICRA. The evidence in this case demonstrates that Respondent, including its trustees and supervisory staff, blatantly disregarded the ICRA in hiring for a bartender in September 2015. It is not entirely clear from the evidence in the case whether the violation of the ICRA was based upon ignorance of the law or a deliberate disregard for it, but either way the anti-discrimination training that the Commission seeks is a remedy that will further the purposes of the ICRA and promote future compliance by Respondent in its relationships with employees and job applicants.

ORDER

The Commission has proven that Respondent Fraternal Order of Eagles Manchester Aerie No. 3538 committed an unfair and discriminatory employment practice with regard to Complainant Jennifer Banks. Respondent is ordered to pay \$12,740 to Banks as compensation for lost wages. Respondent is further ordered to pay \$2,500 as compensation for emotional distress. Respondent shall also arrange for all of its trustees and its supervisory employees to participate in two hours of anti-discrimination training approved by the EEOC or the Commission. Respondent shall submit proof of completion of training to the Commission within 90 days of the date of this decision. If Respondent has questions about finding training that will meet this requirement, such questions may be directed to the Commission.

The Commission has not proven that Respondent Robin Kempf engaged in retaliation under the ICRA. All proceedings with regard to Kempf are dismissed.

Dated this 23rd day of March, 2018.



Laura E. Lockard
Administrative Law Judge

cc: Katie Fiala, AG
Fraternal Order of Eagles Manchester Aerie No. 3538 c/o Mike Noll
Robin Kempf

NOTICE

Any adversely affected party may appeal this proposed decision to the Iowa Civil Rights Commission within 30 days of the date of the decision.¹⁸ The appeal must be signed by the appealing party or a representative of that party and contain a certificate of service. In addition, the appeal shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.¹⁹

The Commission may also initiate review of a proposed decision on its own motion at any time within 60 days following the issuance of the decision.²⁰

¹⁸ 161 IAC 4.23(1).
¹⁹ 161 IAC 4.23(3).
²⁰ 161 IAC 4.23(2).