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

Alfonso Randall
1344 E Wilson
Madison WI 53703

Complainant

vs.

Africana Restaurant and Lounge
2701 Atwood Ave
Madison WI 53704

Respondent

HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

CASE NO. 20082190

EEOC CASE NO. 26B200800096

On September 10, 2009, a hearing on the merits of the above-captioned matter was held before Commission Hearing Examiner, Clifford E. Blackwell, III, in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd., Madison, Wisconsin. Appearing at the hearing were the Complainant, Alfonso Randall, and his attorney, Timothy Yanachek of BMR Bell Moore & Richter. The Respondent, Africana Restaurant and Lounge, appeared by its owner Isouf Ouattara. Based upon the record in this matter, the Hearing Examiner now makes his Recommended Findings of Fact, Conclusions of Law and Order as follows:

RECOMMENDED FINDINGS of FACT

1. The Complainant is a Black, African-American living in Madison, Wisconsin.

2. The Respondent is a restaurant and bar located at 2701 Atwood Avenue in Madison, Wisconsin. It is apparently solely owned by Isouf Ouattara.

3. The Respondent began operation in June of 2008. On or around July 1, 2008, the Complainant, who lived near the restaurant, inquired about possible employment.

4. There were no positions open at the time that the Complainant asked about possible jobs. However, the Complainant explained his anxiousness for a job due to the pregnancy of his girlfriend and his inability to find a job.

5. The Complainant spoke with Evrard Lessa and Zeba Amadou when he first visited the restaurant. The Complainant was told that there were no jobs available, but they might be able to find some limited space on the schedule. Lessa and Amadou told the Complainant to return on July 3, 2008 to speak to Isouf Ouattara. Ouattara met with the Complainant at the restaurant on July 3, 2008.

6. The Complainant explained why he needed work so badly. Ouattara liked the Complainant and wished to help him despite the lack of an actual position. Ouattara agreed that the Complainant could work when there was some work to do. It might entail a variety of tasks.

7. The Complainant began employment with the Respondent on July 4, 2008. He worked approximately two days per week for the rest of July and August. The Complainant worked at a variety of tasks including dishwashing, food prep, bouncing and a variety of other jobs. Though he generally worked two days per week (16 hours per week), the Complainant occasionally picked up additional hours when other employees wanted/needed time off. At the time the Complainant was hired, he was paid $7.00 per hour.

8. When the Complainant was hired there were three other employees in the kitchen, Fatou Saw, Oumar Thiam and Evrard Lessa. Saw was the Chef/Cook and Thiam and Lessa did other prep and kitchen tasks much like the Complainant.

9. The Complainant was well liked by his coworkers and performed well.

10. In late August of 2008, the Respondent hired, Sosteme and Armand Pehi. Both are from the Ivory Coast. They were hired to work in the kitchen.

11. In the Respondent's kitchen, all employees other than the Complainant were from Western Africa. The Respondent hired both individuals from Africa and African-Americans to work as wait staff or in the bar. Everyone in the kitchen spoke French as their first language except the Complainant.

12. Armand Pehi worked until the end of the year in 2008, but then quit to attend school. Sosteme Pehi remained employed and, as of the time of hearing, worked full-time, approximately 35 to 40 hours per week in the kitchen at a wage of $7.25 per hour.

13. In September of 2008, the Complainant asked Ouattara for additional hours. Ouattara stated that business was lagging and that additional hours were not available. At some point in September, 2008, the Respondent told the entire staff that some employees would be retained on an "on-call" basis and others would have their hours reduced because of the slowdown in business. Eventually, in September of 2008, the Complainant was placed on-call. "On-call" meant that if hours became available, the Respondent would call the Complainant to come in.

14. Despite asking for additional hours, the Complainant was not recalled to work.

15. The Pehi brothers, who had been working approximately 20 hours per weeks each prior to the end of September, were retained at a reduced number of hours.

16. Subsequent to being placed on "on-call" status, Ouattara did not attempt to call the Complainant except to invite him to an employee party. At that time, Ouattara found that the Complainant's cellular service had been discontinued. The Respondent only retained the Complainant's cellular phone number after the Complainant began working for the Respondent in July of 2008.

17. The Complainant did return to the restaurant from time to time. Testimony at hearing was contradictory about the Complainant's welcome on these occasions.

18. After the Complainant's child was born, he brought the baby to the restaurant to introduce the baby to his coworkers. This was a happy occasion for all.

19. Subsequent to being placed on "on-call" status, the Complainant attempted to find employment at a number of places. As of the date of hearing, the Complainant was unable to find employment likely due to a variety of reasons, including a slowed economy.

20. The loss of employment placed great emotional strain on the Complainant due to the loss of income, especially with a new family to support.

CONCLUSIONS OF LAW

1. The Complainant, an African-American, is a member of the protected class "national origin/ancestry" due to the predominant culture of West Africans in the Respondent's employment.

2. The Respondent is an employer within the meaning of the Equal Opportunities Ordinance.

3. The Respondent's reduction or elimination of the Complainant's hours did not violate the Equal Opportunities Ordinance.

ORDER

The complaint is dismissed. The parties shall bear their own costs.

MEMORANDUM DECISION

The first question presented by the record for the Hearing Examiner is whether this is a case presented by direct or indirect evidence. In the case of a claim presented by direct evidence, the Hearing Examiner must review the facts, weigh the evidence and render a decision. Direct evidence is that which, if believed, demonstrates a fact without reliance upon inference or presumption. In the case of an indirect claim, the Hearing Examiner will apply the McDonnell Douglas/Burdine burden shifting approach to determine whether discrimination has occurred. See McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981). In a claim presented by indirect evidence, the Hearing Examiner must generally rely upon inferences and presumptions raised by the evidence.

The testimony and evidence presented in this case create a factual record that fits more closely with a determination of discrimination under the indirect method. In this method, the Hearing Examiner must review the record to determine whether it supports a claim of discrimination or not. This analysis is performed through an application of the facts to the elements of a *prima facie* claim of discrimination and an examination of whether the Respondent has offered a legitimate, nondiscriminatory explanation for its conduct leading to the claim of discrimination. If such a reason is offered by the Respondent, the Complainant may

still prevail if he can demonstrate that the Respondent's explanation is not credible or represents a pretext for an otherwise discriminatory motive. Ultimately, it is the Complainant's burden to establish that he has experienced discrimination as claimed in the complaint. It is not the Respondent's burden to demonstrate a lack of discrimination.

In the present matter, the *prima facie* claim can be stated as membership in a protected class, an adverse employment action and reason to believe that there is a causal connection between the Complainant's protected class status and the adverse employment action. The present complaint is somewhat unusual for the Hearing Examiner given the context of the employment.

As an African-American, it seems not unusual that the Complainant would be a member of a protected class such as race. However, for the Complainant's protected class to be national origin/ancestry is somewhat different. The Respondent's place of employment is a restaurant with an emphasis on West African cuisine. As such, the Respondent employed a number of individuals from West Africa, including from the Ivory Coast and Guinea. The kitchen staff was in particular highly staffed with individuals who had come to Madison from West Africa. Elsewhere in the restaurant, the Respondent employed others of African heritage as well as other African-Americans.

Although as an African-American, the Complainant's heritage presumably traces back to some origin in Africa, it is cultural roots as American that are most at question in this complaint. This is distinguished from the presence of primarily West Africans employed in the kitchen and Africans generally employed elsewhere in the restaurant. For purposes of this complaint, the Complainant is a member of the protected class "national origin/ancestry."

The Complainant's being placed on an "on-call" status represents an adverse employment action. It eliminated his hours and eliminated his wages from the Respondent. Regardless of what the Respondent calls the Complainant's status, it is the functional equivalent of a layoff or being terminated from employment.

As is often the case, the most difficult question is whether a causal connection exists between the Complainant's membership in the protected class of "national origin/ancestry" and his status as no longer being employed by the Respondent. The Complainant's allegation relies on an inference created by the fact that Sosteme and Armand Pehi were hired after the Complainant and are from Ivory Coast and were retained after the Complainant went to "on-call" status. Additionally, after Armand Pehi left the Respondent's employment, Sosteme Pehi remained in the Respondent's employment while the Complainant was not recalled.

The inference the Complainant seeks the Hearing Examiner to draw is limited in effect to the extent that both Sosteme and Armand Pehi, though remaining employed with the Respondent, did so at a reduced level. Additionally, it is not clear from the record whether the Pehi's possessed additional skills or talents not possessed by the Complainant. The decision to retain the Pehi's and to eliminate hours for the Complainant came at a time of a business slowdown and while the Complainant was seeking additional hours rather than a reduction in hours.

Opposing the inference of a discriminatory motive in the Respondent's action as set forth above, is another inference recognized in the law. Where a decision to terminate an employee is made by the same official who made the decision to hire an individual and a relatively short

period of time has elapsed between hiring and firing, there is an inference that the firing was not done for a discriminatory motive. The basis of this inference is that if the decision maker were going to discriminate against the employee, it would be easier for the decision maker not to hire the individual in the first place, than to hire him and turn around and fire him a short time later.

The facts as presented at hearing fit the requirements for creation of the inference. Faced with two competing inferences, the Hearing Examiner must address several questions. Is one inference stronger than the other? If yes, which one and why is it stronger? If either yes or no, how are the burdens of proof affected by the inferences?

What makes these questions particularly difficult are the sparse record and the fact that one party was represented while the other was not. Additionally, presumably due to a lack of familiarity with the legal process, the unrepresented party was sanctioned for failing to file an answer to the Notice of Hearing.

The Hearing Examiner admits to having some professional misgivings about the creation of some inferences and their application to specific cases. In the present case, it seems that both inferences have some legitimate basis. In support of the inference of discrimination, the record is clear that the Complainant was well liked and accepted by his coworkers and that he performed well. He had a good record of attendance and for doing what was needed of him whether it was part of his job duties or not. Since he was employed prior to the Pehi brothers and they were retained after the Complainant's hours were eliminated, the question arises of what was different about the Pehi brothers. Was it their national origin/ancestry? Was it their facility with French? Did they possess additional skills beyond those possessed by the Complainant?

The record indicates that the Pehi brothers and the Complainant were all good workers who got along well with the rest of the kitchen staff. The record is silent about additional skills that the Pehi's might have possessed. Facility with French was not a requirement for working in the kitchen and a lack of French was not a hindrance. It appears that what is left is the Pehi's national origin/ancestry, a national origin/ancestry shared by Ouattara and not possessed by the Complainant.

On the other hand, when the Complainant first applied for a position with the Respondent, he was told there were simply no positions open. His subsequent attempts garnered him an interview with Lessa and Amadou. They certainly knew of the Complainant's national origin/ancestry at the time they met with him. The Complainant's story of hardship appealed to the Respondent and despite not really having a position, the Respondent was willing to give the Complainant some minimal hours, generally amounting to 16 hours per week. Had the Respondent been motivated by a discriminatory intent towards the Complainant for any reason, but including his national origin/ancestry, it would presumably have been easiest to simply not hire him in the first place. Given the ease with which the Respondent could have denied the Complainant employment for a discriminatory reason, it is not likely that his status as an African-American played a motivating role in the loss of hours once the economy experienced a downturn.

As between these two competing inferences, the Hearing Examiner finds that the inference of discrimination is slightly stronger. The fact that the Respondent hired the Pehi brothers after the Complainant and at a time when the Complainant was seeking additional hours with little success is, in the mind of the Hearing Examiner, an indication that the Pehi's

national origin/ancestry played some role in their relatively more favorable treatment. Once the economy took a downturn, it appears that the Respondent may well have favored his fellow countrymen over the Complainant, at least in part, because of their common heritage.

