

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION**

**U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,**

Plaintiff,

v.

RENT-A-CENTER EAST, INC.,

Defendant.

Case No. 16-cv-2222

Judge Bruce

Magistrate Judge Long

**PLAINTIFF EEOC'S MOTION FOR PARTIAL SUMMARY JUDGMENT
ON AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE**

INTRODUCTION

Plaintiff United States Equal Employment Opportunity Commission (“EEOC”) hereby moves for partial summary judgment on the second affirmative defense (failure to mitigate damages) asserted by Defendant Rent-A-Center East, Inc. (“RAC”). RAC cannot meet its burden to produce evidence to prove each of the two elements of this affirmative defense. First, there is no evidence that Megan Kerr (“Kerr”) failed to exercise reasonable diligence in her search for a new job after she was discharged by RAC in July 2014. To the contrary, the only pertinent evidence in the record shows that Kerr made substantial efforts to obtain employment—and, indeed, succeeded in finding a new job starting August 1, 2016. Second, RAC has disclosed no evidence that would prove that Kerr could, in fact, have found work comparable to her job at RAC sooner by exercising reasonable diligence.

As this is an affirmative defense, RAC’s failure to meet its burden of production with respect to either element renders the defense deficient as a matter of law. Therefore, summary judgment should be granted to the EEOC with respect to this affirmative defense.

UNDISPUTED MATERIAL FACTS

The following material facts are not in dispute:

- 1) In 2014, Kerr was working as an assistant manager at RAC’s store in Rantoul, Illinois. (Transcript of Deposition of Jason Morris, p. 50:4-6, attached as Exh. 1)
- 2) After being discharged by RAC in 2014, Kerr looked for work. (Transcript of Deposition of Megan Kerr, p. 123:15-17, attached as Exh. 2)¹
- 3) Although she attended a community college for a time, Kerr does not have a bachelor’s degree. (Exh. 2, p. 164:6-13)
- 4) Kerr took her job search seriously. (Exh. 2, p. 394:16-18)
- 5) During her search for alternate employment, Kerr applied to hundreds of employers. (Exh. 2, pp. 123:21-124:11)
- 6) Kerr succeeded in obtaining two or three job interviews. (Exh. 2, p. 395:13-16)
- 7) Kerr worked part-time at a restaurant from on or about May 8, 2016 until August 30, 2016. (Demon Dawgs Pay Stubs, attached as Exh. 3)
- 8) Kerr obtained an offer of employment at Guitar Center and began work there on August 1, 2016. The job was part-time at first, but was intended to become — and did in fact become — a full-time job later in 2016. (Exh. 2, pp. 378:20-379:2).²

ARGUMENT

A. Legal Standard for Summary Judgment

Summary judgment is appropriate “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact

¹ After the events at issue in this case, Ms. Kerr’s last name changed to Vanna. For consistency, she is referred to by the surname Kerr throughout.

² The EEOC has cut off its claim for lost wages as of when Kerr obtained employment at Guitar Center on August 1, 2016.

and that the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). When a motion for summary judgment does not dispose of an entire action, Rule 56(d) permits the summary resolution of matters about which there is no genuine dispute of material fact. Fed.R.Civ.P. 56(d). This includes the summary resolution of affirmative defenses about which there is no material dispute of fact. E.g., Rubin v. Islamic Republic of Iran, 408 F.Supp.2d 549, 552 (N.D.Ill. 2005); see also 10B Wright, Miller & Kane, Federal Practice and Procedure § 2737 (3d Ed.1998).

In order to defeat a motion for summary judgment, “[t]he nonmovant must show through specific evidence that a triable issue of fact remains on issues on which he bears the burden of proof at trial.” Warsco v. Preferred Technical Group, 258 F.3d 557, 563 (7th Cir. 2001). “The nonmovant may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits; it must go beyond the pleadings and support its contentions with proper documentary evidence.” Id. The court must draw all reasonable inferences from the record in the light most favorable to the nonmoving party. See Johnson v. Runyon, 47 F.3d 911, 917 (7th Cir. 1995).

B. Legal Standard for Affirmative Defense of Failure to Mitigate Damages

A victim of employment discrimination under Title VII is presumptively entitled to full relief. See Hutchison v. Amateur Electronic Supply, Inc., 42 F.3d 1037, 1044 (7th Cir. 1994). “Once a plaintiff has established the amount of damages she claims resulted from her employer’s conduct, the burden of going forward shifts to the defendant to show that the plaintiff failed to mitigate damages....” Hutchison v. Amateur Electronic Supply, Inc., 42 F.3d 1037, 1044 (7th Cir. 1994) (internal citation omitted).

To establish the affirmative defense of failure to mitigate damages, an employer must show that: “(1) [the victim of discrimination] failed to exercise reasonable diligence to mitigate [her] damages, and (2) there was a reasonable likelihood that [the victim of discrimination]

might have found comparable work by exercising reasonable diligence.” *Id.* (emphasis added).

Accordingly, RAC bears the burden of proof with respect to this affirmative defense and must present “specific evidence” supporting each of these elements. *See Warsco*, 258 F.3d at 563.

C. There Is No Evidence That Kerr Failed to Exercise Reasonable Diligence

The doctrine of mitigation of damages requires only that a victim of discrimination make a reasonable effort to obtain comparable work. *Hutchison*, 42 F.3d at 1044. It does not require that a victim of discrimination “seek employment which is not consonant with his particular skills, background, and experience or which involves conditions that are substantially more onerous than his previous position.” *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1202 (7th Cir. 1989). Thus the standard does not turn on the victim’s success in finding new employment, per se, or whether her efforts could have been improved upon, but rather on whether the defendant can prove that her efforts were unreasonable.

RAC cannot demonstrate that Kerr failed to engage in a reasonable search for comparable employment. There is no evidence in the record that Kerr failed to search for a new job. There is no evidence that Kerr has turned down any interviews or job offers, let alone interviews or offers for jobs comparable to her job at RAC. Indeed, what evidence there is in the record on this point shows that after losing her job at RAC, Kerr took her job search seriously, applied to many employers, obtained job interviews, and eventually succeeded in finding first part-time and then full-time alternative employment. *See* Statement of Undisputed Material Facts, ¶¶ 1-8, above.

The record contains no evidence that would permit a reasonable finder of fact to conclude that Kerr exercised an unreasonable lack of diligence in searching for a comparable new job. Accordingly, there is no material dispute of fact as to the first element of the affirmative defense.

D. There Is No Evidence of the Likelihood of Kerr Finding Comparable Work

Even if RAC had evidence showing that Kerr's efforts were unreasonable, there is no evidence that would permit a finder of fact to make any finding as to the likelihood that Kerr would find new employment if she made greater efforts. In order to meet its burden on this element of the affirmative defense, RAC must present specific evidence showing that, with a reasonably diligent search, someone with Kerr's qualifications would likely have found a job sooner than Kerr actually did. Indeed, such evidence would necessarily need to take into account the availability — in the areas in which Kerr resided during the relevant periods of time — of suitable employment opportunities for individuals with Kerr's limited educational background. See Statement of Undisputed Material Facts, ¶ 3.

RAC has disclosed no evidence, whether expert opinions or otherwise, that would even begin to permit a reasonable finder of fact to make an informed conclusion on this question. Accordingly, there is no material dispute of fact with respect to the second element of the affirmative defense.

CONCLUSION

RAC bears the burden of proving both elements of the affirmative defense of failure to mitigate damages. It has produced no evidence with respect to either element. Indeed the only pertinent evidence in the record negates the first element by demonstrating that Kerr has made a reasonably diligent — and indeed successful — effort to obtain new employment. Accordingly, there is no material dispute of fact pertinent to this affirmative defense, and it should be resolved summarily in the EEOC's favor.

Wherefore, the EEOC respectfully requests that partial summary judgment be entered in the EEOC's favor with respect to RAC's second affirmative defense.

June 13, 2017

Respectfully Submitted,

s/ Justin Mulaire
U.S. Equal Employment Opportunity Commission
33 Whitehall St., Fl. 5
New York, NY 10004
212-336-3744

CERTIFICATE OF SERVICE

I hereby certify that on today's date, I caused the EEOC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE to be served upon counsel to Defendant via the court's Electronic Case Filing system, pursuant to Local Rule 5.3(A).

June 13, 2017

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

EQUAL EMPLOYMENT OPPORTUNITY)	
COMMISSION,)	
)	
Plaintiff,)	
)	
vs.)	No. 16-cv-2222
)	
RENT-A-CENTER EAST, INC.,)	
)	
Defendant.)	

DEPOSITION
OF
JASON MORRIS

The Rule 30(b)(6) Deposition of JASON MORRIS, taken in the above-entitled cause, before Lisa Hahn Peterman, CSR, RMR, on the 7th day of March, 2017, at the United States Courthouse, 201 South Vine Street, Urbana, Illinois, pursuant to Notice at the hour of 12:55 p.m.

Reported by: Lisa Hahn Peterman, CSR, RMR
License No.084-002149

1 Q. Do they have any responsibility for
2 disciplining employees?

3 A. **In my absence, yes.**

4 Q. And in 2014, who was the assistant store
5 manager again?

6 A. **Eleena and Megan were both.**

7 Q. And then what are the duties of the customer
8 sales representative?

9 A. **In essence, delivery, delivery specialists,
10 as well as collections.**

11 Q. And in 2014, were both Eleena and Megan
12 customer sales representatives?

13 A. **Excuse me?**

14 Q. Was Eleena also a customer sales
15 representative?

16 A. **No, sir. They were both assistant managers.**

17 Q. Okay. And what is the color of the truck?

18 MS. QUINCY: Object to the form of the
19 question. You may answer.

20 BY MR. SHULTZ:

21 Q. In 2014.

22 A. **Multicolor. It has like pictures on the
23 back. The cab is white.**

24 Q. A white cab? And what are the pictures on

Megan Vanna
January 17, 2017

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff, No. 16-CV-2222

vs.

RENT-A-CENTER EAST, INC.,

Defendant.

The videotaped deposition of MEGAN VANNA,
called for examination pursuant to the Rules of
Civil Procedure for the United States District
Courts pertaining to the taking of depositions,
taken before CHERYL L. SANDECKI, Certified
Shorthand Reporter for the State of Illinois, at
321 North Clark Street, Chicago, Illinois, on
January 17, 2017, at the hour of 9:00 a.m.

REPORTED BY: CHERYL L. SANDECKI, CSR, RPR
LICENSE NO.: 084-03710
JOB NO.: 548721

1 THE WITNESS: Not directly, no.

2 BY MR. TRUSEVICH:

3 Q. Do you know that he is a witness in
4 this case?

5 A. I do now.

6 Q. Okay. But not before just now?

7 A. Correct.

8 Q. No one has told you that?

9 MR. SHULTZ: Objection. Form. Foundation.

10 I will also object on the basis of the
11 attorney-client privilege to the extent that it
12 calls for an answer regarding communications
13 between Megan and the EEOC's attorneys.

14 BY MR. TRUSEVICH:

15 Q. So after you were terminated from
16 Rent-A-Center, did you look for work?

17 A. Yes.

18 Q. And between -- and when were you
19 terminated from Rent-A-Center?

20 A. August 14th.

21 Q. All right. So in August 2014,
22 according to you, when you were terminated from
23 Rent-A-Center, until now, how many places have
24 you applied for work?

1 A. Many.

2 Q. Hundreds?

3 A. Yeah.

4 Q. Right, hundreds?

5 A. Yes.

6 Q. Why do you think that you haven't been
7 hired?

8 A. Again, I don't have a specific reason
9 as to why I was hired or not hired.

10 Q. But you were looking for work, right?

11 A. Yes.

12 Q. In fact -- can I have tab 24, please.

13 (Whereupon, RAC Deposition
14 Exhibit 6 was marked for
15 identification.)

16 BY MR. TRUSEVICH:

17 Q. Let me hand you what's been marked as
18 Rent-A-Center Exhibit 6. And I will represent
19 to you that this is documents produced to us
20 from the EEOC. It looks like some -- it looks
21 like your resumés.

22 A. Okay.

23 Q. Take a look at those and let me know
24 when you've had a chance to review those. I

1 THE WITNESS: Not officially, no.

2 BY MR. TRUSEVICH:

3 Q. Franchisee at Enzo's, '94 to '96. Do
4 you see that?

5 A. Yes.

6 Q. Okay. Then it says under education,
7 Moraine Valley Community College, bachelor of
8 arts, BA, grade 4.0. Do you see that?

9 A. Yes.

10 Q. You do not have a BA degree?

11 MR. SHULTZ: Objection. Foundation.

12 THE WITNESS: I do not. It is just something
13 I was working on.

14 BY MR. TRUSEVICH:

15 Q. Let's go to 310. And, by the way, you
16 don't have any objection with us asking for your
17 military records about that E -- to corroborate
18 that you were ever an E6? You have no objection
19 to that, do you?

20 MR. SHULTZ: Objection. Form.

21 THE WITNESS: I do, actually.

22 BY MR. TRUSEVICH:

23 Q. What would your objection be?

24 MR. SHULTZ: Objection.

1 MR. SHULTZ: Objection. Foundation.

2 THE WITNESS: I was not employed at the time
3 that I quit Demon Dogs.

4 BY MR. TRUSEVICH:

5 Q. And you were making 8.50 at Demon Dogs,
6 right?

7 A. Yes.

8 Q. And, according to you, the judge said
9 you have to find a full-time job, correct?

10 MR. SHULTZ: Objection. Foundation.

11 THE WITNESS: Correct.

12 BY MR. TRUSEVICH:

13 Q. Yet you -- according to your story, you
14 quit Demon Dogs after several weeks, right, less
15 than ten?

16 A. Correct.

17 Q. You quit Demon Dogs because it was
18 part-time, but you take a part-time job at the
19 Guitar-Center; isn't that correct, Megan?

20 A. I took the part-time job at
21 Guitar-Center under the premise that it would
22 become full-time.

23 Q. And is it full-time today?

24 A. It is.

1 Q. When did it go full-time?

2 A. November.

3 Q. So you're working 40 hours a week at
4 Guitar-Center?

5 A. Full-time is not 40 hours a week.

6 Q. How long is full-time?

7 A. 30 hours.

8 Q. How many hours a week were you working
9 at Demon Dogs?

10 A. Less than 20.

11 Q. When did you quit -- how long of a gap
12 between the time you voluntarily -- by the way,
13 you voluntarily quit Demon Dogs, you weren't
14 fired, right?

15 MR. SHULTZ: Objection. Form.

16 THE WITNESS: Right.

17 BY MR. TRUSEVICH:

18 Q. From the time you voluntarily quit
19 Demon Dogs to the time you started
20 Guitar-Center, by the way, during this time
21 period when you are unemployed, you had a child
22 to support, correct?

23 MR. SHULTZ: Objection. Form.

24 THE WITNESS: Correct.

1 MR. SHULTZ: Objection. Form and foundation.

2 THE WITNESS: I do understand.

3 BY MR. TRUSEVICH:

4 Q. All right. And part of that is, were
5 you, Megan, reasonable in trying to find other
6 employment. Do you understand that?

7 A. I understand.

8 Q. Because it would be unfair if somebody
9 sued Rent-A-Center and just didn't take -- get
10 in a job seriously and just sat unemployed to
11 get back wages. You would agree that that would
12 be unfair?

13 A. Correct?

14 MR. SHULTZ: Objection. Form.

15 BY MR. TRUSEVICH:

16 Q. And you took your job searches
17 seriously, according to you, correct?

18 A. Yes.

19 Q. And you agree with the old adage that
20 you only have one time to make a first
21 impression, correct?

22 MR. SHULTZ: Objection. Form.

23 BY MR. TRUSEVICH:

24 Q. You've heard of that?

1 MR. SHULTZ: Objection.

2 THE WITNESS: I have heard of that.

3 BY MR. TRUSEVICH:

4 Q. Do you agree with that?

5 A. I do not.

6 Q. You think there is more than one time
7 to make a good impression on the first time?

8 MR. SHULTZ: Objection. Form.

9 THE WITNESS: Of -- being that most
10 applications are online, you have two, one is
11 digital, one in person.

12 BY MR. TRUSEVICH:

13 Q. By the way, on the hundreds of places
14 you applied, how many actually gave you an
15 interview?

16 A. Two, maybe three.

17 Q. Any idea why you think you didn't get
18 any more than two or three interviews out of a
19 couple hundred?

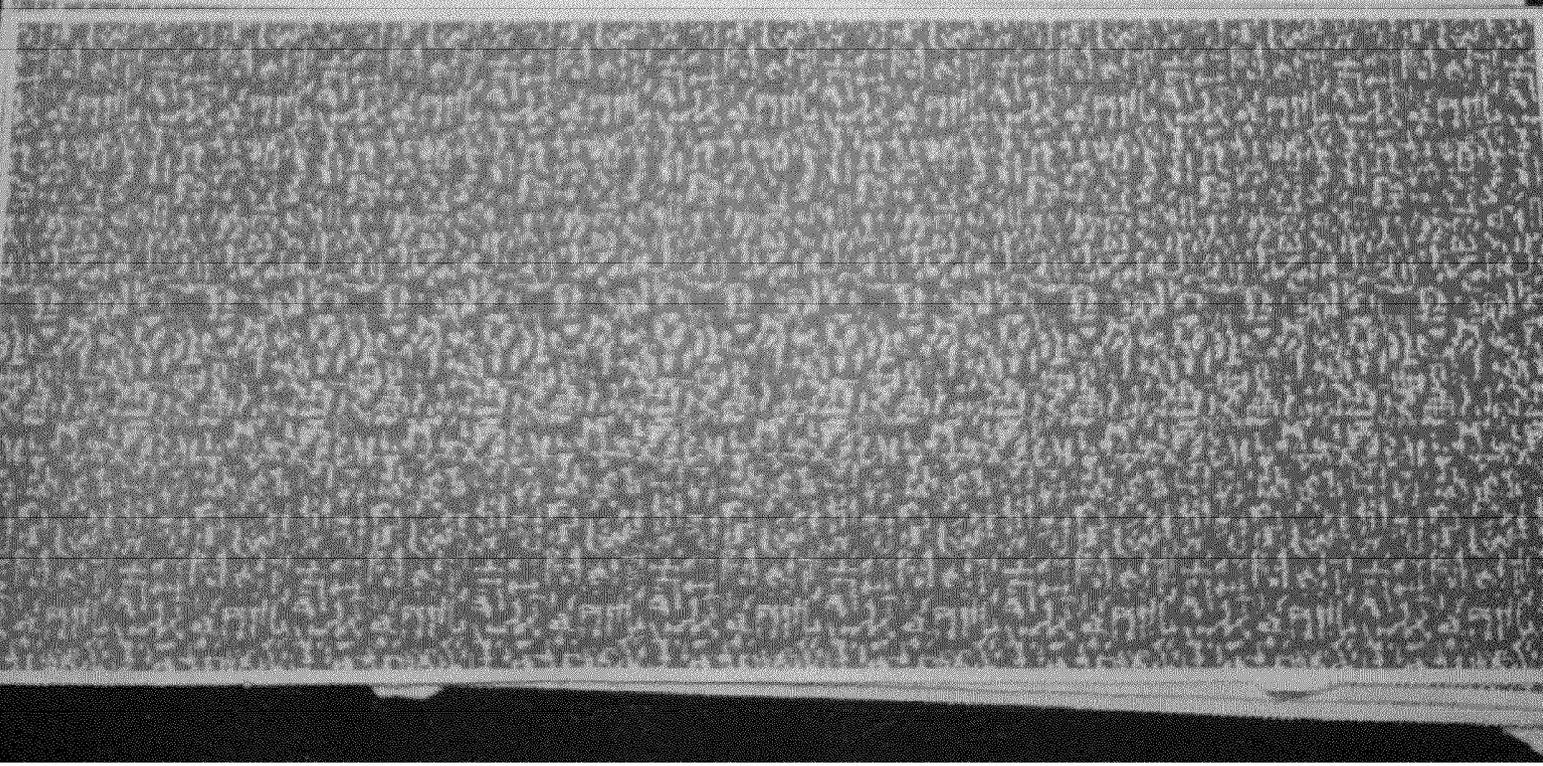
20 MR. SHULTZ: Objection. Form and foundation.

21 THE WITNESS: Again, I would not speculate as
22 to a business's reason for not hiring me.

23 BY MR. TRUSEVICH:

24 Q. Let's look at some of the resumés that

0078		MEGAN YANNA		DEMON DAWGS OF CHICAGO LLC 200 OLD BARN ROAD LAKE BARRINGTON, IL 60010-1618				
DDAP		[REDACTED]		[REDACTED]		[REDACTED]		
MAY 8, 2016		MAY 21, 2016		MAY 26, 2016		[REDACTED]		
EARNINGS			TAXES			DEDUCTIONS		YEAR TO DATE
DESCRIPTION	AMOUNT	RATE	AMOUNT	DESCRIPTION	AMOUNT	DESCRIPTION	AMOUNT	
REGULAR	74.50	9.0000	670.50	FICA	46.32	GROSS	1002.78	
O/TIME	5.68	13.5000	76.68	MEDFICA	10.83	FICA	62.17	
				FED WTH	81.26	MEDFICA	14.54	
				IL	28.02	FED WTH	98.17	
						STATE	37.61	
Totals	80.18		747.18		166.43		0.00	
						06/05/16	*****580,75	



