

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

Ann Bakken
2309 Brewery Rd
Cross Plains WI 53528

Complainant

vs.

Aerotek Staffing Agency
5133 W Terrace Dr Ste 400
Madison WI 53718

CUNA Mutual Group
5910 Mineral Point Rd.
Madison WI 53705

Respondents

HEARING EXAMINER'S DECISION AND
ORDER ON RESPONDENT'S MOTION TO
CONSOLIDATE

CASE NO. 20132110 and 20132111

On July 22, 2013, the Complainant, Ann Bakken, filed two complaints of discrimination with the Madison Department of Civil Rights Equal Opportunities Division. The complaints separately charged the Respondents, CUNA Mutual Group (20132111) and Aerotek Staffing Agency (20132110), with discriminating against her on the basis of her credit history when she was refused a temporary position with CUNA Mutual Group for which Aerotek Staffing Agency was the referring employment agency. The Respondents both deny having discriminated against the Complainant in violation of the Equal Opportunities Ordinance and assert that the Complainant's credit history was sufficiently related to the position that she sought to fall within the ordinance's exception to credit history discrimination found at Mad. Gen. Ord. 39.03(8)(i)(7)a.

Subsequent to an investigation, an Equal Opportunities Division Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondents had discriminated against the Complainant on the basis of her credit history in employment. Efforts to conciliate the complaints were unsuccessful and the complaints were transferred to the Hearing Examiner for further proceedings.

While the complaints name separate Respondents, the allegations arise out of a single set of facts and circumstances. However, as there are two separate complaints, these matters, though closely related, have been treated as distinct complaints wherever practical.

The Hearing Examiner scheduled Pre-Hearing Conferences in both cases for the same day, but at separate times. Counsel for the Respondent Aerotek Staffing Agency requested rescheduling of the Pre-Hearing Conference in that matter due to his being unavailable to prepare for the Pre-Hearing Conference at the scheduled time. The Hearing Examiner granted

that request. Neither the Complainant nor counsel for the Respondent CUNA Mutual Group requested rescheduling of that matter, and a Pre-Hearing Conference was held in that complaint on July 10, 2014.

During the Pre-Hearing Conference held in Bakken v. CUNA Mutual Group MEOC Case No. 20132111, counsel for the Respondent indicated that he would move for consolidation of discovery and hearing of the two complaints filed by the Complainant. When asked for her view on consolidation, the Complainant indicated that she was not prepared to address the issue, but that her initial thoughts were that she would oppose consolidation. The Complainant was unrepresented at the Pre-Hearing Conference and remains so as of this writing.

The Hearing Examiner inquired if counsel for CUNA Mutual Group had discussed consolidation with counsel for Aerotek Staffing Agency. The Hearing Examiner said that in-house counsel for Aerotek Staffing Agency had been contacted but retained counsel had not yet been contacted.

Given some slight uncertainty about the position of one of the Respondents and the Complainant, the Hearing Examiner established a schedule for the filing of a motion to consolidate proceedings and to gain a clearer picture of whether the Respondent Aerotek Staffing Agency would oppose the motion.

On July 14, 2014, the Hearing Examiner issued a Scheduling Order requiring the Respondent for CUNA Mutual Group to file his motion for consolidation on or before July 18, 2014. On July 15, 2014, the Hearing Examiner received from counsel for Aerotek Staffing Agency, a letter informing him that Respondent Aerotek Staffing Agency did not oppose consolidation and essentially joined in CUNA Mutual Group's motion. The Complainant was given until July 28, 2014 to file an argument in opposition to the Respondents' motion for consolidation. The Complainant has not filed any statement either opposing consolidation or agreeing to it.

DECISION

The issue of consolidation is not always clear. There are generally sound reasons relating to simplification of the proceedings and a reduction in time and effort for both parties that mediate in favor of consolidating closely related complaints. However, there are also issues of fairness and individual responsibility that sometimes require maintaining complaints in separate proceedings.

Absent an indication on the record that the causes of action against the two Respondents should be seen as unique or that there is a reasonable prospect that the Complainant's theories of liability could establish different outcomes based upon differences in the actions of the parties, the Hearing Examiner believes that consolidation of these complaints is warranted. The savings in time for all parties, witnesses and the Department are not insignificant. As pointed out by the counsel for CUNA Mutual Group, the witnesses in both actions are likely to be identical and to require separate depositions for the same witnesses in separate actions represents a duplication of effort and expense to all parties that can be reduced by consolidation. This kind of duplication does not necessarily occur each time where there are similar claims, but there is nothing in this record to indicate that such duplication would not be likely in this particular matter.

Another reason for consolidation is the opportunity to avoid the possibility of inconsistent outcomes. If these matters were tried separately upon the same set of facts, differences in outcome could occur due to issues unrelated to the facts. Differences in presentation or in technique might lead to differing outcomes even though it appears that the facts are essentially the same. While this possibility might be seen as a "second chance" for the Complainant, it represents a difficult and potentially untenable problem for the Department. Also, trial of the first claim may well result in a protracted dispute over the application of the principle of collateral estoppel to the second claim.

For the foregoing reasons, the Hearing Examiner determines that consolidation of the complainants for purposes of discovery and hearing is in the best interests of the parties and the Department.

ORDER

Proceedings in MEOC Case Nos. 20132110 and 20132111 will be consolidated for purposes of discovery and other pre-hearing matters and for hearing. Should scheduling of further proceedings be made more difficult by consolidation, this decision will be subject to reconsideration.

Signed and dated this 6th day of August, 2014.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: William E Corum
Daniel Barker