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

Jerry J Birk
1109 Winston Dr
Madison WI 53711

Complainant

vs.

American Red Cross - Badger Chapter
4860 Sheboygan Ave
Madison WI 53705

Respondent 1

American Red Cross
Attn Legal Department
2025 E Street NW
Washington DC 20006

Respondent 2

HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTIONS TO DISMISS

CASE NO. 20062041

EEOC CASE NO. 26BA600044

BACKGROUND

This is a Decision and Order on the Respondent's Motion for Summary Judgment on the Merits and Motion for Summary Judgment for a Lack of Subject Matter Jurisdiction. The Complainant is Jerry Birk. On May 22, 2006, Birk filed a complaint with the Madison Department of Civil Rights, Equal Opportunities Division (EOD). The complaint charged that the Respondents, American Red Cross (ARC) and American Red Cross, Badger Chapter (Badger Chapter), discriminated against the Complainant on the bases of sex and age in his employment in violation of Equal Opportunities Ordinance sec. 39.03(8) Mad. Gen Ord. The Badger Chapter denies discriminating against the Complainant on the basis of his sex or age and asserts that it terminated the Complainant's employment due to intentional misconduct regarding the allocation of expenses to the Badger Chapter's Hemophilia Homecare Program. ARC similarly denies discriminating against the Complainant, and argues that it should be dismissed from the case because it is not a bona fide party to the dispute.

The Respondent filed a motion to dismiss the complaint against the Badger Chapter on the merits and a motion to dismiss the complaint against ARC for lack of subject matter jurisdiction on June 29, 2007. Regarding the motion to dismiss for lack of subject matter jurisdiction, the Respondent principally argues that since ARC is not an integrated employer and ARC did not exercise control over the terms and conditions of the Complainant's employment it could not have discriminated against the Complainant by altering those terms and conditions.

Presently, the Hearing Examiner must determine two issues before this matter may proceed to hearing. First, the Hearing Examiner must determine whether the Badger Chapter can submit a Motion for Summary Judgment on the Merits when the case against the Badger Chapter has been certified for a hearing on the merits. Second, the Hearing Examiner must determine whether the EOD can exercise subject matter jurisdiction over the complaints of sex and age discrimination against ARC.

DECISION

Under Equal Opportunities Ordinance sec. 39.03(8)(a) Mad. Gen. Ord., it is an unfair discrimination practice and unlawful for "any person or employer…to discharge any individual, or otherwise to discriminate against any individual with respect to her/his…terms, conditions, or privileges of employment, because of such individual's sex…[or] age."

The Complainant submitted a complaint of discrimination to the EOD on May 22, 2006. The complaint alleged that ARC and the Badger Chapter discriminated against the Complainant on the bases of sex and age in violation of Mad. Gen. Ord., sec. 39.03(8)(a) when it terminated his employment. The Investigator/Conciliator issued an Initial Determination on March 3, 2007 in which he found probable cause to believe that both ARC and the Badger Chapter discriminated against the Complainant on the bases of sex and age. The Investigator/Conciliator, pursuant to the process by which the EOD handles discrimination claims, held that reasonably disputed facts at the investigation stage must be resolved in favor of the Complainant. The Investigator/Conciliator further held that the Hearing Examiner will resolve credibility issues raised by the information presented when the parties testify under oath. Accordingly, the Investigator/Conciliator certified the case against ARC and the Badger Chapter for a hearing on the merits.

On June 29, 2007, the Badger Chapter submitted a Motion for Summary Judgment on the Merits. Thereafter, on July 2, 2007, the Complainant filed a Motion to Strike the Respondent's Motion for Summary Judgment on the Merits. The Complainant argues that, under Rhone v. Marquip, MEOC Case No. 20967 (Ex. Dec. on summary judgment 4/5/89), summary judgment is not available in cases that are certified to a hearing on the merits. The Complainant argues that the Equal Opportunity Commission (EOC) rules require that such cases be determined on the record after a hearing.

EOC Rule 3.41 lists five circumstances under which the EOD may dismiss a complaint. None of the listed circumstances allow for the dismissal of a complaint that has been certified for a hearing on the merits. See EOC Rules 3.411 – 3.415. Further, the Rhone decision supports the Complainant's contention that the Badger Chapter's Motion for Summary Judgment on the Merits should be dismissed. In Rhone, a case of employment discrimination, the Respondent submitted a motion for summary judgment on the ground that the material facts were undisputed and therefore it was entitled to judgment as a matter of law. See Rhone, *supra*. However, construing the plain language of the EOC Rules, the Hearing Examiner concluded that once a case has been certified for a hearing on the merits, the case must go to hearing. Id. In arriving at this conclusion, the Hearing Examiner relied upon EOC Rule 8.3 (formerly Rule 15.13) and EOC Rule 7.9 (formerly Rule 15.43).

EOC Rule 8.3 states contested cases (i.e. cases certified to hearing) "are required to be determined on the record after a hearing by the Hearing Examiner." As the Hearing Examiner in Rhone noted, the language of Rule 8.3 is mandatory. Further, EOC Rule 7.9 guarantees every

party the right to "cross-examination, presentation of evidence…and all other rights essential to a fair hearing, except where such rights have been forfeited due to default or failure to comply with discovery or other orders of the Commission." The Hearing Examiner held that, in addition to granting parties "other rights essential" to a fair hearing, "MEOC Rule [7.9] also accords the parties a right to a hearing." See Rhone, *supra*. The Hearing Examiner concluded that since Rule 7.9 "enumerates two narrow exceptions under which the rights which it confers on the parties may be curtailed -- in case of default or failure to make discovery -- the rule necessarily precludes the limitation of those rights on any other grounds." Id. (citing Sutherland Stat. Const. sec. 47.23 (4th Ed.) ("expressio unius est exclusio alterius"); Gottfried, Inc. v. Department of Revenue, 145 Wis. 2d 715, 721, 429 N.W.2d 508 (Wis. App. 1988); Gottlieb v. City of Milwaukee, 90 Wis. 21 86, 95, 279 N.W.2d 479 (Wis. App. 1979)). In the case at hand, given that the Complainant has not forfeited his right to a hearing due to default or failure to make discovery, the Complainant is entitled to a hearing on the merits. Accordingly, the Badger Chapter's Motion for Summary Judgment on the Merits is denied.

Also, on June 29, 2007, ARC submitted a Motion for Summary Judgment for Lack of Subject Matter Jurisdiction. Under EOC Rule 3.44, the Hearing Examiner "may dismiss a complaint where she/he has made a finding of 'no jurisdiction' regarding allegations in the complaint." Thus, the Respondent's motion is really a Motion to Dismiss for Lack of Subject Matter Jurisdiction, and not a Motion for Summary Judgment. Therefore, the Hearing Examiner will treat the Respondent's motion as a Motion to Dismiss for Lack of Subject Matter Jurisdiction.

The Respondent makes two arguments. First, the Respondent argues that ARC and the Badger Chapter are not sufficiently integrated to warrant treatment as a single employer. The Respondent points to the fact that two federal district courts ruled that ARC is not an integrated employer with its chapters and granted ARC's motion for summary judgment for lack of subject matter jurisdiction. See Owens v. American National Red Cross, 673 F. Supp. 1156 (D. Conn. 1987); Webb v. American Red Cross, 652 F. Supp. 917 (D. Neb. 1986). The Respondent relies on a four-part test employed in both Owens and Webb to determine whether ARC is an "integrated employer." See Owens, 673 F. Supp. at 1160; Webb 652 F. Supp. at 920. Under the integrated employer theory, two or more entities can be treated as a single employer in their relationship to employees if they are found to share (1) common management, (2) centralized control of labor relations, (3) interrelation of operations, and (4) common ownership or financial control of the two entities. See Owens, 673 F. Supp. at 1158.

The Respondent argues that the courts in both Owens and Webb applied the aforementioned four-part test and found that ARC and its chapters were not sufficiently integrated to be treated as a single entity. Upon review of the analyses set forth in Owens and Webb, the Hearing Examiner finds that it is reasonable to conclude that ARC is not a single employer integrated with the Badger Chapter. The Complainant argues that ARC is a properly named party to the dispute because it communicated directly with the Complainant and these communications indicate that ARC was apparently involved in the internal audit that provided a basis for the Complainant's termination. However, this postulation without more does not refute the Respondent's assertion that between ARC and the Badger Chapter (1) no common management exists, (2) no centralized control of labor exists, (3) there is no interrelation of operations, and (4) no common ownership or financial control exists.

In deciding a Motion to Dismiss for Lack of Subject Matter Jurisdiction, the Hearing Examiner must look at the facts and evidence presented in the light most favorable to the non-

moving party. Here, the Complainant failed to set forth specific facts showing that there is a genuine issue of material fact as to ARC's status as an integrated employer. Accordingly, the Hearing Examiner finds that ARC is not an integrated employer and therefore the complaint as to ARC must be dismissed for lack of subject matter jurisdiction.

Second, the Respondent argues that ARC does not exercise control over the terms and conditions of the Complainant's work, and therefore sec. 39.03(8)(a) Mad. Gen. Ord. does not apply to ARC. Again, the Complainant counters that ARC is a properly named party to the dispute because its direct communications with the Complainant apparently demonstrate that ARC was involved in the internal audit that provided a basis for the Complainant's termination. Under sec. 39.03(8)(a), any "person or employer individually or in concert with others," may be liable for age and sex discrimination. The definition of "person" includes "partnerships, associations, [and] corporations." M.G.O. § 39.03(2)(aa). Thus, even though ARC may not be considered an "employer" of the Complainant, it could nevertheless be liable under sec. 39.03(8)(a), if it acted in concert with the Badger Chapter to discriminate against the Complainant on the bases of sex and age.

Under Papa v. Katy Industries, if a parent corporation directs a discriminatory act, practice, or policy about which an employee of its subsidiary complains, limited liability will not apply to the parent corporation. 166 F. 3d 937, 941 (7th Cir. 1999) (finding that "limited liability does not protect a parent corporation when the parent is sought to be held liable for its own act, rather than merely as the owner of the subsidiary that acted"). The court in Papa held that fundamental principles of affiliate liability dictate that "an affiliate forfeits its limited liability only if it acts to forfeit it—as by…commanding the affiliate to violate the right of one of the affiliate's employees." Id. at 941-42 (original emphasis). The facts of the Papa case are distinguishable in that the case involved a plaintiff's attempt to join a parent and subsidiary in a discrimination action to defeat a provision of Title VII of the Civil Rights Act requiring a named defendant to employ at least 15 or 20 employees. Nevertheless, the Seventh Circuit recognized that the act requirement of basic affiliate liability is emphasized not only in this circuit, but "in numerous other cases across the full range of American law." Id. at 942.

Looking at the facts and evidence in the light most favorable to the non-moving party, the Hearing Examiner finds that the Complainant did not set forth sufficient facts showing that there is a genuine issue of material fact as to ARC's direction of the allegedly discriminatory action taken by the Badger Chapter against the Complainant. Although the Complainant believes that ARC was directly involved with the audit that led to the Complainant's termination, the Complainant failed to point to specific facts that would lead the Hearing Examiner to reasonably conclude that ARC most likely directed the allegedly discriminatory act in question. Therefore, the Hearing Examiner finds that ARC must be dismissed from this complaint for lack of subject matter jurisdiction.

ORDER

IT IS HEREBY ORDERED pursuant to Equal Opportunities Commission Rule 3.44 that the Respondent's Motion for Summary Judgment on the Merits is denied. The Respondent's Motion for Summary Judgment for Lack of Subject Matter Jurisdiction is granted as to ARC and the portion of the complaint against ARC is dismissed. The case against the Badger Chapter will proceed to a hearing on the merits on a date to be determined by the Hearing Examiner.

Signed and dated this 9th day of April, 2010.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Richard F Rice
Bradley C Fulton