File Number 0078	Employee Name MEGAN VANNA	Company Name and Address DEMON DAWGS OF CHICAGO LLC 200 OLD BARN ROAD LAKE BARRINGTON, IL 60010-1618		
Company DDAP	Department	Clock Number	Social Security Number XXX-XX-XXXX	
Period Start MAY 22, 2016	Period Ending JUN 4, 2016	Check Date JUN 9, 2016	Fw - \$ 00 Rt - \$ 00	

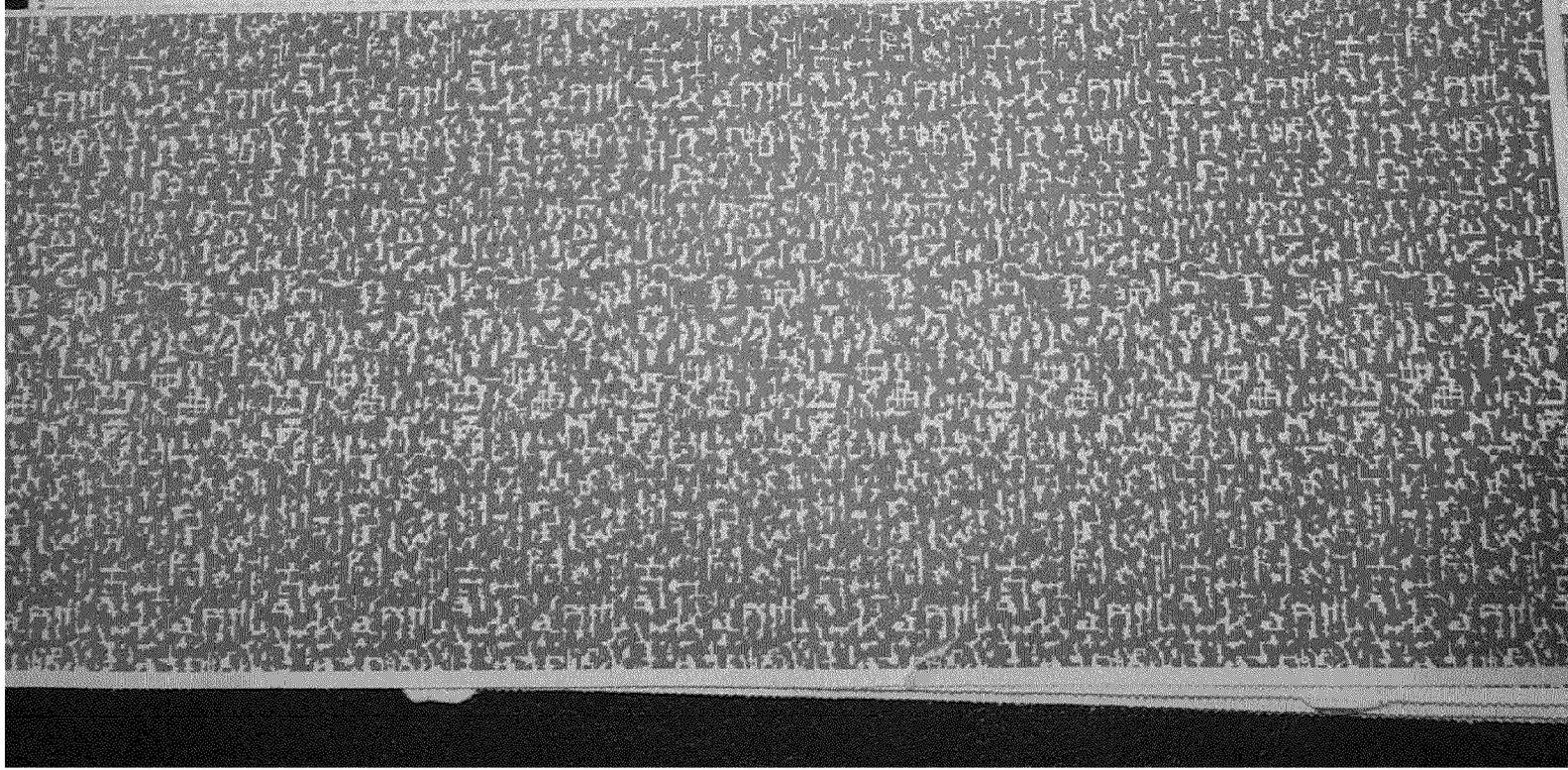
EARNINGS			TAXES		DEDUCTIONS		YEAR TO DATE	
DESCRIPTION	HOURS	RATE	AMOUNT	DESCRIPTION	AMOUNT	DESCRIPTION	AMOUNT	AMOUNT
REGULAR	57.93	9.0000	521.37	FICA	32.33	GROSS		1524.15
				MEDFICA	7.56	FICA		94.50
				FED WTH	47.39	MEDFICA		22.10
				IL	19.55	FED WTH		145.56
						STATE		57.16
Totals	57.93		521.37		106.83		0.00	

Check Number 0070587	Net Pay *****411.52
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0078		MEGAN VANNA		Company		Division		Department		Check Number		Social Security Number		DEMON DAUGS OF CHICAGO LLC 200 OLD BARN ROAD LAKE BARRINGTON, IL 60010-1618	
DDAP										XXX-XX-		[REDACTED]			
Period Start		Period Ending		Check Date		FW - S		ST - S		00		00			
JUN 5, 2016		JUN 18, 2016		JUN 23, 2016		00		00							

EARNINGS			TAXES		DEDUCTIONS		YEAR TO DATE	
DESCRIPTION	HOURS	RATE	AMOUNT	DESCRIPTION	AMOUNT	DESCRIPTION	AMOUNT	AMOUNT
REGULAR	57.83	9.0000	520.47	FICA	32.27	GROSS		2044.62
				MEDFICA	7.55	FICA		126.77
				FED WTH	47.25	MEDFICA		29.65
				IL	19.52	FED WTH		192.81
						STATE		76.68
Totals	57.83		520.47		106.59		0.00	

Check Number	Net Pay
0070596	*****413.85



File Number 0078		Employee Name MEGAN VANNA		Company Name and Address DEMON DAWGS OF CHICAGO LLC 200 OLD BARN ROAD LAKE BARRINGTON, IL 60010-1618	
Company DDAP		Department		Social Security Number XXX-XX-XXXX	
Period Start JUN 19, 2016		Period Ending JUL 2, 2016		Check Date JUL 7, 2016	
PW - S 00		VT - S 00			

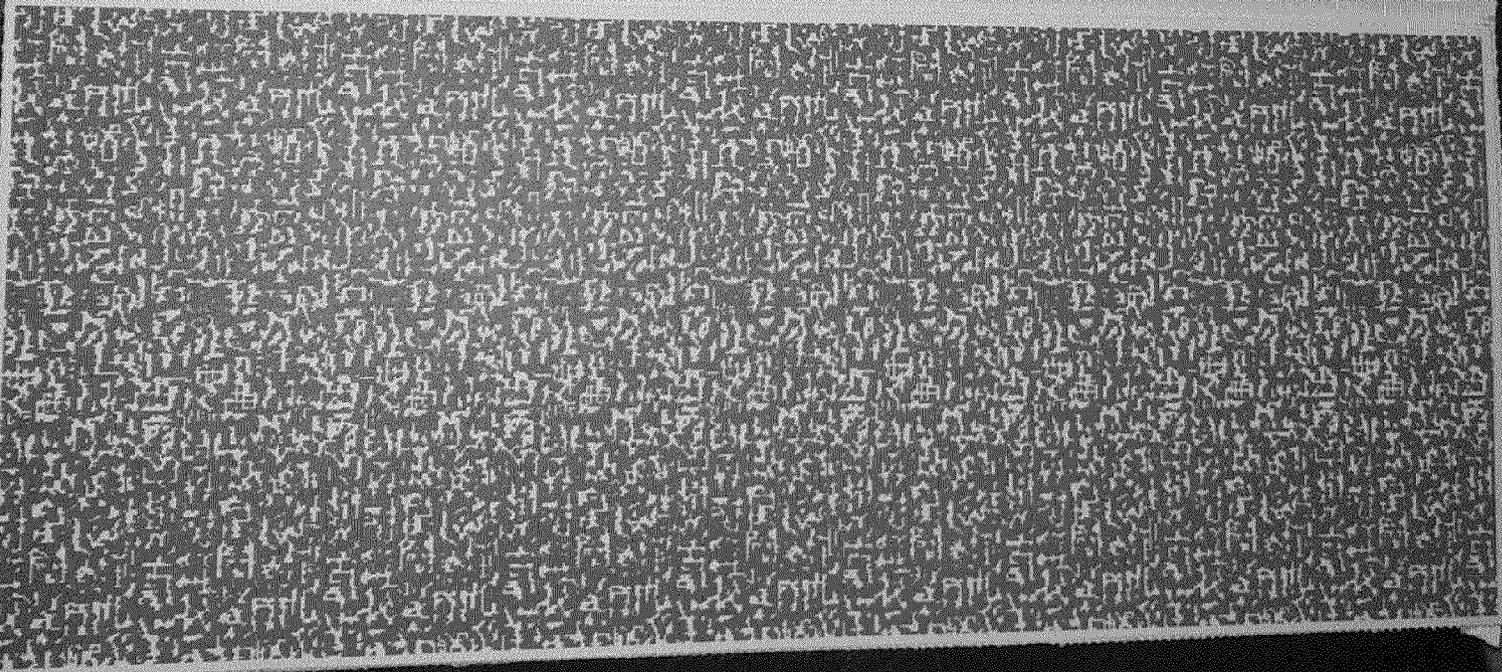
EARNINGS			TAXES		DEDUCTIONS			YEAR TO DATE	
DESCRIPTION	AMOUNT	AMOUNT	DESCRIPTION	AMOUNT	DESCRIPTION	AMOUNT	DESCRIPTION	AMOUNT	
REGULAR	52.73	474.57	FICA	29.42			GROSS	2519.19	
	9.0000		MEDFICA	6.88			FICA	156.19	
			FED WTH	40.37			MEDFICA	36.53	
			IL	17.80			FED WTH	233.18	
							STATE	94.48	
Totals	52.73	474.57				0.00			

Check Number 0070606	Net Pay *****380.10
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File Number 0078	Employee Name MEGAN VANNA		Company Name and Address DEMON DAWGS OF CHICAGO LLC 200 OLD BARN ROAD LAKE BARRINGTON, IL 60010-1618	
Company DDAP	Department	Check Number	Social Security Number XXX-XX	
Period Start JUL 3, 2016	Period Ending JUL 16, 2016	Check Date JUL 22, 2016	PW - S 00 DT - S 00	

EARNINGS			TAXES		DEDUCTIONS			YEAR TO DATE
DESCRIPTION	HOURS	RATE	DESCRIPTION	AMOUNT	DESCRIPTION	AMOUNT	AMOUNT	
REGULAR	51.31	9.0000	FICA	28.63	GROSS		2980.98	
			MEDFICA	6.69	FICA		184.82	
			FED WTH	38.45	MEDFICA		43.22	
			IL	17.32	FED WTH		271.63	
					STATE		111.80	
Totals	51.31			91.09		0.00		

Check Number: 0070617 Net Pay: *****370.70



File Number 0078		Employee Name MEGAN VANNA		Company Name and Address DEMON DAWGS OF CHICAGO LLC 200 OLD BARN ROAD LAKE BARRINGTON, IL 60010-1618	
Company DDAP	Division	Department	Check Number	Social Security Number XXX-XX-XXXX	City/State/Zip/Status
Period Start JUL 17, 2016	Period Ending JUL 30, 2016	Check Date AUG 5, 2016	PW - S 00 ST - S 00		

EARNINGS			TAXES		DEDUCTIONS		YEAR TO DATE	
DESCRIPTION	HOURS	RATE	DESCRIPTION	AMOUNT	DESCRIPTION	AMOUNT	DESCRIPTION	AMOUNT
REGULAR	61.58	9.0000	FICA	34.36	CHLDSUP	115.88	GROSS	3535.20
			MEDFICA	8.04			FICA	219.18
			FED WTH	52.32			MEDFICA	51.26
			IL	20.78			FED WTH	323.95
							STATE	132.58
							CHLDSUP	115.88
Totals	61.58			115.50		115.88		

Check Number 0070627	Net Pay *****322.84
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▼ REMOVE DOCUMENT ALONG THIS PERFORATION ▼