

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN**

Mark A Neal
2714 Old Camden Sq
Madison WI 53718

Complainant

vs.

US Bank
1 S Pinckney St
Madison WI 53703

Respondent

HEARING EXAMINER'S RECOMMENDED
FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

CASE NO. 20112019

EEOC CASE NO. 26B201100024

On March 13, 2012 at 9:00 a.m., a hearing was held in the above-captioned matter before Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III in room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd. Madison, Wisconsin. The Complainant, Mark A. Neal, appeared in person and without counsel. The Respondent appeared by its corporate representative, John Diedrich, and by its counsel, Amy O. Bruchs of Michael, Best and Friedrich, LLP. Based upon the record of the proceedings, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. The Complainant is an African American (Black) male.
2. The Respondent is a bank with numerous employees with its principle place of business in Madison, Wisconsin located at 1 South Pinckney Street.
3. In 2010, the Complainant began the application process for a position with the Respondent as a Mortgage Loan Officer (MLO).
4. The Respondent accepted the Complainant's demonstration of interest though it was not clear that a position as a MLO was available.
5. The Respondent has a well defined list of materials necessary for the completion of the application process for a position as a MLO. One must provide proof of two years of relevant current experience, a current W2 form and pay stubs documenting the applicant's income, proof of production levels for the past several years and reference letters from at least four builders, realtors and/or title companies.

6. The Complainant was aware of the Respondent's need for this information. However, the Complainant was unable to and did not provide most of this basic information.
7. John Diedrich, Mortgage Sales Manager, was the Complainant's primary point of contact for his application. In addition to Diedrich, the Complainant met with Terry Strandberg, Mortgage Regional Production Manager, as part of the application process.
8. In one meeting with Strandberg, Strandberg believed that the Complainant's specific experience and knowledge might better qualify him for a position as a Community Reinvestment Act Loan Officer (CRA).
9. A MLO must be familiar with the needs and market for a wide range of potential loan customers including those of fairly limited means to those who are fairly affluent. A CRA specialist must have knowledge and experience with federal loan and other loan programs that are targeted at a more economically challenged portion of the housing market.
10. While the Complainant professed to have significant experience working with affluent loan customers, his recent experience and the letters of reference he produced indicated a current familiarity with those who might benefit more from programs with which a CRA specialist might work.
11. At the time of the Complainant's application, it did not have an available position for a CRA specialist.
12. While the Complainant had not produced much of the professional documentation required by the Respondent, the Respondent continued the hiring process to give the Complainant the opportunity to produce the required information or perhaps to provide other information that might suffice in the absence of the required materials.
13. At the meeting with Strandberg during which Strandberg observed that the Complainant's background might better match with the position of a CRA specialist, Strandberg asked the Complainant if the Complainant believed that he could still fulfill the position requirements of a MLO. The Complainant believed that Strandberg was questioning whether the Complainant's race might create a barrier for his working as a MLO. This was not Strandberg's intent.
14. Diedrich and Strandberg met to determine whether the Respondent should continue the Complainant's application for the position of MLO. They decided that unless the Complainant could produce the required information that there was no reason to continue processing of the Complainant's application.
15. During the same time period as the Complainant was engaged in the application process with the Respondent, the Respondent was attempting to recruit a MLO from a competitor bank. This individual, Jeff Mack, is an African American who terminated the recruitment process on his own initiative.
16. The Respondent requires the same professional documentation of all applicants for MLO positions regardless of race.

17. At the time the Complainant was pursuing a position with the Respondent, he was employed as a MLO with a branch of Wells Fargo bank. The Complainant's position with Wells Fargo was terminated for failing to meet Wells Fargo's minimum production standards.
18. Subsequent to leaving employment with Wells Fargo, the Complainant obtained a similar position with Home Savings Bank. He voluntarily terminated that employment.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class "race".
2. The Respondent is an employer within the meaning of the Equal Opportunities Ordinance.
3. The Respondent did not violate the ordinance when it declined to continue the application process with the Complainant for a position as a Mortgage Loan Officer.
4. The Respondent's stated reason for not continuing the application process, that the Complainant failed to produce required professional documentation, is a legitimate, nondiscriminatory explanation for not continuing the application process.

ORDER

1. The complaint is dismissed.
2. The parties shall bear their own costs.

MEMORANDUM DECISION

The record in this matter is extremely sparse. This is particularly true from the perspective of the Complainant. The Complainant pursued this complaint pro se. While the Hearing Examiner may extend certain procedural requirements to assist an unrepresented party, the Hearing Examiner may not reduce the standards of proof to assist an unrepresented party.

The Hearing Examiner will review the record to determine whether the record establishes discrimination or not. In this regard, the first question presented by the record for the Hearing Examiner is whether this is a case presented by direct evidence or indirect evidence. In the case of a claim presented by direct evidence, the Hearing Examiner must review the facts, weigh the evidence and render a decision. Direct evidence is that which, if believed, demonstrates a fact without reliance upon inference or presumption. In the case of an indirect claim, the Hearing Examiner will apply the McDonnell Douglas/Burdine burden shifting approach to determine whether discrimination has occurred or not. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) In a claim of indirect evidence, the Hearing Examiner will often rely upon references and presumptions raised by the evidence. The testimony and evidence presented in this case create

a factual record that fits most closely with a determination of discrimination under the indirect method. In this method, the Hearing Examiner must review the record to determine whether it supports a finding of discrimination or not. This analysis is performed through an application of the facts to the elements of a *prima facie* claim of discrimination and an examination of whether the Respondent has offered a legitimate, nondiscriminatory explanation for its conduct leading to the claim of discrimination.

The Hearing Examiner understands that the Complainant believes that there is no doubt that the record establishes discrimination. If that is the case, then that conclusion must be reached through the application of the indirect evidence method.

In this analysis, the first step is to determine whether the Complainant establishes by the greater weight of the credible evidence, each element of a *prima facie* claim of discrimination. In general terms, the *prima facie* claim of discrimination contains three elements: 1. membership in a protected class, 2. an adverse employment action, and 3. a causal connection between the protected class and the adverse employment action. Some courts have separately required proof of an applicant's been qualified for an open position. The Hearing Examiner finds that this issue is subsumed within the third element of the *prima facie* claim as stated here.

There is no doubt that the Complainant can and has established the first two elements of this claim. There is no doubt concerning his membership in the protected class "race". He is an African American or Black male. Equally, there is no doubt that he experienced an adverse employment action when the Respondent failed to hire him for the open position of Mortgage Loan Officer or, at least, determined not to continue the application process.

What is in question, given this record, is whether there are facts or evidence demonstrating that there is a causal connection between the Complainant's race and the fact that the Respondent did not hire him as a Mortgage Loan Officer. This will involve some interpretation of the record as the Complainant's arguments are not particularly clear or well laid out. The Complainant appeared pro se and the Hearing Examiner will need to articulate part of the argument presented in this regard.

The Complainant's primary argument is that the connection between his race and his failure to be hired is demonstrated by a statement made by Strandberg while he met with the Complainant. In the broadest terms, the Complainant asserts that Strandberg indicated to the Complainant that he (Strandberg) had only one concern with the Complainant's application. The Complainant asked Strandberg if that was whether the office would accept him as a Black man. The Complainant then states that Strandberg either wondered or was worried about how the Complainant, as a Black man, would fit into the majority White office.

The Respondent denies that Strandberg made any such statement. Rather, the Respondent contends that the question of race was first raised by the Complainant when Strandberg observed that the Complainant's qualifications and experience might better qualify him for a position in the Respondent's Community Reinvestment Act program or office. Given the Complainant's demonstrated connections in the communities served by the CRO program, Strandberg wondered if the Complainant would also feel comfortable in addressing the needs of the different communities served by a conventional MLO. When the Complainant asked Strandberg if the question arose because he is Black, Strandberg allegedly stated, "Absolutely not."

It is the Complainant's burden to establish that his version of events is the correct one. He must carry this burden by the greater weight of the credible evidence. In popular terms, this is the preponderance of the evidence. In other words, the Complainant must convince the Hearing Examiner that no matter how narrowly, his version of the facts is more likely than that of the Respondent.

If the Respondent convinces the Hearing Examiner that its explanation is more credible or if neither party convinces the Hearing Examiner that one version is more credible than another, the Complainant fails to carry his burden of proof and fails to demonstrate discrimination.

The Hearing Examiner is presented with two fairly balanced explanations of a conversation that only the two participants can verify. On the side of the Complainant, his presentation was impassioned and though not precisely consistent, was consistent as to the content over the period of this complaint. On the side of the Respondent, its explanation is consistent with the record as a whole and presents a picture of an interaction that one expects in today's racially sensitive environment.

The Respondent challenges the Complainant's testimony by pointing out a number of alterations in his description of the statements over the life of the complaint. In this regard, the Respondent points to the omission of some parts of the interchange and the change in words used to recount the interaction such as the substitution for "worried" for "wondered".

The Hearing Examiner is not particularly concerned with the changes in the Complainant's recounting of his conversation with Strandberg. The differences, in the Hearing Examiner's mind, are slight, unintentional and represent the minor variances that one might expect from a witness over time and during the stress of a hearing.

Of a greater concern is how these alleged statements fit with the record as a whole. It's clear that both Strandberg and Diedrich knew of the Complainant's race throughout the process. Despite the Complainant's failure to provide the required documents, Strandberg and Diedrich were willing to encourage the Complainant's application while hoping to receive the required application information. At the same time as the Complainant's application was being processed, the Respondent was attempting to recruit an African American MLO named Jeff Mack from M & I Bank.

The Complainant's explanation is inconsistent with the fact that the Respondent was encouraging his application despite his failure to submit the required documentation. Equally, if the Respondent were going to discriminate against the Complainant on the basis of his race, it seems unlikely that it would be actively pursuing another individual of the Complainant's race at the same time that it was discriminating against the Complainant.

The Hearing Examiner also finds interesting that in both the Complainant's rendition of events and that of the Respondent that the first individual to explicitly raise the issue of the Complainant's race was the Complainant. Nothing in the record demonstrates any presence of a concern for race prior to the Complainant's first mention of it. If something had occurred during the application process to raise concerns in the Complainant's mind over how his race might affect his candidacy, the Complainant has not presented it.

The Hearing Examiner can accept that race for a member of a minority group is always a present factor and issue in virtually all transactions between those of differing races. However, given that cultural background, it is still incumbent upon the Complainant to present evidence demonstrating how that underlying fact of life played out in a given interaction.

While the Respondent's explanation appears consistent with the testimony about the context of the statement, there is little more to support the Respondent's version of events. In this situation, either the Respondent's explanation is credible or it is not. The Hearing Examiner finds that it is credible given the record as a whole and Strandberg's demeanor while testifying.

In finding that the Respondent's explanation is credible, the Hearing Examiner is not making a judgment that the Respondent's version is necessarily more credible than that of the Complainant. In this regard, the Hearing Examiner merely determines that the Respondent's testimony is, at least, as credible as the Complainant's. However, for the reasons indicated above, the Hearing Examiner finds that the Complainant's version of events is, in fact, less credible than that of the Respondent's version.

To summarize, though the Complainant's testimony was presented with emotion and a certain internal consistency, it was contrary to the inference the record as a whole creates. That Dietrich and Strandberg encouraged the Complainant's application while knowing of his race and while the Respondent was actively recruiting other MLO's of the Complainant's protected class leads one to the inference that the Complainant's race was not the reason that the Respondent determined not to further process the Complainant's application. While this is an inference, there is no evidence in the record to challenge that inference.

There is a second argument which might be made upon this record, but that was not explicitly made by the Complainant. During the meeting with the Complainant, Strandberg noted that the materials submitted by the Complainant might better qualify him for a position as a provider of loans under the Community Reinvestment Act (CRA or CRO). The CRA is a federal program that provides mortgage funding to low and other targeted communities that might not otherwise qualify for conventional mortgages. The participants in these programs are often members of racial minorities.

At the time of the Complainant's interview with Strandberg, the Respondent did not have a position as a Loan Officer in its CRA program. That Strandberg suggests that the Complainant's materials might better qualify him for a position in the CRA program might be seen as steering an individual who is a member of a protected class into a position that will serve other members of his protected class. In that regard, it is arguable that the Complainant might demonstrate a causal connection between his race and the Respondent's failure to hire him as a Mortgage Loan Officer.

Having posited such an argument, the Hearing Examiner must conclude that there is insufficient evidence in the record to support a finding based upon such a claim. It is clear that the Complainant's application was being processed as that for a Mortgage Loan Officer. There was no CRA position available nor was one immediately anticipated. There is nothing in the record that suggests that the Complainant was steered towards a potential position in the CRA program in lieu of a position as a MLO.

As the Complainant has not presented sufficient evidence to demonstrate a *prima facie* claim of discrimination on the basis of his race, the complaint must be dismissed. Even if the Hearing Examiner were to conclude that the Complainant had demonstrated a *prima facie* claim of discrimination, the burden would shift to the Respondent to present a legitimate, nondiscriminatory explanation for its actions. This is a burden of presentation, not one of proof. The Respondent presented testimony through both Dietrich and Strandberg that it finally determined that it could not further process the Complainant's application without the Complainant's cooperation. The Complainant admittedly had not submitted much of the material required by the Respondent as part of the application process. There is no assertion that the material required by the Respondent was discriminatory or that the requirement to provide the information was either discriminatory or was discriminatorily applied.

The Hearing Examiner finds that the Respondent has provided a legitimate, nondiscriminatory explanation for its decision not to proceed with the application process with the Complainant. Nothing in the record indicates that the material requested was unreasonable or represented a pretext for an otherwise discriminatory animus. A failure to cooperate in the application process or to complete the application process is clearly a legitimate, nondiscriminatory reason for the Respondent to have terminated the application process.

The Respondent having presented a legitimate, nondiscriminatory explanation for its actions, the burden once again shifts to the Complainant. The Complainant might still prevail if he can produce sufficient evidence that establishes either that the explanation presented by the Respondent is either not credible or represents a pretext for an otherwise discriminatory explanation. The primary argument put forth by the Complainant in this regard is that there was no reason for Strandberg to meet with the Complainant given the Complainant's failure to submit the material required by the application process. It seems that this argument by the Complainant has two points. First, the Complainant appears to contend that the Respondent must have found his application sufficient even without the requested material or it would not have taken the time to hold the interview. Second and somewhat in the alternative, the Complainant may be arguing that Strandberg's interview was simply a ruse to hide the Respondent's discriminatory decision.

There are simply no facts in the record to support either of these contentions. Strandberg testified that he routinely would interview candidates prior to the complete submission of all application data. In general, this would seem to be a matter of convenience for both the applicants and for Strandberg. The record is clear that the Respondent has never hired an MLO without having all the required materials in hand. That the Respondent would interview someone prior to having those materials with the anticipation that the materials would be submitted, represents a common sense approach to time management and to encouraging those who had yet to complete the submission process.

The Complainant's contention that the Respondent found sufficient merit in his application to interview him does nothing to explain why he believed that the Respondent would waive the remaining documentation requirements. At best, the Hearing Examiner might conclude that the Complainant's incomplete materials indicated sufficient promise that the Respondent wished to keep his application active to give the Complainant the opportunity to complete his application. When he failed to do so and made it clear that he would not be able to do so, the Respondent terminated his application.

As for the Complainant's assertion that the Respondent's interview of him was merely a reuse to cover another wise discriminatory decision, the record lacks any support for this contention. As noted above, it appears to the Hearing Examiner that the Respondent wished to give the Complainant every opportunity to complete the application process as possible. The Hearing Examiner can understand how to the Complainant this might have seemed as if the Respondent were stringing his application along based upon the Complainant's knowledge that he would not be able to complete the process. However, in a job market where good employees are invaluable, an applicant with potential will likely receive additional encouragement to complete the process.

In short, the Complainant fails to point to evidence or facts that are sufficient to rebut the Respondent's nondiscriminatory explanation for its decision to terminate the Complainant's application.

Had the Complainant initially made a *prima facie* case of discrimination, this failure to carry his burden of proof at this stage would result in a finding of no discrimination as well.

There is no doubt that the Complainant's status as a pro se litigant placed him at a disadvantage. The Complainant's deep conviction that he experienced discrimination at the hand of the Respondent also undoubtedly colored the Complainant's perception of his claim. However, the Hearing Examiner is convinced that the Respondent's actions were in no way motivated by the Complainant's race. Most notably, the Respondent's processing of the Complainant's application after knowledge of his race and the fact that the Respondent was actively pursuing other members of the Complainant's protected class for the same position as the Complainant demonstrate a lack of discriminatory attitude or motive.

The complaint is dismissed.

Signed and dated this 8th day of March, 2013.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Amy O Bruchs