

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

<p>Stanley E Young 3201 Ridgeway Ave Apt 5 Madison WI 53704</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Nakoma Golf Club 4145 Country Club Rd Madison WI 53704</p> <p style="text-align: center;">Respondent</p>	<p>HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO ENFORCE SETTLEMENT</p> <p>Case No. 20032159</p>
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BACKGROUND

On August 25, 2003, the Complainant, Stanley Young, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, Nakoma Golf Club, discriminated against the Complainant on the bases of race and color in his terms and conditions of employment and his termination, in violation of the Madison Equal Opportunities Ordinance, Sec. 3.23(8), Mad. Gen. Ord. The Respondent denied the allegations of the complaint.

Subsequent to an investigation, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe the Respondent discriminated against the Complainant on the bases of race and color in his employment. Efforts to conciliate the complaint proved unsuccessful. The complaint was then transferred to the Hearing Examiner for a hearing on the merits.

During the investigation of the complaint, efforts at conciliation, and during the pre-hearing process, up to and including the day of hearing, the Complainant was unrepresented. He took part in all aspects of the complaint process on his own, despite having been advised that he could be represented at any time. The Complainant never informed the Hearing Examiner that he was seeking representation.

Hearing was scheduled for November 23, 2004. Originally, the hearing had been scheduled for September, 2004, but was postponed at the request of the Complainant.

On November 23, 2004, the Complainant appeared in person and without counsel. The Respondent appeared by Skip Avery and attorney Steven M. Compton. Before calling the complaint, the Hearing Examiner, as is his customary practice, asked the parties to make one last attempt to settle the complaint. To assist the parties, the Hearing Examiner asked Investigator/Conciliator David Lopez to facilitate the discussion. The Hearing Examiner was not present during the settlement discussion and took no part in it.

After some discussion, the parties, through Mr. Lopez, informed the Hearing Examiner that a settlement had been reached. The Hearing Examiner was prepared to put, at least, the fact of settlement on the record, but was informed that the settlement was to be a "private" settlement drawn up by counsel for the Respondent, and that the Commission would act as intermediary without becoming a party.

On or about November 30, 2004, the Commission received from Attorney Compton the settlement documents and a check in the amount of \$5,000.00. The settlement documents were forwarded to the Complainant for signature. The Commission retained the Respondent's check pending receipt of the completed settlement documents.

On December 10, 2004, the Commission received a notice of appearance from Attorney Willie J. Nunnery for the Complainant. On December 13, 2005, the Commission received a letter from Attorney Nunnery informing the Commission that the Complainant was taking the position that there had been no settlement. Apparently this position had been communicated to the Respondent at an earlier date. The Respondent was also requesting that the Hearing Examiner schedule further proceedings with respect to the allegations of the complaint.

On January 5, 2005, the Hearing Examiner held a Status Conference to determine what the parties thought should happen next. The Complainant wished the case to be set for further proceedings. The Respondent requested an opportunity to brief the question of whether the Commission could enforce the terms of an oral settlement agreement. The Hearing Examiner set a briefing schedule to receive argument on the Respondent's request to enforce the settlement agreement.

DECISION

As noted above, the Complainant contends that there was no agreement that could be enforced or would otherwise bind the parties. The Respondent, citing *Taylor vs. Gordon Flesch Company, Inc.*, 793 F.2d 858 (7th Cir. 1986), contends that the Complainant should be barred from proceeding further and that the terms of the oral settlement agreement reached on November 23, 2004 should be enforced.

The parties both miss the mark to some extent. The question is more appropriately put in the context of the Commission's authority to enforce an oral settlement agreement to which it was not a party.

Though there is a dispute between the parties as to whether there was an oral agreement, the Hearing Examiner finds on this record that such an agreement was struck. The terms of the settlement agreement are those set forth in an attachment to the affidavit of Respondent's counsel.

The parties, at the request of the Hearing Examiner, on November 23, 2004 undertook one last effort to settle the allegations of the complaint before the commencement of a public hearing. The parties were assisted by an employee of the Commission other than the Hearing Examiner. The Hearing Examiner did not participate in order to preserve his neutrality in the event that settlement was not possible. After some time, the Investigator/Conciliator informed the Hearing Examiner that a settlement had been reached. Because the Commission was not to be a party to the settlement, the terms and fact of settlement were not put on the record. The Hearing Examiner thanked the parties and the parties were excused. The Complainant left and the Respondent and its attorney remained to discuss general policy issues with the Commission staff.

The settlement documents were to be drafted by the Respondent's counsel and forwarded to the Commission for transmission to the Complainant. At no time did the Complainant, in the presence of the Hearing Examiner, indicate that his agreement was contingent upon review by an attorney or any outside individual.

The Commission received the settlement documents from the Respondent along with the check in the agreed upon amount. The documents were forwarded to the Complainant. The next word received by the Commission was that the Complainant was now represented by counsel and that the Complainant denied having reached an agreement with the Respondent.

Though the Hearing Examiner was not present for the discussions between the Complainant, the Respondent and the Investigator/Conciliator, the parties' actions, once together after the negotiations, along with the contemporaneous statements of the Investigator/Conciliator, leave the Hearing Examiner with no doubt that there was an offer and acceptance. The Commission received a check from the Respondent as part of the settlement. The check was made payable to the Complainant, but release of the check was contingent upon return of the signed settlement documents.

The Complainant's contention that there can be no settlement agreement because the Complainant was without counsel has no merit whatsoever. Nothing in the rules of the Commission or in law of any kind limits settlement authority to parties with counsel. The Complainant was repeatedly given an opportunity to seek representation. He declined each opportunity.

Curiously, though there were some indications that the Complainant might contend that his acceptance of the settlement was conditional, the Complainant did not make this argument for the record. This might have been his best argument. The absence of any proof or record on this point is damaging to the Complainant's argument that there is no agreement.

The Complainant also makes some contention that because the complaint or settlement agreement did not reference actions under 42 U.S.C. 1981 and 1982, the settlement cannot be effective. The Commission has no authority with respect to these Reconstruction Era laws. It can only enforce the dictates of the Equal Opportunities Ordinance. This argument is better posed to enforcement in a different forum.

The Hearing Examiner finds that there was an offer, an unqualified acceptance of the offer and consideration to support a contract. Taylor, supra. Despite the existence of an oral contract between the parties, the Hearing Examiner finds no authority to enforce such an oral contract.

Section 6.4 of the Rules of the Madison Equal Opportunities Commission discusses settlements, in general, and where the Commission is a party to the agreement. Generally, the rule requires that settlements be reduced to writing whether the Commission is a party or not. When the Commission is a party, such a settlement agreement becomes a final order of the Commission. The Commission may enforce such an agreement by referral to the Office of the City Attorney for filing of an appropriate action in Circuit Court. The rules do not address the situation of an agreement between the parties where the Commission is not a party, other than to indicate that it should be affirmed in writing. Under those circumstances, it seems logical to believe that the parties are on their own with respect to enforcement. Parties who reach an agreement outside of the structure provided by the Commission run the risk that one or the other party may default and leave the enforcing party with no remedy within the system provided by the Commission.

It is difficult to project the mechanism for enforcement of the oral settlement agreement. It does not seem appropriate that the Hearing Examiner "order" the Complainant to sign the settlement agreement upon penalty of dismissal for refusal. The Commission is without authority to refer the settlement to the City Attorney because there is no final order.

The Respondent relies on the Taylor case to assert that the oral settlement should bar further proceedings. In Taylor, the parties reached an oral settlement that for a variety of reasons was never reduced to writing before the Complainant attempted to repudiate it. The agreement was reached to resolve a complaint before the Commission. Once the Complainant determined that from his prospective, there was no settlement, he sought to bring an action in the United States District Court under Title VII 42 U.S.C. 2000e. It was this later action that was barred by the earlier oral settlement before the Commission. The court's opinion in Taylor never indicates the fate of the underlying complaint before the Commission. It seems that the Respondent would be better served by relying upon Taylor if the Complainant wishes to proceed in a parallel process in some other forum.

Under the circumstances, the Hearing Examiner is compelled to set this matter for further proceedings. The Hearing Examiner would consider a stay of proceedings before the Commission in the event that parallel proceedings are being pursued in another forum.

ORDER

The Respondent's motion for enforcement of an oral settlement agreement is denied. Further proceedings will be scheduled by separate cover.

Signed and dated this 19th day of April, 2005.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner