

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

<p>Theresa Zabit c/o 3402 Burke Ave. Madison, WI 53714</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> <p>Kraft Foods et. al. 910 Meyer Ave. Madison, WI 53704</p> <p style="text-align:center">Respondent</p>	<p>HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION</p> <p>Case No. 22563</p>
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BACKGROUND

On December 13, 1996, the Complainant, Theresa A. Zabit, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, Kraft Foods, Inc., discriminated against her on the bases of her sex and age when it replaced her in the position of Quality Assurance Manager, Asia-Pacific with a younger male employee. The Respondent denies that it discriminated against the Complainant on any basis and asserts that the Commission is without geographic jurisdiction to hear the complaint.

DECISION

This complaint presents an interesting question of the extent to which the Commission can exercise jurisdiction over actions that did not occur within the physical boundaries of the City of Madison. Somewhat complicating this analysis is the burden of proof and production at the early stages of investigation of a complaint before the Commission.

Prior to her taking the position that is the subject of this complaint, the Complainant was an employee in the Human Resources Department of Oscar Mayer Foods (OM). Oscar Mayer's corporate headquarters is located in Madison, Wisconsin. It is not clear from this record exactly what position the Complainant held with OM or for how long she had held it. OM is a subsidiary of Kraft Foods, Inc. of Northfield, Illinois. Both Kraft Foods and OM are owned by Phillip Morris. Kraft Foods maintains several different divisions or operational units including Kraft Foods International. Kraft Foods International operates an entity known as Kraft Foods AsiaPacific Ltd (KF-AP) headquartered in Hong Kong. This entity is responsible for business operations throughout the western Pacific rim for Kraft Foods and its subsidiaries.

In early 1993, the Complainant interviewed for and was offered the position of Quality Assurance Manager, Asia-Pacific. Based upon some economic representations made by the managing officer of KF-AP, the Complainant accepted the position and took steps to move to Hong Kong. These included selling her house in Madison and terminating her position with OM.

The Complainant's employment with OM ended on or about April 1, 1993. The Complainant asserts that she almost immediately experienced difficulties in her employment at KF-AP. For example, the Complainant had understood that her position was rated at SG-14 and was surprised to find that it had been reduced one level to SG-13. The Complainant also contends that she was not informed about certain relocation policies that would have had a significant impact on her economic options. Specifically, she sold her home in Madison rather than using a property management program that would not have required her sale. Subsequent to the sale of her house, she purchased another property in order to avoid a liability for capital gains taxes.

Once employed by KF-AP, the Complainant was employed on a series of employment contracts that were renewed from time to time. Prior to the circumstances giving rise to this complaint, the Complainant and her supervisor, Michael Guest, Vice-President for Operations, agreed to extend her employment for an additional year in January of 1996.

Despite the extension agreement with Guest, in the succeeding months, the Complainant received indications that her position might be in jeopardy. These rumors culminated in the announcement of a restructuring of the KF-AP operations at the end of June or early July, 1996. Accepting the Complainant's version of events, Guest knew that the Complainant was to be terminated and her position given to a younger male employee, David Adams, while he (Guest) was telling the Complainant that no decision had been made with respect to her position. Eventually, the Complainant was told that her position was being eliminated on or about July 18, 1996. According to the Complainant, her position had been offered to Adams on July 11, 1996. Adams' position as a Technical Manager in Beijing was terminated and Guest had no other position available for Adams.

In early August 1996, the Complainant learned that her understanding of what was happening to her position was wrong. The Complainant was extremely upset and believes that Guest and other managers had lied to her. The emotional distress and loss of trust experienced by the Complainant made it difficult for her to assess the options offered to her by the company.

From this record, it appears that the Complainant's options were to accept severance from the Kraft family of companies, accept another position within the Kraft family or strike out on her own. The options for continued employment within Kraft were extremely limited. On this record, it appears that the only Quality Assurance position within Kraft was as the assistant to the Quality Assurance Manager at OM in Madison, Wisconsin. This position had been offered to the Complainant by Joan Menke Schaezner, Vice-President for Quality NA, in late June when the Complainant was attending meetings at the Kraft Headquarters in Northfield, Illinois. This position was rated to pay less than what the Complainant was being paid in Hong Kong and had less responsibility than her KF-AP position.

When the Complainant had been offered the same position in June of 1996, she declined it because she loved her overseas work and wished to either continue in the international area or return to the US in a position that was clearly a next step for her career.

The Complainant made her career goals known during this meeting in a conversation with Bill Doeden, Vice-President, Quality World Wide.

After significant negotiation, the Complainant reluctantly accepted repatriation with Kraft Foods. She took the position in Madison at OM. Her salary continued at the level she had been paid in Hong Kong even though the position in Madison was rated one step lower.

The Complainant contends that her position in Hong Kong was not eliminated and that she had been discriminatorily replaced by a younger male in violation of the ordinance. In order to meet the geographic jurisdiction requirements of the ordinance, the Complainant asserts that she was actually an OM employee on loan to Kraft Foods and that OM management participated in the decision to terminate the Complainant's employment with KF-AP. In support of her claim, the Complainant notes that she has maintained ownership of a house in Madison and that she has Wisconsin taxes withheld from her check. The Complainant also submitted a number of memoranda between herself and various managers memorializing the Complainant's discussions and problems surrounding the termination of her employment.

After review and consideration of the materials submitted by the Complainant, the Hearing Examiner concludes that they fail to demonstrate or do anything more than hint in the general direction suggested by the Complainant.

There is nothing in the record tending to demonstrate that the Complainant remained as an employee of OM on loan to Kraft Foods International or KF-AP. The Complainant's September 18, 1996 memorandum clearly indicates that the Complainant terminated her employment with OM in order to pursue the KF-AP position. She sold her home and moved to Hong Kong. The Complainant presents no documentation from her employment file showing any continuing relationship with OM.

The Hearing Examiner does find it somewhat curious that the only Quality Assurance position in the whole of the Kraft Foods far flung corporate structure was with her former employer in Madison, Wisconsin. It is also troubling that this one position would be offered to the Complainant before she was informed that her KF-AP position was allegedly being eliminated. However, it does fall to the Complainant to point to facts, not mere speculation, to demonstrate that the Commission has jurisdiction over the complaint.

The fact that the Complainant has maintained a house in Madison, on this record, is irrelevant to the Complainant's contention. The Complainant's September 18, 1996 memorandum is once again revealing. In that document, the Complainant indicates that she bought a new home after selling her original property in order to avoid liability for capital gains taxes resulting from the earlier sale of her house. The earlier sale is a pretty clear indication that she did not intend to maintain ties to Madison and only tax considerations motivated the maintenance of a property in Madison. The Hearing Examiner supposes that the Complainant could have purchased a primary residence anywhere in the United States to accomplish the same tax savings. It is not unreasonable to believe that the Complainant's choice of Madison was dictated by her lengthy past residence and familiarity with Madison and her personal contacts with people who might assist with property management.

By itself, the fact that the Complainant has Wisconsin taxes withheld from her KF-AP paychecks does not demonstrate a continuing connection with OM. The Hearing Examiner is generally ignorant of the world of taxation of wages paid to United States citizens working outside of the United States. It does not seem unreasonable, however, that the Complainant would continue to have Wisconsin taxes withheld if there is an obligation to withhold taxes from a state of primary residence. After all, the Complainant had not relinquished her citizenship and had not formed an intent to become a resident of any other state. These tax and residency considerations would seem to be independent of the Complainant's employment relationships.

In opposing the Complainant's claim of jurisdiction, the Respondent points to the fact that none of the witnesses pointed to by the Complainant as persons having knowledge of the facts surrounding the complaint are employed by OM. The Hearing Examiner agrees that this is a significant point. If OM

managers were to have participated in the decisions regarding the Complainant's employment, the Hearing Examiner would expect at least one locally placed person to appear on such a list. The closest managers to OM on the Complainant's witness list were employed in Kraft Foods headquarters in Northfield, Illinois. Virtually all of the other potential witnesses are located in Hong Kong.

The Complainant asserts that because of the close corporate relationship between OM, Kraft Foods, Kraft Foods International and KF-AP, the Commission should view them as a single entity for purposes of this case. While such an approach is occasionally used in making some jurisdictional determinations, the Hearing Examiner does not believe that it is appropriate to do so in this case. It appears that the Complainant's employment by KF-AP was to serve as Quality Assurance Manager in Asia-Pacific for all of the Kraft Foods products, not just those produced by OM. The Complainant's employment in Hong Kong seems to have been of a different nature from her former employment with OM. All of the Complainant's discussions about her position and the control over her work were handled exclusively by managers in Hong Kong. There is nothing in this record to support the Complainant's suggested approach of considering all of the corporate entities as one with OM. After all, would the Complainant suggest that an employee in Northfield, Illinois who occasionally works with OM products could file a complaint in Madison, Wisconsin, if terminated by his or her manager in Northfield?

As noted above, this motion presents an interesting question of the proper burden and the placement of that burden at this stage of a complaint. Customarily, when filing a complaint, the Complainant must state facts and allegations sufficient by themselves to establish a prima facie claim of discrimination. At the point of the issuance of an Initial Determination, the burden on the Complainant rises to point to facts that by themselves, regardless of contradiction by the Respondent, are sufficient to establish a prima facie case of discrimination. By the time of hearing, the Complainant's burden once again rises to one of proof of facts sufficient to establish a prima facie case. Given that this complaint is going before a hearing and even issuance of an Initial Determination, what should be the Complainant's burden?

The Hearing Examiner is comfortable with requiring the Complainant to point to facts sufficient by themselves to demonstrate that the Commission has geographic jurisdiction or at least to raise a reasonable question of the Commission's jurisdiction. If a reasonable question exists, then the Hearing Examiner may remand the complaint to the Investigator/Conciliator for development of a sufficient factual record or can hold a hearing on the limited question of jurisdiction. It should not be sufficient to rely on speculation, hypothesis or supposition. The Commission and the parties should be able to determine the general basis of the complaint and the Commission's jurisdiction before proceeding to investigate the allegations.

In the present case, the Complainant's claim of jurisdiction rests on speculation and surmise. The facts upon which the Complainant rests her assertion of jurisdiction are not demonstrated on this record. Under the circumstances, the Hearing Examiner orders dismissal of the complaint. The record does not demonstrate a reasonable theory of jurisdiction that might be more adequately documented after further investigation or a hearing.

ORDER

The complaint is hereby dismissed.

Signed and dated this 19th day of May, 1998.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner