

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

<p>Jenny Lee 2517 Waltham Rd Madison WI 53711</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> <p>National Conference of Bar Examiners 402 W Wilson St Madison WI 53703</p> <p style="text-align:center">Respondent</p>	<p>COMMISSION'S DECISION AND FINAL ORDER</p> <p>Case No. 20032014</p>
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BACKGROUND

On February 13, 2003, the Complainant, Jenny Lee, filed a complaint with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, the National Conference of Bar Examiners, discriminated against her on the bases of age, race, color and national origin/ancestry and that it retaliated against her for her exercise of rights protected by the ordinance. The Respondent denied having discriminated or retaliated against the Complainant in any manner.

Subsequent to an investigation, a Commission Investigator/Conciliator issued an Initial Determination, on September 24, 2003, concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant in employment on the bases of race, color and national origin/ancestry and that the Respondent had retaliated against the Complainant because of her exercise of rights protected by the ordinance. The Initial Determination concluded that there was no probable cause to believe that the Respondent had discriminated against the Complainant in employment on the basis of her age. The Complainant appealed the Initial Determination's conclusion of no probable cause on October 9, 2003.

On November 7, 2003, the Respondent filed a motion seeking transfer of the complaint to the Department of Workforce Development Equal Rights Division (ERD) due to the involvement of the Investigator/Conciliator in aspects of the case in ways that might lead to questions about the Commission's neutrality.

On April 21, 2005, the Hearing Examiner issued a Decision and Order transferring the complaint to the Department of Workforce Development ERD due to the possible appearance of impropriety in the Commission's handling of the case and because of the Complainant's ex parte communications with the Commission staff on April 27, 2005. The Complainant appealed the Hearing Examiner's Decision and Order transferring the complaint.

After the opportunity for the parties to submit briefs in support of their respective positions, the Commission met on September 15, 2005, to address the Complainant's appeal. Participating in the Commission's deliberations were Commissioners Bayrd, Brandon, Howe, McDonell, Morrison, Natera, Ross, TellezGiron and Zipperer. Commissioner Enemuoth-Trammel recused herself from action on this complaint.

DECISION

At the core of the Commission's concern about this complaint is that there maybe a reasonable public perception of a lack of neutrality on the part of the Commission. The Commission stresses that it in no way finds that it is unable to fully and fairly carry out its duties with respect to this complaint. However, the Commission accepts that the allegations that the Investigator/Conciliator's actions may have contributed to the

Complainant's actions and ultimately to her termination, one of the claims upon which this complaint rests, places the Commission in the unenviable position of judging the credibility of one of its own staff. The problem is exacerbated by the fact that the Investigator/Conciliator now serves in the capacity of Interim Executive Director. This position brings closer contact and trust creating a greater perception that the Commission might not be able to fairly judge that persons credibility if such became an issue.

The Commission is also disturbed by the fact of the Complainant's repeated ex parte contacts with the staff of the Commission including the Hearing Examiner despite clear prohibitions on such contacts in the Rules of the Commission. The Commission has no reason to believe that any decision would have been adversely affected by these contacts. However, the Complainant has created a possible perception that she is seeking to influence the outcome of her complaint outside of the complaint process.

The Commission is concerned that transfer of the complaint may result in a reduction of the remedies that may be available to the Complainant if she eventually demonstrates that the Respondent discriminated against her in violation of the Equal Opportunity Ordinance. However, the Complainant has created the appearance of impropriety and has therefore limited her own options.

The Complainant sought to have the Commission retain jurisdiction and to remedy the problem by appointment of an outside Hearing Examiner. This would only be partially successful in removing the appearance of a lack of neutrality. It does nothing to resolve the potential problem of the Commission needing to pass on the credibility of its own staff especially the Interim Executive Director. It is immaterial to the Commission whether the complaint is transferred to the ERD or to the United States Equal Opportunities Commission (EEOC). Unless the Complainant requests in writing within 10 days of receipt of this order that this matter be transferred to the EEOC, the Commission will undertake to transfer this complaint to the ERD for further processing. The Commission understands that the ERD may have no obligation to accept the transfer.

ORDER

This complaint shall be transferred from the jurisdiction of the Commission. Initial efforts to transfer this complaint will be made to the ERD as requested in the Respondent's original motion.

Joining in the Commission's action are Commissioners Bayrd, Brandon, McDonell, Natera, Ross and Tellez-Giron. Opposing the Commission's action are Commissioners Howe, Morrison and Zipperer. Commissioner Enemuoth-Trammel took no part in the Commission's Action.

Signed and dated this 20th day of October, 2005.

EQUAL OPPORTUNITIES COMMISSION

Ramona L. Natera
EOC President

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MADISON, WISCONSIN**

<p>Jenny Lee 2517 Waltham Rd Madison WI 53711</p> <p style="text-align: center;">Complainant</p>	<p style="text-align: center;">HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO TRANSFER</p> <p style="text-align: center;">Case No. 20032014</p>
<p>vs.</p>	

National Conference of Bar Examiners 402 W Wilson St Madison WI 53703	
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Respondent

BACKGROUND

On February 13, 2003, the Complainant, Jenny Lee, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, National Conference of Bar Examiners, had discriminated against the Complainant on the bases of her age, race, color, sex and national origin/ancestry in her terms and conditions of employment and in discharging her from employment. The complaint also alleges that the Respondent retaliated against the Complainant as a result of her exercise of rights protected by the ordinance. The Respondent denied having discriminated or retaliated against the Complainant in any manner.

Subsequent to an investigation, a Commission Investigator/Conciliator issued a mixed Initial Determination. The Initial Determination concluded that there was probable cause to believe that the Respondent had discriminated against the Complainant in her terms and conditions of employment and in her termination on the bases of race, national origin/ancestry and color, and that the Respondent had retaliated against the Complainant for her exercise of rights protected by the ordinance. The Initial Determination concluded that there was no probable cause to believe that the Respondent had discriminated against the Complainant because of her age. The Complainant appealed from those findings of no probable cause of the Initial Determination.

Once the appeal of the findings of no probable cause was before the Hearing Examiner, the Respondent, on November 6, 2003, moved the Commission to transfer processing of the complaint to the State of Wisconsin Department of Workforce Development's Equal Rights Division (ERD). The Respondent contends that the Commission's process and result are/will be impermissibly tainted as a result of interactions and communications between the Commission's staff and the Complainant. A more detailed description will follow. The Complainant opposes the transfer of the complaint for a variety of reasons mostly centered upon forum selection.

During the pendency of the Respondent's motion, the Complainant separately requested transfer of the complaint to the United States Equal Opportunities Commission (EEOC). In furtherance of the Complainant's request, the Commission provided the Complainant with copies of forms to be signed and returned to the Commission. The Complainant has not returned those forms, necessitating this Decision and Order.

DECISION

Central to the issue before the Hearing Examiner are events occurring during the investigation of the complaint. On or about March 19, 2003, subsequent to filing her complaint with the Commission, the Complainant was ordered not to come to work because her supervisor was going to be unavailable for several days. The Complainant was apparently upset and confused by the directive and wished to retrieve items of personal property from her desk.

The Complainant sought advice from the Investigator and others at the Commission about what she could and should do. It is somewhat unclear what advice was given or what part it played in the Complainant's termination and the allegations of this complaint. However, the Investigator did also appear at an Unemployment Compensation hearing concerning what information she gave the Complainant.

Subsequent to issuing the Initial Determination in this complaint, the Investigator has been appointed to the position of Interim Executive Director. Also during the pendency of this motion, the Complainant has contacted the Commission on several occasions.

The Respondent's request to transfer the complaint to the ERD pits two competing interests or principles against each other. On one hand, the parties and the Commission have an interest in preserving the actual and perceived neutrality of the complaint process. The Respondent argues that neutrality may be compromised in

the current case where the Hearing Examiner and possibly the Commission may be called upon to judge the credibility and actions of another Commission employee. On the other hand, the Complainant and the Commission have a legitimate interest in seeing that the ordinance is enforced and that those differences between the ordinance and the Fair Employment Act are maintained as a matter of public policy.

Balancing these interests is not at all an easy task. However, the Hearing Examiner was initially inclined to find that the interest of the Commission in giving parties the opportunity to file complaints and in enforcement of rights under the ordinance outweighed any potential apparent prejudice resulting from the Investigator's discussions with the Complainant. This is especially true given that, at the time of the appeal of the Initial Determination, the Investigator was on the same administrative level as the Hearing Examiner and did not directly report to the Commission.

Given the relatively isolated nature of the Investigator position, the fact that the complaint was on appeal from a finding of no probable cause, where credibility is not generally an issue, and given the lack of evidence linking the Investigator's discussions with the Complainant's actions, the Hearing Examiner felt that the potential for an appearance of impropriety was extremely low. It would, however, deprive the Complainant of her choice of forum to transfer processing of the complaint. Contrary to the Respondent's position, there are differences between the FEA and the ordinance and how they are enforced. These differences do not necessarily require the Commission to conform itself to the procedures and limitations of the FEA.

While the Hearing Examiner's initial review led him to the conclusion that this matter should not be transferred to another authority, subsequent events have conspired to direct a different result. Most importantly, the selection of the Investigator to fill, on an interim basis, the position of Executive Director could create a question of fairness relating to the claims of the complaint. While the Investigator, who was then the Investigations Supervisor, did not have direct contact with the Commission in her earlier role, she has direct access to the Commission as Interim Executive Director. In the role of Interim Executive Director, it would not be necessarily unreasonable for someone to believe that the testimony of the Interim Executive Director might receive less scrutiny or evaluation than another employee who is not in quite so close a relationship to the Commission.

A second factor leading the Hearing Examiner to the conclusion that this complaint should be transferred for further processing is the Complainant's additional contacts with the Commission. The Hearing Examiner has by separate cover notified the parties of a potentially ex parte communication from the Complainant. This contact indicates that the Complainant has a view of the Commission's neutrality that is inconsistent with the exercise of independent judgement. The Complainant's attempt to create an adverse opinion of the Respondent outside of accepted channels could be seen by a reasonable third party as creating an unfair environment for review of this complaint. This potentially prejudicial environment is one of the Complainant's own making.

It must be stressed that none of the contacts discussed in this decision are actually prejudicial. The Hearing Examiner is confident that neither his judgement nor that of the Commission would be compromised by the contacts discussed herein. Rather, it is that in order to assure all parties and the public of a fair and impartial forum, the Commission must take steps to avoid even the slightest inference of favoritism. Circumstances have conspired to create a reasonable question concerning the testimony of a Commission employee who might be called to testify, as well as the efforts of the Complainant to enhance her own credibility by attacking that of the Respondent outside of a hearing. The fact that one might reasonably view with suspicion these contacts requires that this complaint be transferred to a forum without this particular history.

ORDER

This complaint will be transferred to the Equal Rights Division pursuant to the worksharing agreement between the ERD and the Commission, unless the Complainant returns the documents for transfer of this complaint to the EEOC within 15 days of the undersigned date.

Signed and dated this 21st day of April, 2005.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner