

**STATE OF INDIANA
CIVIL RIGHTS COMMISSION**

**DOCKET NO. EMha04050231
EEOC NO. 24FA400212**

PHILLIP L. BRITT,
Complainant,

vs.

**CAPITAL ATHLETIC
VENTURES, INC. d/b/a
CLUB INDIANAPOLIS,**
Respondent.

FILE DATED

FEB 27 2009

Indiana State Civil Rights Commission

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On January 30, 2009, 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: 27 February 2009

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

Phillip L. Britt
1238 Cottage Avenue
Indianapolis, IN 46203

Capitol Athletic Ventures, Inc. d/b/a Club Indianapolis
c/o Chief Executive Officer
620 North Capitol Avenue
Indianapolis, IN 46204

McCROSSON & ASSOCIATES, P.C.
BY: Dennis F. McCrosson, Esq.
Attorneys for Respondent Capitol Athletic Ventures, Inc. d/b/a Club Indianapolis
6125 U.S. Highway 31 South
Indianapolis, IN 46227

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

Joshua S. Brewster, Esq.; Staff Counsel
Indiana Civil Rights Commission
Attorney for Complainant Phillip L. Britt
Indiana Government Center North
100 North Senate Avenue, Room N103
Indianapolis, IN 46204-2255

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FILE DATED

JAN 30 2009

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 May 3, 2007. Complainant, Phillip L. Britt ("Britt"), was present and was represented by counsel, Joshua S. Brewster, Esq.; Staff Attorney with the ICRC. Respondent – Capital Athletic Ventures, Inc. d/b/a Club Indianapolis ("CAVI" or "the club") - was represented by counsel, Dennis F. McCrosson, Esq. and Jeffrey A. Hunt, Esq. of the Indianapolis firm of McCROSSON & ASSOCIATES, P.C.

After opening statements were made, Britt testified on his behalf. During the presentation of Britt's case, Respondent's Exhibit 1 ("RX__"), RX2, RX3, RX4, RX5, and Complainant's Exhibit A ("CX__") were admitted into evidence without objection and RX6 was admitted into evidence over objection. CAVI's motion for a directed verdict was denied and the club elected to present evidence. The club called William L. Weinke ("Weinke"), Aaron Hunt ("Hunt") and Britt. During the presentation of CAVI's case, RX7, RX8, RX9, and CXB were admitted into evidence without objection.

After the Hearing was completed, it was discovered that the audio tape that had been used to record the testimony of Britt (when called by Britt) and the first portion of Weinke's testimony was inaudible. Efforts to enhance the tape so that it would be audible proved unsuccessful. The parties stipulated that the record would consist of the transcript, various discovery materials, and the exhibits. SCHEDULING ORDER AND ORDER ON ADMITTED EVIDENCE (April 16, 2008). In accordance with the schedule set in that order, Britt filed Complainant's Recommended [Proposed] Findings Of Fact, Conclusions Of Law, And Order and his Brief In Support Of Complainant's Recommended [Proposed] Findings Of Fact, Conclusions Of Law, And Order on May 12, 2008 . Also on May 12, 2008, CAVI filed Respondent's [Recommended] 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 the ICRC enter the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The issues identified are (1) whether the reason for Britt's termination had to do with disability and, (2) if so, what relief should be awarded. FIRST PRE-HEARING ORDER ¶9 (July 13, 2006); SECOND PRE-HEARING ORDER ¶11 (March 15, 2007).
2. Britt has been, at all material times, an adult male who is HIV positive. Britt was employed by CAVI as an "employee helper" beginning on April 1, 2003. Britt was interviewed by Hunt, and disclosed that he was HIV positive in that interview. His duties included running the desk, doing laundry, and cleaning rooms used by customers. Britt was a part-time employee, since he received disability benefits and had an income ceiling. Britt normally worked the 4 to midnight shift, 2 or 3 days per week.
3. Britt's condition had substantial effects, requiring a battery of medications and, sometimes, hospitalization for treatment of migraine headaches; however, he was able to

perform his duties in an exemplary manner. Weinke even referred to his performance as "perfect".

4. Soon after his hiring, Britt signed a document entitled "Nature of the Employment Relationship" that stated, in material part, as follows:

Set forth below is a list of the Company's policies and practices (in no particular order) which are most often the cause of discipline and/or discharge. This list is not all-inclusive nor does it alter your "at will" employment with the company. The Company retains its right to discipline or discharge any employee at any time for any reason it deems advisable.

...

6. Use of profanity and/or rudeness towards customers or other employees ...
RX3, RX4.

5. Britt's supervisor was Hunt, the manager. In Hunt's absence, Britt's supervisor was Weinke, the assistant manager.

6. In July of 2003, Britt was granted a brief medical leave. He was instructed to contact Hunt when he was able to return to work. When he was ready, Britt contacted Hunt, and returned to work without incident.

7. Britt's work performance at CAVI was considered excellent by both Hunt and Weinke.

8. On Tuesday, December 2, 2003, Britt advised Hunt that he needed time off because he was not feeling well and had medical appointments scheduled.

9. Hunt allowed Britt the requested time off and advised him to call when he was ready to return to work.

10. Hunt made the schedule for the following week, which did not include Britt, on Wednesday, December 3, 2003. He posted it that same day. This was the normal procedure for making and posting the schedule.

11. On Saturday, December 6, 2003, Britt called the club. After being advised that he was not on the schedule, his call was transferred to Weinke. Britt had assumed that he would be on the schedule and, as a result, thought he might have been terminated. Britt was angry and asked Weinke what was going on and why he was not scheduled. Weinke did not know why the schedule did not include Britt and had not been advised that Britt

was terminated. As a result, Weinke could not answer Britt's questions. Britt did use profanity during this call but it was directed at the situation and not at Weinke or anyone in particular. Britt told Weinke that, if he was terminated, that he would sue the club.

12. Weinke considered the law suit threat to be serious and reported it to Hunt. He reported that Britt was agitated but does not remember whether he reported the use of profanity.

13. After the conversation with Weinke, Britt attempted on several occasions to reach Hunt by telephone. He was not successful until Friday, December 12, 2003. During this conversation, too, Britt was agitated and did use some profanity. More critically, in the context of this proceeding, Hunt told Britt he was terminated, stating that he was too sickly to work there.

14. The club has asserted that the reason that Britt was terminated was his use of profanity and abusiveness in the telephone conversations with Weinke and Hunt and in other telephone conversations with other employees in the time when Britt was trying to reach Hunt.

~~15. The reason asserted is, on this record, unworthy of credence for various reasons.~~

A. At one point, the club set forth a sequence of events in which Hunt and Weinke met, shortly after the Britt-Weinke call, and it was decided that Britt would be terminated because of his profanity and abusiveness. Yet, Weinke does not remember such a meeting and did not learn of any reason for Britt's termination until a few months before his deposition (in October of 2006). At the Hearing, Hunt testified that it had not been definitively decided that Britt would be terminated until the call on December 12 involving Britt and Hunt. The club has thus changed what it says happened, casting serious doubt, in these circumstances, on the credibility of its asserted reason for Britt's discharge.

B. It is clear that Britt thought he'd been terminated by the time that he talked to Weinke and that that was why Britt was so angry. His agitation is surely understandable even if he might have dealt with the situation more calmly.

C. It is not, of course, inherently unbelievable that a person would be fired for,

essentially, cussing out the boss. A person fired for that reason is unlikely to be told "you're too sickly to work here".

16. Britt was replaced by a person with no known or apparent disability.
17. CAVI terminated Britt because of his disability.
18. At the time of his termination, Britt was earning \$9.25 per hour and working 2 or 3 days per week.
19. Britt has not looked for work since his termination.
20. It is reasonable to conclude that if Britt had made reasonable efforts to find comparable employment, he would have found comparable employment by the beginning of 2005. This might have been sooner but it must be noted that Britt had just been terminated from his job and that factor would surely deter some potential employers.
21. Had he not been terminated by CAVI, Britt would have earned a total of \$10,175.00, gross, through January 1, 2005. This is calculated as follows:

\$9.25 per hour
X 20 hours per week
\$185.00 per week
X 55 weeks
\$10,175.00

22. Britt has also lost the use of the income he would have earned from the club. 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, Britt is entitled to interest, up to the date of the Hearing, in the amount of \$3,058.33, calculated as follows:

2003	\$10,175.00 x .08 x 3/52 (3 weeks)	\$	46.97
2004	\$10,221.97 x .08		817.76
2005	\$11,039.73 x .08		883.18
2006	\$11,922.91 x .08		953.83
2007	\$12,876.74 x .08 x 18/52 (18 weeks)		356.59
TOTAL			\$3,058.33

23. Throughout Britt's employment, CAVI employed 12 to 14 persons.

24. 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. Britt and CAVI 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. CAVI 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:

“Discriminatory practice” means:
the exclusion of a person from equal opportunities because of ...
disability ... ;

...

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.* 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. Section 3(r) of the ICRL provides, in material part, as follows:
“Disabled” or “disability” means the physical or mental condition of a person that constitutes a substantial disability. In reference to employment, under this chapter, “disabled or disability” also means the physical or mental condition of a person that constitutes a substantial disability unrelated to the person’s ability to engage in a particular occupation.
IC 22-9-1-3(r).
7. Britt’s condition is a substantial disability unrelated to his ability to engage in the occupation for which he was employed at CAVI.

8. A discrimination case can be proven by the "direct method" if a complainant proves by a preponderance of the evidence that an adverse action was taken because of a prohibited characteristic, such as disability. *Rogers v. City of Chicago*, 320 F.3d 748, 91 FEP Cases 273 (7th Cir. 2003). Britt has met this burden.

9. CAVI did not prove that it would have made the same decision absent consideration of Britt's disability.

10. Alternatively, in a case where there is no direct evidence that the adverse action was taken for a prohibited reason, the order and allocation of proof is governed by the three stage process first set out in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973). That formulation requires that the complainant make a *prima facie* case of unlawful discrimination, thereby creating a mandatory, but rebuttable, presumption of unlawful discrimination. The respondent may rebut that presumption by introducing evidence of (not proving) a legitimate business reason for the adverse action. The complainant may then prove by a preponderance of the evidence that the asserted reason is a pretext for unlawful discrimination.

11. ~~Britt met his burden of establishing a *prima facie* case by showing that (1) he was a member of a protected class; (2) he was meeting the employer's legitimate performance expectations; (3) he suffered an adverse employment action; and; (4) he was replaced by someone who was not disabled.~~

12. CAVI introduced evidence of a legitimate nondiscriminatory reason for discharging Britt, that being the use of abusive and profane language toward his supervisors.

13. Britt proved that the asserted reason for her termination was a pretext for discrimination because of disability by proving that the asserted reason was unworthy of credence. That is not to say that the reason was insufficient but to say that it was not the reason for the termination.

14. CAVI terminated Britt because of disability.

15. CAVI's termination of Britt was a "discriminatory practice" as that term is defined in section 3(l) of the ICRL. Because there is no applicable exemption in the ICRL for such a practice, it was unlawful.

16. Section 6(k) of the ICRL governs 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).

17 Britt has proven out of pocket losses that were the proximate result of the proven unlawful discriminatory practice.

18. 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.

19. 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).

20. 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).

21. 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).

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

ORDER

1. CAVI shall cease and desist from excluding employees from equal opportunity for employment because of disability.
2. CAVI shall deliver to the ICRC a check payable to Britt, in the amount of \$13,233.91, minus taxes and other deductions required by law and/or agreement. Of this amount, only \$10,175.00 shall be subject to deductions.
3. All supervisory or management employees of CAVI shall attend a professionally developed seminar approved by the ICRC's Executive Director addressing the recognition, elimination, and treatment of unlawful discrimination because of disability. CAVI shall obtain the Executive Director's approval 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. CAVI shall post and maintain, on bulletin boards normally used to disseminate employee information, a bold print statement of policy prohibiting discrimination and harassment and procedures for enforcing this policy.
5. CAVI shall report, in writing, when the undertakings outlined in paragraphs 2 through 4 of this Order have been met. This report must describe the manner in which the undertakings have been carried out and include copies of the documents required by this order. The report shall be submitted not later than February 28, 2010.
6. 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 ICRC pursuant to IC 4-21.5-3-31(a), stayed by ICRC under 4-21.5-3-31(b), or stayed by a court of competent jurisdiction.

Dated: 30 January 2009



Robert D. Lange
Administrative Law Judge

To be served by first class mail this 30th day of January, 2009 on the following parties and attorneys of record:

Phillip L. Britt
1238 Cottage Avenue
Indianapolis, IN 46203

Capitol Athletic Ventures, Inc. d/b/a Club Indianapolis
c/o Chief Executive Officer
620 North Capitol Avenue
Indianapolis, IN 46204

McCROSSON & ASSOCIATES, P.C.
BY: Dennis F. McCrosson, Esq.
Attorneys for Respondent Capitol Athletic Ventures, Inc. d/b/a Club Indianapolis
6125 U.S. Highway 31 South
Indianapolis, IN 46227

and to be personally served this 30th day of January, 2009 on the following:

Joshua S. Brewster, Esq.; Staff Counsel
Indiana Civil Rights Commission
Attorney for Complainant Phillip L. Britt
Indiana Government Center North
100 North Senate Avenue, Room N103
Indianapolis, IN 46204-2255

Indiana Civil Rights Commission
c/o Tony A. Kirkland, Executive Director
Indiana Government Center North
100 North Senate Avenue, Room N103
Indianapolis, IN 46204-2255