

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

Roselind Johnson
62 Wittwer Rd
Madison WI 53714

Complainant

vs.

Hy-Vee
675 S Whitney Way
Madison WI 53711

Respondent

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

CASE NO. 20142051

EEOC CASE NO. 26B201400028

A public hearing on the allegations of the above captioned complaint was heard on April 28, 2016 in room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr., Boulevard, Madison, Wisconsin. The Complainant, Roselind Johnson, appeared in person and without counsel. The Respondent, Hy-Vee, appeared by its counsel, Lori Lubinski, of the law firm of Axley Brynelson, and by its corporate representative, Jeremy Low. Based upon the record of the proceedings, the Hearing Examiner, Clifford E. Blackwell, III, makes his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. The Complainant is an African-American female who was 45 years of age in November of 2013.
2. The Respondent is an Iowa corporation which operates grocery or food stores across the Midwest including a store located at 675 S. Whitney Way in the City of Madison (53711). The Respondent employs approximately 300 individuals at that location.
3. The Complainant began her employment with the Respondent in March or April of 2013. The Complainant's employment was terminated on November 5, 2013.
4. The Complainant, at all times relevant to this matter, was employed as a Dishwasher in the Respondent's restaurant. The Complainant began employment with an hourly wage of \$8.50 per hour and was paid \$9.00 per hour at the time of her termination.
5. The Complainant was a part-time employee and generally worked a schedule running from 1:00 p.m. to 5:00 p.m. on Mondays through Fridays and from 8:00 a.m. to 5:00 p.m. on Sundays. As of October 17, 2013, the Complainant's supervisor was Jesse Roquemore. While Roquemore was the Complainant's supervisor, the Complainant believed her supervisor was Eric Shahan, Kitchen Manager.

6. The Complainant's employment was without problem until November 5, 2013. On that day, shortly after appearing for work, the Complainant and Roquemore became engaged in a heated dispute over the Complainant's job duties and Roquemore's authority to assign the Complainant work. The argument escalated to the point that both parties used profanities and had very raised voices.
7. The dispute ended with the Complainant leaving to find Shahan and Roquemore going to the Respondent's administrative office. When the Complainant observed Roquemore heading for the offices, the Complainant followed Roquemore.
8. The precise chain of events is unclear from this point until Roquemore, the Complainant, and Jeremy Low (Respondent's Store Operations Manager) and Kaitlin Luoma (at the time Nowicki) all arrived at the area around the time clock. Luoma came from her office because she had heard voices raised in an argument and then heard profanities being exchanged. Low had been elsewhere in the store and had received a call indicating that a significant disruption had occurred in the restaurant area.
9. When Luoma observed Roquemore and the Complainant involved in a loud argument that appeared to be escalating, Luoma escorted the Complainant to the Human Resources office. Mike Niemyer, another supervisor employed by the Respondent, escorted Roquemore to another office. Low followed Luoma and the Complainant to Luoma's office and closed the door.
10. Once in Luoma's office, Luoma took the seat behind her desk; the Complainant stood behind or perhaps sat in the visitor's chairs in front of Luoma's desk and Low remained standing next to the office door.
11. The Complainant, when she realized that Roquemore was not present, vigorously requested that Roquemore be brought into the office. The Complainant was agitated and spoke loudly using profanity.
12. Neither Luoma nor Low felt that the situation could be controlled if Roquemore was brought into the office. Low spoke with the Complainant trying to calm her down and to de-escalate the situation. Despite Low's efforts and those of Luoma, the Complainant remained agitated and continued to swear during her explanation of the circumstances and also swore at Low.
13. When Low determined that the effort to calm the Complainant down was not working, he indicated that he would send the Complainant home for the day and they could discuss the situation during the Complainant's next shift.
14. The Complainant was outraged by Low's indication that she would be excused for the day. She had only just recently arrived at work after a lengthy commute from her home and she felt economic pressure to remain at work. Low did not indicate that the Complainant could be paid for the time off and the Complainant did not inquire if that was a possibility. Instead, the Complainant objected to the suggestion of the time off and continued to use profanity both generally and directed at Low and/or Luoma.

15. Low was becoming increasingly frustrated with the inability to regain control over the situation. Low finally warned the Complainant not to use profanity again and that if she did, she would be terminated.
16. Rather than taking time to consider, the Complainant once again swore at Low, stating that "This is bullshit." Low terminated the Complainant's employment immediately.
17. The Complainant once again swore at Low saying "Fuck you too bitch!" and left Luoma's office throwing her work smock and identification badge as she left.
18. Roquemore, Luoma and Low are all younger than the Complainant and are all White.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected classes, race, color and age and is covered by the provisions of the Equal Opportunities Ordinance.
2. The Respondent is an employer within the meaning of the Equal Opportunities Ordinance and is subject to regulation under the ordinance.
3. The Complainant was not disciplined by the Respondent prior to her termination.
4. The Complainant's termination did not violate the provisions of the Equal Opportunities Ordinance.

ORDER

The complaint is dismissed. The parties shall each bear their own costs.

MEMORANDUM DECISION

The first question presented by the record for the Hearing Examiner is whether this is a case presented by direct 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. 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 presented by indirect evidence, the Hearing Examiner must generally rely upon inferences and presumptions raised by the evidence.

The testimony and evidence presented in this case create a factual record that fits 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 claim 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. If such a

reason is offered by the Respondent, the Complainant may still prevail if she can demonstrate that the Respondent's explanation is not credible or represents a pretext for an otherwise discriminatory motive. Ultimately, it is the Complainant's burden to establish that she has experienced discrimination as claimed in the complaint. It is not the Respondent's burden to demonstrate a lack of discrimination.

The elements of a *prima facie* claim of discrimination will vary depending upon the precise nature of the claim of discrimination. In the present matter, the Complainant alleges that she was discriminated against in two ways, by being disciplined and by being terminated on the bases of race, color and/or age. In this regard, there are two basic claims and three protected classes relating to each claim.

The Elements of the Complainant's two claims are: membership in one or more protected class(s); an adverse action; and a causal connection between the adverse action and the Complainant's protected class(s). This basic statement of elements is the same for the Complainant's claim that she was discriminatorily disciplined and for the claim that she was discriminatorily terminated.

With respect to the first element, that of membership in a protected class, there is no doubt that the Complainant is a member of the protected classes race and color. The Complainant is an African-American with skin that is appreciably darker than that of the other individuals involved in the incidents that comprise this complaint. The Complainant describes her skin color as "caramel brown." The question of whether the Complainant is a member of the protected class age is somewhat more involved. The Equal Opportunities Ordinance's definition of age is significantly more broad than that of state law, or that of Title VII on the federal level. Under the Equal Opportunities Ordinance, the category "age" applies to any individual over 18 years of age. The Wisconsin and federal provisions against age discrimination only apply to those over 40 of age. The Complainant is over 40 years of age so she minimally meets the definition for the "age" protected class at all levels of regulation.

While there might be an argument that the Complainant is not sufficiently older than the other participants in the incident to warrant her being in a separate age category, such a refined argument is irrelevant to the outcome in this matter. Additionally, the Respondent does not appear to challenge the Complainant's membership in the protected class "age".

The next question is whether the Complainant experienced an adverse employment action. With respect to her claim that she was discriminated against when her employment was terminated, there is no doubt that the record establishes that she was terminated and that termination is an adverse employment action. The Respondent does not contend that with respect to her termination that the Complainant did not suffer an adverse employment action.

With respect to the claim that the Complainant was discriminated against because of her allegedly being disciplined, the question is somewhat more complicated. There is no doubt that discipline represents an adverse employment action. However, the Respondent, generally speaking, asserts that it did not discipline the Complainant during the incidents on November 5, 2013. If by discipline, the Complainant means her termination, then the two separately identified claims merge into a single claim. In that context, there is really no distinction to be drawn between the Complainant's discipline and her termination.

However, the Hearing Examiner assumes that the Complainant means by discipline, Low's direction that the Complainant should go home for the rest of the day. In this context, if Low's direction constituted discipline, the Complainant's claim of discrimination in discipline would be a claim separate and distinct from the termination claim.

Since to treat the Complainant's claim of discrimination in discipline as referring to the Complainant's termination would make the language of the original complaint and the Notice of Hearing meaningless, the Hearing Examiner will address the discipline claim as referring to the incident up to the Complainant's termination.

Given the record as a whole, the Hearing Examiner can accept that the Complainant viewed Low's direction that she go home for the rest of the day as disciplinary. While the Hearing Examiner can understand why the Complainant felt Low's direction to be disciplinary in nature, the Complainant's feelings or beliefs are not necessarily controlling. The Respondent denies that Low's direction for the Complainant to go home was intended as discipline. The Respondent states that it believed that such a directive was needed to regain control over a situation that had unexpectedly become unmanageable.

The circumstances leading up to Low's directive started when the Complainant first came to work on November 5, 2013. She observed a co-worker doing a task that was unexpected. When the Complainant commented on the unusual work, the co-worker indicated that the Complainant would be doing it as well. When the Complainant bridled at this indication, Jessie Roquemore became involved by indicating that the Complainant would do the same work. Roquemore is a younger, White employee of the Respondent and was at the time, the Complainant's supervisor.

The Complainant objected to being told by Roquemore what to do, at least in part, because the Complainant did not believe that Roquemore was her supervisor. The Complainant believed that Eric Shahan was her supervisor. At hearing, the Respondent's witnesses stated that despite the Complainant's beliefs about Shahan, Roquemore was, in fact, the Complainant's supervisor. The Hearing Examiner accepts this version of the supervisory relationships.

The dispute between the Complainant and Roquemore quickly escalated to the point that both parties were using profanities and the possibility of violence was apparent.

The Complainant left the dispute to search out Shahan. Roquemore left apparently to report the incident to someone in Human Resources. The dispute was loud enough to be heard throughout the restaurant area and up to the Human Resources offices which are located on the second floor of the Respondent's building.

As the Complainant saw Roquemore heading for the Human Resources offices, the Complainant opted to follow. Roquemore was joined by Low as she ascended the stairs. It is not clear whether Roquemore and Low had any discussion about the incident as they walked, but it is likely that Roquemore had the opportunity to brief Low as to her position with respect to the dispute.

Once Roquemore, Low and the Complainant all reached the second floor outside of the Human Resources offices, near the time clock, the argument between Roquemore and the

Complainant was renewed. The Human Resources manager, Kaitlin Nowicki (now Luoma) heard the argument from her office and came to see what might be done to calm the dispute.

Low and Luoma endeavored to separate the Complainant and Roquemore. To this end, Low and Luoma escorted the Complainant to Luoma's office. At the same time, Mike Niemyer, another manager, escorted Roquemore to another office. There was no particular reason for this specific division other than to separate the participants.

Once Low, Luoma and the Complainant were in Luoma's office, Luoma took a seat behind her desk, Low stood against the wall near the closed door and the Complainant hovered around or behind the visitor's chairs in front of Luoma's desk.

The Complainant remained angry about the dispute and wanted Roquemore to be present so that the dispute could be resolved.

Low and Luoma both testified that the Complainant remained agitated and used frequent profanity in demanding Roquemore's presence. On the other hand, the Complainant testified that though she was upset and wanted to get the matter resolved so that she could return to work, she remained calm and respectful.

Given the record as a whole, the Hearing Examiner finds that Low's and Luoma's testimony is more credible in this regard than that of the Complainant. By making this finding, the Hearing Examiner does not find that the Complainant's testimony was false or intentionally misleading. Rather the Hearing Examiner finds that due to the emotional content of the interaction, the Complainant did not have as clear a recollection of the circumstances. Both Low and Luoma testified that their individual recollections might not be perfect due to the emotional content of the meeting and the passage of time. This is understandable and is frequently the situation in testimony at the time of hearing. This also applies to the Complainant's testimony.

There are several reasons why the Hearing Examiner finds that Low's and Luoma's testimony is somewhat more credible. First, at the time of hearing, despite the passage of time, the Complainant's testimony was clearly still emotionally powerful to her. Though she remained respectful, she was often angry sounding and tended to become caught up in the emotions of her recollections. This is not a bad thing, but does reflect that she was likely even more emotionally charged during the events two and a half years ago. It must be noted that the Complainant has a hearing loss and wears hearing aids. As a result, her voice level sometimes rises. However, the emotional content of the Complainant's testimony remained despite the volume of her voice.

Second, there is no doubt that the meeting in Luoma's office ended with the Complainant's swearing at Low and stalking out throwing parts of her uniform as she went. This was testified to by the Complainant as well as Low and Luoma. This makes a continuously stormy meeting more likely than one which was calm and suddenly became heated to the point described by all sides.

Third, the highly emotional content of the dispute between Roquemore and the Complainant leading up to the meeting in Luoma's office more likely indicates a continuation of the high emotions than a reduction in emotional conduct. The dispute had occurred over a span

of some time and in three different locations. It seems unlikely that such a disruptive conflict would suddenly quiet down.

Determination of the emotional state of the Complainant is important to a finding that Low did not seek to discipline the Complainant, but rather wished to restore order and create an environment that could result in resolution of the dispute. It is the Respondent's position that Low was seeking to regain control of a situation that had become unmanageable. The Complainant asserts that Low's directive to go home for the rest of the day was punitive because of her race, color and age.

The only support for the Complainant's position is that the directive to leave did not include a statement that she would be paid for the time off. However, given the circumstances of the situation, it seems unlikely that Low had the opportunity to consider whether the leave would be with or without pay.

The Hearing Examiner understands the Complainant's testimony that she was very upset about the directive that she leave for the rest of the day. She had just arrived at work after a lengthy commute from home and she faced an equally long commute home. Additionally, the Complainant's economic situation dictated that she receive all the work hours she could get. To be faced with the likely loss of a day's pay in a circumstance that she viewed as being the fault of another employee was extremely frustrating to the Complainant.

However, the Complainant's concerns, while legitimate and understandable, do not control the categorization of Low's directive. Under the circumstances as disclosed in the testimony of the parties, the Hearing Examiner finds that Low's directive to the Complainant to leave for the rest of the day did not constitute discipline, but was an attempt to regain control over a difficult situation.

Finding that Low's directive did not constitute discipline, the Complainant's allegations that she was disciplined on the basis of her race, color or age are not proved and are dismissed. Even if the directive to leave represented some form of discipline, the record falls short of demonstrating that it was imposed because of the Complainant's protected classes. The record does not indicate whether Roquemore, under similar circumstances would have been treated more favorably. Roquemore was not present and did not participate in the disruption described by Low and Luoma in Luoma's office. It is unfortunate that Roquemore was not present to testify at the hearing, but the Hearing Examiner can only work with the record that was presented to him.

The Complainant's second general claim of discrimination is that her termination resulted from discrimination because of her race, color and/or age. The Respondent contends that the Complainant's termination came about because of the Complainant's failure to heed Low's warnings to calm down and his directives not to swear at him or Luoma.

It is important to remember that it is the Complainant's burden to establish discrimination by the greater weight of the credible evidence. This means that where two opposing sides testify to the opposite positions, the Complainant must show that her version of events is more likely correct than that of the Respondent. In a situation where the Hearing Examiner is presented with differing explanations of an event and there is no reason to accept one version over the other, the Complainant fails to carry the burden of proof.

At best, the Hearing Examiner is presented with a classic example of "he said, she said." The Complainant testified that she remained calm until the point at which she was terminated. She states that she knew she had to remain calm in order to save her job and only wanted to resolve the dispute between her and Roquemore so that she could return to work. On the other hand, Low and Luoma testified that the Complainant was loud and agitated throughout the meeting and failed or refused to follow Low's directions to calm down, stop using profanity, until Low's final warning that the Complainant needed to stop swearing at him and Luoma or be terminated. Given the differences in testimony and without compelling evidence to support either side's version, the Hearing Examiner must conclude that the Complainant has failed to meet her burden of proof to show a causal connection between her membership in her protected classes and her termination.

Without finding that the Complainant's version of events represents a falsification, the Hearing Examiner finds that the Respondent's version of events is somewhat more likely. The Hearing Examiner incorporates his findings on credibility from above. It is not that the Respondent presented two witnesses that corroborated each other's testimony while the Complainant was her only witness. The record as a whole demonstrates a very contentious and bitter dispute between the Complainant and Roquemore. The Hearing Examiner makes no finding as to whose fault that dispute was. However, once separated from Roquemore outside the Human Resources offices, the Complainant also began to feel that she was being singled out. Objectively speaking, this was not the case. Both participants were being isolated in order to reduce the level of dispute and anger. However, the Complainant's frustration that Roquemore was not being produced, in the mind of the Hearing Examiner, maintained or heightened her feelings of discrimination and alienation. Given this view of events, the Hearing Examiner accepts the Respondent's testimony that the Complainant continued to be upset and continued to use abusive language when she did not get the satisfaction of Roquemore's presence.

The Complainant's clearly emotional testimony at the time of hearing supports a finding that the Complainant was more likely extremely upset and agitated in the meeting with Low and Luoma. The Hearing Examiner does not mean to convey the impression that the Complainant raved or was abusive at the time of hearing. Rather, she testified in a forthright manner, but with passion and a sense of how upsetting the situation in 2013 was.

Both sides testified to the Complainant's final statements and the manner in which she left the meeting in Luoma's office. This adds to the impression of a situation that had escaped the control of all who were there.

The Respondent's decision to terminate the Complainant rather than to impose some lesser form of discipline for the Complainant's continued use of profanity appears to be an example of an imprudent decision reached in the heat of the moment. While it is not the decision that the Hearing Examiner might have reached in similar circumstances, the Hearing Examiner is not empowered to second guess the Respondent's decision absent a clear link to a discriminatory motive. The record does not demonstrate such a link.

While it might be tempting to compare the apparent lack of discipline imposed on Roquemore, the White and younger employee, it is not appropriate to do so. She was not present and there is no way to know how she would have been treated under similar

circumstances. Low and Luoma acted appropriately when they separated Roquemore and the Complainant in an attempt to lower the level of conflict. Once Low and Luoma were isolated with the Complainant, they attempted to reduce the level of anger and to find out what had happened from the Complainant's perspective. Unfortunately, that was not possible and the situation spun further out of control. It is impossible to know whether simply allowing the parties to separately cool down by themselves without the presence of managers might have worked better. That the Respondent's manager, Low, felt compelled to terminate the Complainant rather than to take a less drastic course is truly regrettable, but given the record, the Hearing Examiner cannot find that it was motivated by the Complainant's race, color or age.

The complaint is dismissed.

Signed and dated this 15th day of June, 2016.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Lori M Lubinsky