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

Audrey E Berning 217 Lakeview Dr Lakeview, AR 72642-7154 Complainant vs. Delaney's Charcoal Steaks 449 Grand Canyon Dr Madison, WI 53719 Respondent	NOTICE OF RIGHT TO APPEAL FINAL ORDER Case No. 19993102

BACKGROUND

On June 1, 1999, June 14, 1999, June 18, 1999, June 23, 1999 and July 2, 1999, the Complainants, L. Tobias Lewis, Patricia A. Hahn, Joseph H. Hahn, Robert C. Hahn, Lance G. Hahn, Sheralyn E. Berning, Edward H. Berning, Audrey E. Berning and Rebecca Berning Lewis filed complaints of discrimination with the Madison Equal Opportunities Commission (Commission). The complaints charged that the Respondent, Delaney's Charcoal Steaks, treated a member of their dinner party less favorably than another patron of the restaurant not of his race with respect to a hat policy. Several different complaints were filed at the same time or shortly after the first. These complaints, MEOC Case Nos. 19993093, 19993099, 19993102, 19993103, 19993104, 19993110, 19993111, 19993118 and 19993100, were processed together without objection from the parties to reduce cost and duplication of effort.

Subsequent to an investigation, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainants in the provision of a public place of accommodation or amusement on the basis of race. Efforts to conciliate the complaint were unsuccessful and the complaints were transferred to the Hearing Examiner for further proceedings.

At the Pre-Hearing Conference held on March 24, 2000, counsel for all parties tentatively agreed that the facts were generally not in dispute, but that application of those facts to the law would lead to a decision of discrimination or no discrimination. Counsel for the Complainants indicated that he must discuss the procedure with the Complainants before fully agreeing to the process. Subsequently, counsel for the Complainants agreed to and participated in this process.

Generally speaking, the parties negotiated and agreed to a stipulation of facts and then submitted briefs applying the stipulated facts to the law deemed to be applicable by each side. This process was to be a substitute to a public hearing. This alternative process was utilized to reduce the

cost to the parties and to minimize disruption to the parties, especially the Complainants, because several of them live outside of Madison.

On February 2, 2001, the Hearing Examiner issued a Decision and Order concluding that the Respondent had not discriminated against the Complainant on the basis of race. In the case of Rebecca Berning Lewis, MEOC Case No. 19993100, the Hearing Examiner specifically determined that the Complainant could not maintain an action because she had not actually been at the restaurant.

On February 21, 2001, the Complainants, with the exception of MEOC Case No. 19993100, requested that the Hearing Examiner either amend the language of his decision without changing the holding or appeal the Decision and Order. The Hearing Examiner suggested that the counsel for the parties work out a stipulated Order for the Hearing Examiner. After a reasonable period of time failed to produce such a stipulated Order, the Hearing Examiner processed the Complainants' appeal.

On May 15, 2001, the Commission, through the Executive Director, issued a Notice of Appeal and Briefing Schedule. Subsequent to the submissions of the parties, the Commission took up the Complainants' appeal at its meeting on January 10, 2002. Participating in the Commission's discussions were Commissioners Hicks, Marunich, Morrison, Natera, Rico, Van Rooy, Verriden, Weill and Zipperer.

DECISION

After review of the record in this proceeding, the Commission adopts and incorporates by reference as if fully set forth herein, the Hearing Examiner's Decision and Order dated February 2, 2001. The Commission finds that the Hearing Examiner's Decision and Order is supported by the record especially as stipulated to by the parties.

ORDER

Joining in the Commission's action are Commissioners Hicks, Marunich, Morrison, Natera, Van Rooy, Verriden and Weill. Opposing the Commission's action was Commissioner Zipperer. There were no abstentions.

Signed and dated this 18th day of January, 2002.

EQUAL OPPORTUNITIES COMMISSION

Bert G. Zipperer
EOC President

BGZ:15

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Audrey E Berning 217 Lakeview Dr Lakeview AR 72642-7154 Complainant vs. Delaney's Charcoal Steaks 449 Grand Canyon Dr Madison WI 53719 Respondent	DECISION AND ORDER ON MOTION TO DISMISS ON A LACK OF JURISDICTION Case No. 19993102

On June 1, 1999, the Complainants, L. Tobias Lewis, Rebecca Berning Lewis, Lance G. Hahn, Audrey E. Berning, Edward H. Berning, Sheralyn E. Berning, Robert C. Hahn, Patricia A. Hahn, and Joseph H. Hahn, filed with the Madison Equal opportunities Commission (MEOC) a complaint of discrimination. The complaint alleged that the Respondent, Delaney's Charcoal Steaks, discriminated against the Complainants in the provision of a place of public accommodation or amusement on the basis of race. L. Tobias is of mixed race, the other eight complainants are White. There are nine individual complaints that have been consolidated with the parties' consent. Hereafter, all nine complaints will be referred to as "the complaint."

The complaint arises out of an incident on May 8, 1999, at the Delaney's Charcoal Steaks restaurant in Madison. The Complainants allege that they were discriminated against by Respondent when a member of their party was asked to remove his hat while another patron of a different race was not asked to remove his. The restaurant's policy has been to ask all men to remove their hats before entering the dining area. Complainants allege that Respondent refused to remedy the situation by asking the other patron to remove his hat.

An investigator issued a finding of probable cause on December 30, 1999. On April 28, 2000, the Respondent filed a Motion to Dismiss the complaint. Respondent asserts that the Complainants are not members of a protected class and that the Complainants were not denied enjoyment of a public place of accommodation as defined under Section 3.23(5) of the Madison Equal Opportunities Ordinance. The parties were given the opportunity to present written arguments and collaborate on a stipulation of facts. Based upon the arguments submitted by the parties and the independent research of the Hearing Examiner, it is concluded that the Motion to Dismiss should be granted.

FACTS

The facts as set forth in this section are either stipulated to by the parties or are identified by the Hearing Examiner from the record.

1. Respondent Delaney's Charcoal Steaks is a Madison restaurant located at 449 Grand Canyon Drive. Delaney's Charcoal Steaks appears to be owned, operated and managed by James Delaney. There is no indication that Delaney's Charcoal Steaks is a corporation.
2. Complainants L. Tobias Lewis, Lance G. Hahn, Audrey E. Berning, Edward H. Berning, Sheralyn E. Berning, Robert C. Hahn, Patricia A. Hahn, and Joseph H. Hahn went to Respondent's restaurant, Delaney's Charcoal Steaks. Complainant Rebecca Berning Lewis had planned to go but stayed home due to illness.
3. Mr. Delaney seated the group and asked L. Tobias Lewis to remove his hat.
4. Delaney's Charcoal Steaks has a no-hat policy for gentlemen. A sign was posted to that effect behind the reservations desk. Respondent's employees have regularly enforced this policy.
5. Mr. Delaney asked L. Tobias Lewis to remove his hat before entering the dining area.
6. L. Tobias Lewis went to the restroom, removed his hat and sat down with the group.
7. Ms. Angie Friemuth, a part-time employee of Respondent, seated a party of two. One member of the party was wearing a hat. Ms. Friemuth did not ask the gentleman to remove his hat.
8. Robert C. Hahn saw the gentleman with the hat and asked Ms. Friemuth to ask the gentleman to remove his hat in accordance with the no-hat policy.
9. Ms. Friemuth did not know who Robert C. Hahn was or that L. Tobias Lewis had been asked by Mr. Delaney to remove his hat. Ms. Friemuth did not ask the gentleman to remove his hat.
10. After five to ten minutes, Robert C. Hahn again asked Ms. Friemuth to ask the gentleman to remove his hat. Ms. Friemuth declined to comply.
11. Robert C. Hahn announced to the group that he was leaving.
12. After Robert C. Hahn left the restaurant, the remainder of his group arose and left.
13. As the group was leaving, Lance G. Hahn informed Mr. Delaney that the group would not be paying for their meals. Mr. Hahn also informed Mr. Delaney that their reason for leaving was the failure to ask the gentleman to remove his hat while L. Tobias Lewis had been asked to do so.
14. The Complainants went to another restaurant, ate, and then went home. The Complainants informed Rebecca Berning Lewis as to what had happened at Delaney's Charcoal Steaks.
15. Mr. Delaney called the Madison Police and informed them that the Complainants had left without paying for their meals.
16. $55.02 was eventually paid to Delaney's Charcoal Steaks as a result of Mr. Delaney's complaints to the police.

MEMORANDUM DECISION

The Complainants can be divided into three groups: Rebecca Berning Lewis, the seven remaining White Complainants and L. Tobias Lewis. The Hearing Examiner will address each of their claims in turn.

Rebecca Berning Lewis is White, and does not claim to be a member of the Complainant's protected class. The parties stipulate that Ms. Lewis was at home that evening and did not go to the restaurant. Complainant maintains that despite not being physically present, she felt the same discrimination as the other Complainants did. Hearing about an event and talking with police does not constitute a necessary level of

involvement. Complainant cites precedent allowing people not directly discriminated against to bring a complaint. Bond v. Michael's Family Restaurant, (LIRC, 03/30/94.) However, there is a difference between being present and hearing racially offensive remarks about one's race and being informed of an event hours later. Permitting people who did not experience but merely were informed later about discrimination leads down a slippery slope whereby anyone who later becomes aware of another's possible discrimination might file a claim. Ms. Lewis was not present at the restaurant and could not have suffered any differential treatment or reduction of service. There is no indication that Ms. Lewis was denied any future admission to the restaurant. There is no evidence in the record that Ms. Lewis suffered a deprivation or differing treatment at a public place of accommodation or amusement as defined under Section 3.23(5). The complaint of Rebecca Berning Lewis is dismissed.

The Complainants Lance G. Hahn, Audrey E. Berning, Edward H. Berning, Sheralyn E. Berning, Robert C. Hahn, Patricia A. Hahn, and Joseph H. Hahn, are White, and claim to be a member of L. Tobias Lewis' protected class "race" by association. These seven Complainants assert that the request by Mr. Delaney for Mr. Lewis to remove his hat while another patron of another race was permitted to wear his, was so offensive and racially motivated to constitute a constructive or actual denial of equal service.

Complainants use Bond as relevant precedent to show that Complainants need not be the direct targets of discriminatory behavior. The Complainants rely on Bond to establish the elements of their claim. Bond recognized that a person not directly the target of discriminatory actions may nevertheless have a cause of action where 1) the individual is subjected to racially derogatory actions which create a hostile environment, 2) where the hostile environment causes the individual to feel unwelcome in the place of accommodation; and 3) where the derogatory actions were either directly or indirectly condoned by the management of the place of accommodation.

When applying these criteria, it is apparent that the seven Complainants do not have a cause of action under the ordinance. It should be noted that in Bond, the Administrative Law Judge was applying the Wisconsin Public Accommodations Law (106.52(3)). The Madison City Ordinance being applied here is reasonably similar to the state law and Bond may be relevant in examining Complainant's arguments.

First, the seven Complainants were not, as individuals, subjected to racially derogatory language or actions. Mr. Lewis, a guest in the party, was merely asked to remove his hat pursuant to a posted policy. An employee other than the person who asked Mr. Lewis to remove his hat permitted another patron to violate the policy. While it is arguable that Mr. Lewis' race might have been a factor in this transaction, it remains mere speculation that race was the motivating factor. The ordinance needs more than speculation to support jurisdiction.

Second, the conduct alleged and stipulated to in the record falls short of demonstrating a hostile environment. There is no comparison between the treatment endured by Bond, i.e. racially explicit language and seeing a patron of another race wearing a hat after you have been asked to remove yours and that treatment alleged in these complaints. Nothing in this complaint suggests the type of pervasive conduct that would be offensive to a reasonable person for purposes of establishing a hostile environment. Mr. Lewis and his party were seated and served and by all indications, treated with respect, until one of the party, became irate over a perceived slight. While the ordinance does not limit itself to only "serious matters of discrimination," the Hearing Examiner believes that the claim of these complaints that this establishes a hostile environment falls far short of the mark.

Third, the record lacks evidence that the situation or circumstances were condoned, directly or indirectly, by the Respondent's management. Ms. Friemuth, a part-time, once-a-week employee, cannot be considered as being management. Mr. Delaney had no knowledge of Ms. Friemuth's seating of the White patron with the hat, nor her declining Mr. Hahn's request that she ask the White patron to remove his hat. Mr. Delaney did not know of the alleged discriminatory action until after the time that the first of the Complainants left the restaurant. Mr. Delaney was not given an opportunity to rectify the problem once it was called to his attention.

Complainant argues that it was made clear that to enjoy the restaurant, it was a condition to suffer racial discrimination. It does not appear that at any time any employee of the Respondent conditioned service to these seven Complainants because of their association with L. Tobias Lewis. Mr. Delaney was not aware there was a problem until after Robert C. Hahn had exited the restaurant. It is not apparent how Mr. Delaney could knowingly condition service to the seven or offer them disparate treatment based on their association with L. Tobias Lewis. The seven Complainants were not individually denied full and equal enjoyment of the Respondent's public accommodation as defined under Section 3.23(5). It was their perception of an act that curbed their enjoyment more than any actual discrimination. Accordingly, their complaints are dismissed.

L. Tobias Lewis is a member of the protected class "race." Mr. Lewis' complaint is, at best, supported by speculation. The only evidence in the record that involves differing races is that one employee asked Mr. Lewis to remove his hat while another employee failed to ask a patron of another race to remove his. While the Complainant may be entitled to certain inferences stemming from these facts at the time of failing of the complaint, and perhaps at the stage of an initial determination, it falls far short of what is required to demonstrate discrimination at the hearing stage. There is nothing in the record that suggests that the hat policy is a facially-neutral policy that is either being disparately applied or has a disparate impact on those of Mr. Lewis' race. The Hearing Examiner is in no position to speculate about the reasons for Ms. Friemuth's actions. Given the special circumstances that bring this complaint to the Hearing Examiner, the Hearing Examiner will not undertake Complainant's role to provide an explanation.

Mr. Lewis was served after being asked to remove his hat, in accordance with restaurant policy. There is no indication that Mr. Lewis was unwilling to remove his hat or that wearing his hat had some particular significance for him. Mr. Lewis was not denied service, nor did he have service conditioned on the basis of enduring a racially discriminatory environment simply because another patron not of his race was permitted to wear his hat. There is no explanation on this record for Ms. Friemuth's failure to enforce the no-hat policy. The fact alone that the two individuals involved in the hat controversy are of different races, on this record, fails to establish that the respondent condoned or permitted a racially hostile environment to exist, or applied its policy to Mr. Lewis on the basis of his race.

Even when examining the evidence in the light most favorable to the Complainant, there is not enough evidence to show that the management of the Respondent directly or indirectly condoned the incident. In Bond, management condoned and created the racially hostile environment. In this case there is no evidence on the record that the management of the Respondent condoned the act of alleged discrimination. Ms. Friemuth was not a member of restaurant management. Mr. Delaney and Ms. Friemuth cannot be considered as being "one", as Complainant suggests. The record lacks any indication that Ms. Friemuth or her actions could or should bind the Respondent beyond those of an ordinary employee. Mr. Lewis was not denied the full and equal enjoyment of the restaurant on the basis of race as defined under Section 3.23(5). The complaint of Mr. Lewis is dismissed.

The Hearing Examiner stresses that this is a complaint that is unusual in nature and procedure. It is difficult to draw conclusions about future application of this decision given the special nature of this case. Specifically, the Hearing Examiner does not want to leave the impression that individual acts of disparate treatment on the basis of any protected group will be tolerated or sanctioned by the Commission.

The Hearing Examiner has referred to the special circumstances in the procedure used to bring resolution to this complaint. The parties agreed that the majority of the facts necessary to resolve this matter were undisputed and therefore a hearing on the merits to establish those facts was not necessarily appropriate. The parties established the facts by stipulation. In retrospect, the record may be somewhat more limited than the Hearing Examiner would have liked.

While the Hearing Examiner has concluded that the complaints in this matter should be dismissed, he is no way condones or sanctions the actions taken by the Mr. Delaney once the Respondent was informed of the reasons for the Complainant's leaving. In these days, where customer satisfaction is emphasized in all we read and hear, Mr. Delaney's actions shout out as a paradigm of how not to treat your customers. Mr. Delaney's petty pursuit of what only could have been a small bill for dinner displays a shocking arrogance and self-centeredness. It seems clear to the Hearing Examiner that hours of anxiety, attorney time, and effort on part of the Commission could easily have been avoided by, at worst, an apology, and at most, the offer of a free meal. The Hearing Examiner can only hope that Mr. Delaney will demonstrate a more enlightened and less tyrannical view of customer relations in the future. The complaints are hereby dismissed. The parties shall bear their own costs.

Signed and dated this 1st day of February, 2001.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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