

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

<p>Robert M. Reagan 426 King Street Belvidere, IL 61008</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>P.A. Bergner d/b/a Boston Store 215 West Towne Mall Madison, WI 53719</p> <p style="text-align: center;">Respondent</p>	<p>HEARING EXAMINER'S DECISION AND ORDER ON COMPLAINANT'S MOTION FOR LEAVE TO AMEND COMPLAINT</p> <p>Case No. 21832</p>
--	---

BACKGROUND

On January 7, 1993, the Complainant, Robert Reagan, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, P. A. Bergner d/b/a Boston Store terminated his employment on the basis of his conviction record and thereby discriminated against him in violation of Section 3.23(7)(a) of the Madison General Ordinances. The complaint was assigned to a Commission investigator/conciliator for investigation. On May 10, 1993, the investigator/conciliator issued an Initial Determination concluding that there was probable cause to believe that discrimination had occurred as alleged in the complaint.

Pursuant to the requirements of the Ordinance and the Commission rules, the complaint was transferred to conciliation. Efforts at conciliation proved unsuccessful. The complaint was then transferred to the Hearing Examiner for a public hearing on the allegations of the complaint.

The Hearing Examiner held a Pre-Hearing Conference in this matter on September 14, 1993. At that conference, the Complainant, by his attorney, for the first time indicated that he wished to pursue his complaint on an additional theory of discrimination on the basis of arrest record. To this end, the Complainant requested leave to amend his complaint to the extent that the existing complaint and Initial Determination did not encompass such a theory.

The Hearing Examiner gave the parties the opportunity to submit written argument in support of their respective positions. Based upon the record before the Hearing Examiner, the Hearing Examiner concludes that the Complainant's request must be granted.

DECISION

The first issue before the Hearing Examiner is whether the complaint and resulting Initial Determination are sufficiently broad to encompass a theory of arrest record discrimination as well as conviction record discrimination. The only issues addressed by the investigator/conciliator relate to a claim of conviction record discrimination. Nowhere in the Initial Determination does the investigator/conciliator address or discuss any issue relating to a claim of arrest record discrimination.

The complaint does make reference to the Complainant's arrest but appears to do so in the context of providing a factual background for the claim of conviction record discrimination. The allegations of the complaint, as currently written, do not attribute any adverse employment action giving rise to a claim of discrimination to the fact of arrest as opposed to the fact of the Complainant's conviction and incarceration.

If the existing complaint cannot support the theory urged by the Complainant, should the complaint be amended to include the additional theory? The rules of the Commission permit the Complainant to freely amend a complaint at any time prior to the issuance of a Notice of Hearing. Rule 6.13 A Notice of Hearing is customarily issued subsequent to a Pre-Hearing Conference and contains a brief statement of the issues to be decided as well as the time, date and location of the hearing. The language of Rule 6.13 clearly gives the Complainant control over the nature and form of the complaint until a Notice of Hearing has been issued. Similarly, the provision also provides that the Complainant may withdraw the complaint, in full or in part, at any time. The Rule does not indicate that the Commission may exercise any degree of control or limitation over these activities of the Complainant.

The Complainant made his request prior to the issuance of a Notice of Hearing in this matter. The request to amend the complaint was made at the Pre-Hearing Conference on September 14, 1993 and pursuant to that request the Hearing Examiner stayed further proceedings pending the Complainant's filing of this motion and a decision on that motion. A Notice of Hearing has never been issued in this matter.

The Respondent objects to the Complainant's motion on several grounds. These generally fall into two broad categories: estoppel and statute of limitations. None of these grounds are sufficient to defeat the Complainant's motion.

The Respondent points out that the Complainant filed his complaint on December 14, 1992 after receiving assistance from an intake worker of the Commission. This assistance consisted of discussing with the Complainant the facts and issues of the complaint and helping the Complainant to refine his complaint. After this assistance, the Complainant, with the help of the Commission intake worker, filed the current complaint. The complaint was investigated and an Initial Determination issued without the Complainant deciding that he might wish to amend his complaint.

Throughout the majority of the above process, the Complainant was not represented by counsel. He obtained counsel in July of 1993. Despite the appearance of an attorney on the scene, the Complainant did not request the opportunity to amend the complaint until the Pre-Hearing Conference on September 14, 1993.

The Respondent seems to contend that the above circumstances should in some manner estop the Complainant from amending his complaint. This position has no basis in fact or law.

The assistance of an intake worker is intended to help focus the thoughts of a potential Complainant and to assure that a prima facie statement of discrimination is made in the complaint. The intake worker does not act as a representative of the potential Complainant nor does the intake worker counsel the potential Complainant about the Complainant's rights or causes of action. In this way the intake worker is an entirely neutral influence in the complaint preparation process. The fact that an intake worker has assisted a Complainant does nothing to limit later actions with regard to the complaint. The Respondent does not make clear how it may have been prejudiced by any particular action of the intake worker in this case. The Respondent could not have relied upon the worker's

efforts in assisting the Complainant in putting the information that he presented into the form of a complaint. To a great extent, the intake worker is limited by the information provided by the Complainant.

Similarly the investigator/conciliator is limited by the allegations of the complaint as to what he or she can investigate. As with his or her investigation the Initial Determination is limited to the claims alleged in the complaint. The fact that the investigation proceeded along certain lines or the Initial Determination is limited to a certain claim does not bear any relationship to other issues that might have been raised or might be raised as the result of an amendment.

The fact that the Complainant's attorney may have waited two to two and a half months to file a request to amend the complaint is irrelevant in this case. The time period is essentially small in the greater scheme of things. The Respondent cannot seriously contend that it was prejudiced by the relatively short delay. There was little to be gained by the Complainant in filing his request much before the Pre-hearing Conference given that the parties were still attempting to conciliate the claim. The Complainant's attorney may not have even been fully aware of the existence of the claim or the Complainant's failure to pursue the claim until sometime after his retainer.

In general, a party may be estopped from taking some action where the party to be estopped has acted improperly or the party seeking to estop another has detrimentally relied on the action of the party to be estopped. Nothing in this record indicates that either the Complainant or his attorney acted improperly or that the Respondent placed any reasonable reliance on the actions of the Complainant. This record does not support a finding that estoppel principles should be applied in this case.

The second argument put forth by the Respondent is that the Complainant's amendment would be for conduct that falls outside the 300 day limit even if one were to consider the original date of filing. The Respondent contends that the requested amendment would fall outside the period of limitations provided for at MGO 3.23(9)(c)1 and therefore would fall outside of the Commission's jurisdiction. This argument has much appeal but is somewhat premature because the applicability of the argument depends on the precise claim of the amendment.

If the Complainant's amendment attempts to draw in the Respondent's actions in suspending the Complainant subsequent to his arrest, then those matters would likely be time barred. If on the other hand, the Complainant's amendment wishes to add the basis of his arrest record as possible grounds of his termination, then that allegation would not necessarily be time barred. To the extent that the Complainant's amendment falls somewhere between these two extremes, the Hearing Examiner would have to examine the precise allegation.

The key concept for consideration is not when did the arrest occur in relationship to the January 7, 1993 filing date but when did the adverse employment action that was based upon the Complainant's arrest record occur in relationship to the actual filing date.

ORDER

For the foregoing reasons, the Hearing Examiner grants the Complainant's motion for leave to amend his complaint of discrimination. The Complainant may file such an amendment within 30 days of the undersigned date. If he should decide not to amend his complaint, this matter will be set for a Pre-Hearing Conference. If the Complainant files an amendment to the complaint as provided herein, further proceedings before the Hearing Examiner will be stayed and the complaint and its amendment

will be remanded to the investigator/conciliator for investigation and issuance of an Initial Determination.

Signed and dated this 4th day of February, 1995.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner