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

Gary Wrolstad
7754 Hillcrest Ave
Middleton WI 53562

Complainant

vs.

Cuna Mutual Group
5910 Mineral Point Rd
Madison WI 53701-0391

Respondent

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

CASE NO. 20102042

EEOC CASE NO. 26B201000027

BACKGROUND

On March 18, 2010, the Complainant, Gary Wrolstad, filed a complaint of discrimination with the City of Madison Department of Civil Rights Equal Opportunities Division. Wrolstad's complaint alleged that the Respondent, CUNA Mutual Group, Inc., discriminated against him on the basis of his age when it failed or refused to select him for a variety of positions, discouraged him from applying for at least one position, eliminated his position and terminated his employment in violation of the Madison Equal Opportunities Ordinance 39.03 (8) Mad. Gen. Ord. The Respondent denied that it discriminated against the Complainant on any basis and asserted that several of the Complainant's claims should be dismissed for a lack of jurisdiction because the Complainant had entered into a settlement of certain claims with the Respondent and claims covered by that settlement should be deemed waived.

Rather than addressing the Respondent's claims regarding the alleged waiver of certain of the allegations in the complaint, the Investigator/Conciliator proceeded with an investigation. On December 2, 2010, the Investigator/Conciliator issued an Initial Determination concluding that there was no probable cause to believe that the Respondent had discriminated against the Complainant in employment on the basis of the Complainant's age. On December 14, 2010, the Complainant appealed the Initial Determination's findings of no probable cause to the Hearing Examiner.

The procedural history of this complaint is complex and is tied up with an action in Dane County Circuit Court brought by the Respondent to enforce the previously entered settlement between the parties to this action. Case No. 1 I-CV-0491, January 28, 2011. The Dane County Circuit Court, on March 15, 2012, entered an order dismissing the proceedings indicating that the MEOC (Department of Civil rights) should have the first opportunity to address the waiver issues. Processing of the Complainant's appeal of the Initial Determination's findings of no probable cause had been stayed on February 8, 2011, by the Hearing Examiner so that there might be a resolution of the Respondent's claims of waiver and a lack of jurisdiction.

Cutting through this history, what is pending before the Hearing Examiner is the Respondent's Motion to Dismiss three of the five allegations of discrimination in the complaint due to the settlement agreement entered into between the parties in this matter. The remaining two allegations of discrimination for which there was a finding of no probable cause should proceed through the review process regardless of the Hearing Examiner's determination with respect to jurisdiction.

DECISION

This case presents several unique questions for resolution. As the parties note, the Equal Opportunities Commission has little public experience in the enforcement of private settlement agreements. During the present Hearing Examiner's period of service, the only case dealing with this subject is Young v. Nakoma Golf Club, MEOC Case No. 20032159 (Ex. Dec.04/19/2005). That case differs from the present matter somewhat though. In Young, the settlement agreement which the Respondent in that matter sought to enforce was reached in the context of an active complaint on the day of hearing. Because the agreement was reached without making the Commission a party and the Complainant allegedly repudiated the agreement before execution, the Hearing Examiner indicated that he had no authority to attempt to create and enforce a private settlement agreement.

In the present matter, the parties contracted with each other to avoid litigation prior to the commencement of any proceedings before the Commission or any other body. It is not clear whether the timing of this agreement to waive then-existent claims should control later action by the Commission.

The Commission actively promotes settlement of claims before the Commission, as well as takes steps to avoid the filing of such claims in the first place. Education as to the rights and duties of individuals and business entities form a critical part of the Commission's over all charge. See Mad. Gen. Ord. Sec. 39.03(10)(b)(3).

Though not mandated by the Rules of the Commission, the staff of the Equal Opportunities Division makes concerted efforts to resolve complaints short of the complete administrative process. It is the position of the Commission that such efforts help to shepherd the Commission's scarce administrative resources and provide the parties with an opportunity to reduce the expenditure of their own resources, both financial, as well as emotional. It is the belief of the Commission that where parties can come together and reach an agreement that meets their individual needs, it is more likely to result in a just resolution so long as the parties come to the bargaining table with more or less equal interests and resources.

These efforts at resolution begin shortly after the filing of a complaint and continue throughout the process in a mostly informal manner. Where a complaint has been investigated and an Initial Determination has been issued containing a finding that there is probable cause to believe that discrimination has occurred, the Equal Opportunities Ordinance mandates a formal attempt to conciliate the complaint. Mad. Gen. Ord. Sec. 39.03(10)(b)(4). If conciliation is unsuccessful at that stage, the Hearing Examiner frequently includes Commission conciliators at various points in the hearing process including at the Pre-Hearing Conference and prior to the commencement of the hearing.

Given the emphasis placed on resolving complaints short of the complete hearing process, it seems that there should be little reason for the Commission not to give effect to a resolution of disputes that might otherwise come before the Commission, even where that resolution is reached between the parties prior to the commencement of a formal complaint. The Equal Rights Division of the Wisconsin Department of Workforce Development (ERD) as well as the United States Equal Employment Opportunity Commission (EEOC) regularly give effect to such private agreements if they meet certain requirements. Grahl v. Mercury Marine, ERD Case No. 8902050 (LIRC 12/4/92); Lynch v. Zalk Joseph's Fabricators, Inc., ERD Case No. 9401181 (LIRC 7/17/96); Wesley v. TMP Worldwide, Inc., ERD Case No. 200201566 (LIRC 2/7/03).

It should be noted that while the EEOC will give effect to settlement agreements and waivers reached between an employee and his or her employer, it will not recognize a settlement provision that attempts to limit the EEOC's ability to enforce the various laws under its jurisdiction. The Respondent, in its initial brief, indicates that such should not be a consideration for the Commission since the Commission does not seek to separately enforce the provisions of the ordinance.

The Respondent's assertion concerning the Commission's authority is erroneous. The Hearing Examiner believes this mistake stems from a misinterpretation of the Commission's general practice rather than the Commission's actual authority. Mad. Gen. Ord. Sec. 39.03(10)(c)(3)(a and b), and 39.03(10)(d)(13). Section 39.03(10)(c)(3)(a and b)indicate that the Commission may request that the Office of the City Attorney file an action to enforce the ordinance. This authority is separate and distinct from the enforcement process that is generally pursued, i.e., processing individually filed complaints. Additionally, Section 39.03(10)(b)(4) provides for a process whereby an individual member of the Equal Opportunities Commission is empowered to file a complaint to enforce the ordinance. It is true that these Commission authorities have rarely been used or even considered, but the power for the Commission to act beyond review of an individually filed complaint exists in parallel with the similar authority of the EEOC.

Setting aside the Commission's authority, there are sound policy grounds to give effect to settlement agreements and waivers reached outside of the Commission's complaint process. As noted above, the Commission, as a matter of policy and practice, encourages settlement of complaints by the parties. While there may be circumstances where the Commission might insist on being a party to agreements which settle complaints brought under the Ordinance, the Commission is generally willing to allow the parties to act independently. For the most part, parties prefer to engage in so called "private settlements," at least in part, to avoid the need for the terms and conditions of a compromise from becoming available to the public as would be the case where the Commission is a party. Not to give effect to these private settlements would undercut the Commission's desire to see disputes settled with the least expense and turmoil to the parties. Giving effect to such settlements helps the Commission in its efforts to reduce strife and the other adverse affects of illegal discrimination as set forth in the Preamble to the Equal Opportunities Ordinance, See Section 39.03(1). Such settlements should reduce the expenditure of administrative resources by the Commission, allowing for other enforcement efforts.

For the foregoing reasons, the Hearing Examiner finds that, generally speaking, the Commission has the authority and the interest to give effect to settlement agreements and waivers such as the one in the present matter. While recognizing that such agreements are not

contrary to the enforcement scheme set forth in the Ordinance, it does not necessarily follow that every such agreement can or will be given the desired preclusive effect. As the parties both recognize, the ERD and the EEOC both have standards for judging the voluntariness of such agreements and waivers. As noted above, the Commission can have no interest in giving effect to a settlement agreement and waiver that is achieved by overreaching or without safeguards to assure that both sides are adequately informed of their rights and options. It is critical to the viability of a settlement agreement that it reflect meaningfully the legitimate interests of both parties.

The heart of the question for the Hearing Examiner is what process should be utilized by the Commission to adjudge the sufficiency of a settlement agreement in the context of the Commission's complaint process. The parties urge the Hearing Examiner to adopt different approaches to analysis of the voluntariness of settlement agreements. The Respondent suggests that the Commission follow the approach taken by the ERD. The ERD utilizes a "totality of circumstances" test when determining whether a settlement agreement and waiver should be given preclusive effect. The Complainant urges the Hearing Examiner to follow the checklist of factors and the burden of proof utilized in age discrimination cases by the EEOC. See 29 USC 626(f)(1)(ADEA) and 29 C.F.R. Sec. 1625.22(h). Both approaches have some commonalities. It is these common factors that will be of the greatest use to the Hearing Examiner.

The Complainant argues that the Commission should or perhaps must adopt the approach taken by the EEOC in order to maintain consistency with the EEOC programs under the Worksharing Agreement between the Commission and the EEOC. The Respondent correctly points out that the Commission also has a Worksharing Agreement with the ERD that should be considered. While consistency among enforcement agencies is a highly desirable goal and consideration, all three agencies recognize that they need not travel in lockstep with each other for them to work effectively together. For example, the Commission's list of protected classes is much more extensive than either of the other two agencies. The ERD utilizes a different definition of "disability" and follows somewhat different standards in addressing claims of disability discrimination. The Commission exercises its authority in a different manner when considering remedies for discrimination than either the ERD or the EEOC. Despite these differences, the three agencies through their Worksharing Agreements work together to address the issues of discrimination which form a common bond among the agencies.

In determining the approach to be taken by the Commission in any effort to enforce the Equal Opportunities Ordinance, it is critical to remember that the Ordinance is a different legislative enactment from the various laws enforced by the EEOC or the different provisions of state law that encompass the jurisdiction of the ERD. As the Wisconsin Court of Appeals recognized in McMullen v. LIRC 148 Wis. 2d 270, 434 N.W. 2d 830 (Ct. App. 1988), the final test is what is necessary to give force and effect to the local ordinance with all of its different emphases on local interests and considerations. While the Hearing Examiner may consider how either the ERD or the EEOC analyze their different cases, ultimately, the Hearing Examiner must attempt to divine the intent and purpose of the ordinance and give effect to the provisions of the ordinance. In doing so, the Hearing Examiner may find particular policies or interpretations of similar laws to be persuasive, but rarely are those different decisions binding upon the Hearing Examiner's interpretation of the ordinance. Of course where state and federal constitutions or policies require a certain interpretation or limitation as a matter of the Supremacy Clause (Pagel v. Elder Care of Dane County, MEOC Case No. 22442 (Ex. Dec.

10/31/96)) or the doctrine of preemption (Anchor Savings and Loan v. MEOC, 120 Wis. 2d 391, 355 N.W. 2d 234 (1984)), the Hearing Examiner must follow those principles. However, there is nothing in this record that calls into question these issues. In fact, both parties seem to want the Hearing Examiner to set forth the approach that he feels is most appropriate under the Ordinance.

The Hearing Examiner favors an approach that borrows liberally from both the ERD and the EEOC. While this means that the Hearing Examiner will follow an approach like the totality of circumstances approach as set forth in the cases from the ERD cited by the Respondent, the Hearing Examiner may not necessarily adopt the same elements utilized by ERD and LIRC.

The Hearing Examiner does not find that strict adoption of the provisions set forth by the EEOC at 29 USC 626(f)(1) (ADEA) is appropriate for the Commission. The requirements of such provisions are tailored to the needs and purposes of federal law and do not necessarily reflect the goals or founding principles of the Equal Opportunities Ordinance. The federal requirements are subject to change without notice to or input from agencies such as the Commission. The burden placed upon the Commission to update its interpretations is unacceptably high. Since the Commission follows an essentially common law approach of interpretation, refining and honing its interpretations on a case by case basis, the more legislative and administrative approach utilized by the EEOC does not meet the needs of the Commission.

The Hearing Examiner concurs with the parties that it would be preferential for issues of jurisdiction, such as this one, be addressed as early in the process as possible. In this regard, the Hearing Examiner believes the Investigator/Conciliator erred in not transferring the complaint to the Hearing Examiner when the issue of waiver was first raised by the Respondent. Had that transfer occurred, the Hearing Examiner and the parties could have established whether there was a need for an evidentiary hearing or the proper steps for addressing the claim of a lack of jurisdiction. This Decision and Order should serve to provide the Investigator/Conciliators with guidance concerning how and when to transfer such issues to the Hearing Examiner.

As raising of the issue of jurisdiction falls upon the Respondent, it would not be appropriate to require the Complainant to disgorge his or her proceeds of the settlement, if any, during this process. In considering the burden of proof with respect to the validity of the waiver and its preclusive effect, the ERD process places that burden on the Complainant. The EEOC process, which is based upon a reading of the Age Discrimination in Employment Act (ADEA), 29 USC 626(f)(1), and the Older Worker's Benefit Protection Act (OWBPA), 29 USC 621-634, places the burden on the Respondent to demonstrate compliance with the factors set out at 29 USC 626(f)(1) (ADEA) and 29 C.F.R. Sec. 1625.22(h).

The Hearing Examiner finds that it is more consistent with the provisions of the Equal Opportunities Ordinance and the burdens established under the ordinance for the Complainant to carry the burden of proof as to the issue of the nonvalidity of the waiver. Under the ordinance, as it is in virtually all civil rights statutes, the ultimate burden of proof rests on the Complainant at all stages of the proceeding. The Hearing Examiner sees the process of producing the agreement and the challenge of the waiver to be similar to the portion of the McDonnell Douglas/Burdine burden shifting analysis whereby the Respondent has the burden to produce evidence of a legitimate, nondiscriminatory explanation, but that the Complainant can overcome the presumption of a lack of discrimination by demonstrating a lack of credibility or pretext on

the part of the Respondent. In a waiver dispute, it should be the Respondent's burden to produce the settlement agreement and waiver documents, that then shifts the burden to the Complainant to demonstrate the underlying defects in an otherwise valid settlement agreement. Those defects may be facially obvious in a poorly drafted settlement agreement and release or may require presentation of evidence concerning the circumstances surrounding the settlement process to cast doubt on the nature of the agreement. Since it is the Complainant who wishes to disturb the status quo created by signing of the settlement agreement, it is appropriate that the Complainant bear the burden of proving that the status quo is illusory.

Given the state of the proceedings, the Hearing Examiner will give the Complainant 15 days from the undersigned date to determine whether he wishes this matter transferred to the EEOC for further processing as an incomplete file. Should the Complainant wish to complete the processing of this matter with the Commission, the hearing Examiner will set a date for a scheduling conference after the expiration of the 15 day period. At a scheduling conference, the parties can determine whether discovery or an evidentiary hearing is required or if the issue of waiver can be resolved on briefs.

The record, at this point, is insufficient for the Hearing Examiner to decide the actual issue of whether the settlement should be given preclusive effect or not. At best the Hearing Examiner is able to indicate that he will use a "totality of circumstances" methodology for determining whether the settlement deprives the EOD of jurisdiction with respect to three of the five stated issues. Further proceedings will be scheduled.

Signed and dated this 23rd day of April, 2015.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Timothy M Scheffler
Thomas R Crone