

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

<p>Paul Mullen 2405 Winnebago Madison, WI 53704</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Answer Madison-TDS 333 W. Mifflin, Ste. 2 Madison, WI 53703</p> <p style="text-align: center;">Respondent</p>	<p>COMMISSION DECISION AND FINAL ORDER</p> <p>Case No. 21815</p>
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INTRODUCTION

On November 16, 1992, the Complainant, Paul Mullen, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, Answer Madison-TDS, had discriminated against the Complainant on the bases of sex and physical appearance in the terms and conditions of the Complainant's employment and in his termination.

The Complainant amended his complaint on April 19, 1993, by adding sexual orientation as an additional protected class. The complaint was assigned to a Commission Investigator/Conciliator for investigation of the allegations of discrimination and issuance of an Initial Determination. Subsequent to investigation, the Investigator/Conciliator issued an Initial Determination concluding that there was both probable and no probable cause to believe that discrimination had occurred. Specifically, the Investigator/Conciliator found that there was probable cause to believe that the Respondent had discriminated against the Complainant on the bases of sex, sexual orientation and physical appearance in the terms and conditions of the Complainant's employment and no probable cause to believe that the Respondent had discriminated against the Complainant on the bases of sex, sexual orientation and physical appearance in the Complainant's termination.

The Complainant appealed the Initial Determination's conclusions relating to the finding of no probable cause. The Commission's Hearing Examiner, after providing opportunity to supplement the record and to submit additional argument, determined that there was probable cause to believe that the Respondent had discriminated against the Complainant on the bases of sex and sexual orientation in the Complainant's termination and no probable cause on the basis of physical appearance in the Complainant's termination. The Complainant did not appeal the Hearing Examiner's finding of no probable cause.

The remaining allegations of the complaint were transferred to conciliation. Efforts at conciliation proved unsuccessful. The complaint was transferred to the Hearing Examiner for a public hearing on the allegations of the complaint that ultimately received findings of probable cause.

After hearing and the opportunity for written argument, the Hearing Examiner issued, on April 12, 1996, his Recommended Findings of Fact, Conclusions of Law and Order. The Hearing Examiner concluded that the Complainant had failed to meet his burden of proof on all of the claims before him. The Hearing Examiner recommended that the complaint be dismissed.

The Complainant timely appealed the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order. The Commission provided the parties with the opportunity to submit additional written argument in support of the parties' respective positions. On February 13, 1997, the Commission met to consider the Complainant's appeal. Participating in the Commission's deliberations were Commissioners Fieber, Hands, Liu-Katsuma, Miller, Thomas, Vedder, Washington, Zarate and Zipperer.

DECISION

This matter came before the Commission on the Complainant's appeal from the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order issued on April 12, 1996. The Hearing Examiner determined that the Complainant had not proven that he had been discriminated against on the basis of his sex, physical appearance or sexual orientation in his terms and conditions of employment or his sex or sexual orientation in his termination from employment. Specifically, the Hearing Examiner found that the Complainant had failed to present a prima facie case of discrimination by failing to demonstrate that his membership in any of the listed protected classes was a factor in the Respondent's employment decisions. The Hearing Examiner recommended that the complaint be dismissed.

The Complainant presents many exceptions to the Hearing Examiner's Recommended Findings of Fact. The Complainant asserts that the Hearing Examiner erred in accepting many facts that the Complainant views as being contested and argues that the facts should be as he presents them.

The Commission finds that the Hearing Examiner's findings as to the facts are supported by substantial evidence in the record. The Commission finds no reason to dispute the Hearing Examiner's findings as to the credibility of the witnesses and believes that the Hearing Examiner's conclusion that the Complainant failed to present a prima facie case of discrimination is supported by the record. The Commission gave serious consideration to the Complainant's long list of exceptions. The Commission believes that these exceptions arise from one party's view of the facts. It is the Hearing Examiner's duty to weigh the evidence presented and assess the credibility of the witnesses called and make a determination as to whether the parties have carried their respective burdens of proof. The record demonstrates that the Hearing Examiner performed these duties and reached a conclusion that is supported by the record when viewed as a whole. That one or the other party may disagree with a particular finding or the findings as a whole is not surprising. It is from such differences that hearings and appeals arise. Despite the Complainant's view of the evidence, the Commission finds that when the record as a whole is examined, the Hearing Examiner's decision is supported by substantial evidence. Because the Commission accepts the Hearing Examiner's conclusion that the Complainant failed to present a prima facie case of discrimination, the Commission need not address whether the Hearing Examiner properly stated and applied the "in part" test for setting forth a claim of discrimination. Failure to establish a prima facie case of discrimination eliminates any need to analyze the record to determine whether the Hearing Examiner properly stated and applied this test for discrimination.

The Complainant spent much of his appeal essentially asserting that he had not been adequately represented by his counsel at the hearing. This is not an issue that is relevant to this appeal. The Complainant is left to pursue these claims in other more appropriate forums.

ORDER

The complaint is hereby dismissed.

Joining in the Commission's decision are Commissioners Fieber, Hands, Liu-Katsuma, Miller, Thomas, Vedder, Washington, Zarate and Zipperer.

Signed and dated this 13th day of March, 1997.

EQUAL OPPORTUNITIES COMMISSION

Diana Miller
President