Finding that the inference of discrimination is somewhat more likely than the nondiscrimination inference, the Hearing Examiner finds that the Complainant makes out a *prima facie* claim of discrimination under the McDonnell Douglas/Burdine test. The Complainant's meeting his initial burden of proof shifts the analysis to the Respondent.

Under the McDonnell/Burdine framework, the Respondent must present a legitimate, nondiscriminatory explanation for its actions. This is a burden of production, not one of proof.

The Respondent states that in September of 2008, the economy slackened and it was faced with a shortage of business and too much expense for staff. The Respondent's payroll hit a high in August of 2008 and then was reduced to approximately $7,000 for the succeeding three or four months. All staff either lost hours or were placed in an "on-call" status.

A lack of business and hence income represents a legitimate, nondiscriminatory explanation for reducing staff and cutting hours including those of the Complainant. Presentation of this explanation meets the Respondent's burden of production and shifts the burden back to the Complainant.

The Respondent having met its burden of production, the Complainant may yet prevail if he can demonstrate that either the Respondent's explanation is not worthy of credence or represents a pretext for an otherwise discriminatory motive.

During the Complainant's testimony as highlighted by his counsel in closing arguments, there is no question that the economy had slowed down and businesses all over were either not hiring or were reducing their staff levels. In part, the Complainant attributes his inability to obtain employment elsewhere to the poor economy. The Respondent's testimony that all of the employees either were place in "on-call" status or experienced a reduction in their hours further corroborates the Respondent's explanation. This is reflected in the lowered payroll figures from those of August 2008.

As for the contention that the Respondent's explanation represents a pretext for an otherwise discriminatory motive, the Complainant points to several issues to show the Respondent's bad faith. The Complainant indicates that the Respondent failed to provide him with his W-2 wage statement for filing his taxes. However, the Respondent testified and produced for transfer, a copy of the Complainant's W-2 form which had been returned by the Post Office.

The Complainant also testified that on one occasion when visiting the restaurant after September, 2008, a Bartender or Server named Peggy told him that Ouattara had told the employees to call the police if the Complainant came to the premises. Peggy's testimony was not corroborated. She did not call the police as the Complainant indicates she was instructed to do. Fatou Saw testified that she heard no such instruction from the Respondent and that when the Complainant returned to introduce his new baby, everyone was happy to see the Complainant and there was no indication of any hostility between Ouattara and the Complainant.

The Complainant focuses his allegation on the culture of the kitchen. However, the testimony indicated that other African-Americans worked outside of the kitchen and were apparently retained though presumably with reduced hours. Peggy, whose statement the Complainant relied upon, was born in the United States, but was of Kenyan heritage. This is an indication that not all African-Americans were laid off. The Complainant does not explain why the only comparators should be those in the kitchen. The Complainant did perform some work outside of the kitchen from time to time.

The Complainant's testimony about and towards Ouattara was hostile and was spoken with anger and disgust. Such is not unexpected where one feels that another is responsible for the bad things that have befallen one. However, anger and frustration do not constitute proof.

The Hearing Examiner accepts that the Complainant and the Respondent have different perspectives and opposite hopes and viewpoints. Both have an accepted stake in the Hearing Examiner's belief in their credibility. However, nothing in this record permits the Hearing Examiner to fully accept either party's version of events as constituting the defined and unalloyed truth.

On this record, the Hearing Examiner must conclude that the Complainant has failed to meet his burden to establish either that the Respondent's explanation is not credible or represents a pretext for an otherwise discriminatory motive.

While the Hearing Examiner accepts that there is some evidence that the Respondent may have favored those from his homeland over the Complainant, the Hearing Examiner cannot find that evidence overcomes the undisputed fact that the Respondent suffered economic hardship and undertook a series of reductions to keep his business from going under as of the time of hearing. Businesses are generally given wide latitude in managing their workforces unless they do so in a discriminatory manner. The Hearing Examiner, given the record as a whole, cannot find that the Respondent did so in this instance.

Signed and dated this 16th day of June, 2016.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner