

**STATE OF INDIANA
CIVIL RIGHTS COMMISSION**

DOCKET NO. PAse07050217

FILE DATED

DEC 16 2009

IRINA KOVACH b/n/f JOHN M. KOVACH,

Complainant, Indiana State Civil Rights Commission

v.

**KANKAKEE VALLEY ASSOCIATION, and ROLLING
PRAIRIE BASEBALL ASSOCIATION;**

Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On October 8, 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"). On October 15, 2009, Complainant, Irina Kovach ("Irina") b/n/f John M. Kovach ("John") ("Kovach" when referring to the complainant), filed Complainant's Objections To Proposed Findings Of Fact, Conclusions Of Law, And Order ("Objections"). On December 4, 2009, Respondents – Kankakee Valley [Baseball/Softball] Association ("KVA") and Rolling Prairie Baseball Association ("RPBA") (collectively "Respondents") - filed their Response To Complainant's Objections To Proposed Findings Of Fact, Conclusions Of Law, And Order. On December 14, 2009, Kovach filed Complainant's Brief In Support Of Objections.

Alpha Blackburn, Chairperson, presided over oral argument on Kovach's Objections on December 18, 2009. Other Commissioners present were David C. Carter (the Vice-Chairperson), Barry Baynard, John E. Garcia, and Charles D. Gidney.

Commissioners absent were Tehiji G. Crenshaw and Steven A. Ramos. Kovach was represented by counsel, Frederick S. Bremer, Esq., Staff Attorney with the ICRC. Respondents were represented by counsel, Matthew J. Hagenow, Esq. of the LaPorte firm of NEWBY, LEWIS KAMINSKI & JONES.LLP. Arguments of counsel were heard, questions were asked by members of the ICRC, 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. In this case, Kovach and Respondents both moved for summary judgment. The ALJ granted Kovach's motion. Because there was no evidence of out-of-pocket losses or any particular emotional distress experienced by John or Irina, the ALJ awarded nominal damages and ordered Respondents to cease and desist from prohibiting females from participating in baseball because of sex. Kovach's Objections assert that the ALJ should have conducted further proceedings to hear evidence and argument concerning the relief to be awarded.

2. On January 26, 2009, the ALJ entered a Pre-Hearing Order that stated, in material part, the following:

[t]he parties agreed that the matter shall be resolved by summary judgment pursuant to the schedule set out below.

SECOND PRE-HEARING ORDER ¶1 (January 26, 2009).

3. Kovach did not object to the Pre-Hearing Order.

4. Furthermore, neither Kovach's motion for summary judgment nor the supporting brief suggest the scheduling of further proceedings to hear evidence concerning relief.

5. A Pre-Hearing Order "...**shall** control the subsequent course of action unless modified thereafter to prevent manifest injustice...". 910 IAC 1-9-1(j) (emphasis supplied).

6. It was not possible for the matter to be resolved without addressing relief.

7. Kovach has not met the burden of an objecting party to show an error that affected the result.

8. It is appropriate to modify the injunctive relief awarded to have broader application than that stated in the proposed decision.

IT IS, THEREFORE, ORDERED

1. Paragraph 1 of the Order is MODIFIED to read as follows:
 1. Respondents shall apply eligibility criteria that provide equal opportunity for young persons to participate in baseball and softball without regard to race, religion, color, sex, disability, national origin, or ancestry.
2. In all other respects, Complainant's Objections To Proposed Findings Of Fact, Conclusions Of Law, And Order are **OVERRULED**.
3. Except as specified above, 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: 18 December 2009

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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Indiana State Civil Rights Commission

IRINA KOVACH b/n/f JOHN M. KOVACH,
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v.

**KANKAKEE VALLEY ASSOCIATION, and ROLLING
PRAIRIE BASEBALL ASSOCIATION;**
Respondents.

**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

On December 22, 2008, Complainant, Irina Kovach ("Irina") b/n/f John M. Kovach ("John") ("Kovach", when referring to the complainant), and Respondents – Kankakee Valley [Baseball/ Softball] Association ("KVA") and Rolling Prairie Baseball Association ("RPBA") (collectively "Respondents") – filed their Stipulations. On February 25, 2009, Kovach filed Complainant's Motion For Summary Judgment and Complainant's Brief In Support Of Motion For Summary Judgment. On March 27, 2009, Respondents filed Respondents' Cross-Motion For Summary Judgment and Respondents' Memorandum Of Law In Opposition To Kovach's Motion For Summary Judgment And In Support Of Cross-Motion For Summary Judgment.

Having carefully considered the foregoing and being duly advised in the premises, the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC") proposes that the ICRC enter the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Irina is a female who, on January 25 of 2007, was 12 years of age. John is her father.
2. RPBA was, at all material times, one of eight members of the KVA and was, as such, subject to rules of KVA
3. RPBA's constitution provided that RPBA's purpose was "to promote the teaching of baseball fundamentals, sportsmanship, fair play and good citizenship on any field".
4. One was eligible to be drafted to play in a particular division within RPBA by presentation of a copy of a birth certificate showing one to be within the established age limit and the "right" gender and by payment of a modest fee.
5. KVA's constitution provided that KVA is a recreational program formed for the purpose of teaching baseball and softball fundamentals, sportsmanship, fair play and good citizenship on and off the field, a program intended for boys and girls.
6. ~~RPBA and KVA each offer their services and facilities to the general public.~~
7. RPBA and KVA each describe their purpose to include teaching and, while the subjects to be taught are not classically academic, it is appropriate to describe Respondents as an organization involved in education.
8. KVA divided its leagues by age groups, each league (with the exception of the Challenge League Softball for players with special needs from age 5 to 21) spanning 2 or 3 years. With the exception of the 4-5 year old co-ed tee ball league, all leagues are either for boys or girls.
9. On January 25, 2007, John and Irina appeared at an organizational sign-up. John sought to sign Irina up to play baseball.
10. Mike Winter ("Winter"), President of RPBA, told John that Irina had to be put in the softball league because she was a girl and RPBA did not provide for girls to play baseball at the 12 to 14 year old level that RPBA entitles "Intermediate". Winter advised that Irina could play softball.

11. After being advised by Winter that that RPBA's only baseball team for persons aged 12 to 14 was a boys baseball team, John demanded that his daughter be admitted to be a member of that team. Winter did not allow that.

12. The KVA board of directors, consisting of the presidents of the member teams, met on February 27, 2007 and unanimously voted to continue to restrict membership in intermediate (12 – 14) baseball to boys.

13. John was the only parent to have sought the admission of a girl to play baseball at the 12 to 14 level.

14. Respondents denied Irina the opportunity to play baseball because she is female.

15. Baseball is not a contact sport. Although contact is not unforeseeable, it is not an object of the game to make contact with other players, as with football, and contact is considerably less common than in basketball.

16. There is some emotional distress that occurs when one is denied an opportunity because of one's gender. On the other hand, there is no evidence that any representative of either RPBA or KVA insulted John or Irina in the denial of their request to have Irina participate in baseball. For that reason, an award of nominal damages, \$100.00, is all that is appropriate on this record.

17. 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 parties and the subject matter.

2. John, Irina, RPBA , and KVA 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. RPBA and KVA are each a "public accommodation" as that term is defined in section 3(m) of the ICRL. IC 22-9-1-3(m).

4. RPBA and KVA are an organization involved in education as the term "education" is used in the ICRL.

5. Summary judgment is authorized in proceedings before the ICRC by section 23 of the Administrative Orders And Procedures Act, ("the AOPA"), IC 4-21.5-3-23. Because the substance of section 23 of the AOPA is nearly identical to the substantive portions of Ind. Trial Rule 56 ("T.R. ___"), cases decided under the substantive provisions of T.R. 56 are persuasive in the interpretation of section 23.

6. Summary judgment may be granted if the designated evidence establishes that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. IC 4-21.5-3-23(b), *Madison County Bank & Trust Company v. Kreegar*, 514 N.E.2d 279 (Ind. 1987). No weighing of the evidence is to be involved, *Mogan v. Southern Indiana Bank and Trust Company*, 473 N.E.2d 158 (Ind. App. 1985), and all doubts must be resolved against the moving party. *Jones v. City of Logansport*, 436 N.E.2d 1138 (Ind. App. 1982).

7. Section 6(k) of the ICRL authorizes the ICRC to award relief if it finds an unlawful discriminatory practice.

8. Section 3(l) of the ICRL provides, in material part, as follows:

(l) "Discriminatory practice" means:

(1) the exclusion of a person from equal opportunities because of ...
sex ...

...
Every discriminatory practice relating to ... education, public accommodations ... shall be considered unlawful unless it is specifically exempted by this chapter.

IC 22-9-1-3(l).

9. Some such exemptions are found in section 3(q) of the ICRL. Respondents have argued that they are exempt under the following subsection of section 3(q).

(q) "Sex" as it applies to segregation or separation in this chapter applies to all types of ... education, public accommodations However:

...

...

(3) it shall not be a discriminatory practice for a private or religious educational institution to continue to maintain and enforce a policy of admitting students of one (1) sex only.

IC 22-9-1-3(q)(3).

10. Neither RPBA nor has ever had a policy of admitting students of one sex only; therefore, section 3(q)(3) does not apply to exempt the practice of which Complainant complains.

11. Respondents also note that the Indiana Supreme Court held that a rule of the Indiana High School Athletic Association (“IHSAA”) preventing male and female students of member schools from competing on the same team or against each other was unconstitutional only as applied to non-contact sports in *Haas v. South Bend Community School Corp.*, 289 N.E.2d 495 (Ind. 1972). Even if *Haas* has some effect in a case involving a statutory claim, baseball is not a contact sport.

12. There is no genuine issue of material fact.

13. Respondents committed a “discriminatory practice” as that term is defined in section 3(l) of the ICRL when they denied Irina the opportunity to play baseball because of sex. Because there is no applicable exemption for that practice, it was unlawful. IC 22-9-1-3(l).

14. 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).

15. Damages may be awarded by the ICRC to compensate for emotional distress. *Indiana Civil Rights Commission v. Alder*, 714 N.E.2d 632 (Ind. 1999).

16. 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).

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

ORDER

1. Respondents shall cease and desist from prohibiting females from participating in baseball because of sex.
2. Respondents shall deliver to the ICRC a check payable to John and Irina in the amount of \$100.00.
3. 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 IC 4-21.5-3-31(b), or stayed by a court of competent jurisdiction.

Dated: 08 October 2009



Robert D. Lange
Administrative Law Judge

To be served by first class mail this 8th day of October, 2009 on the following parties and attorneys of record

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