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

Darwin H Vivas
125 S Franklin St
Madison WI 53703

Complainant

vs.

Summit Credit Union
4800 American Pkwy
Madison WI 53718

Respondent

HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S VARIOUS MOTIONS

CASE NO. 20112109

EEOC CASE NO. 26B201100063

BACKGROUND

On July 21, 2011, the Complainant Darwin Vivas, filed a complaint with the City of Madison Department of Civil Rights, Equal Opportunities Division (EOD). The complaint alleged that Vivas had experienced racial and ethnic harassment while employed by the Respondent, Summit Credit Union, which ultimately led to his constructive discharge. The Respondent denies that it discriminated against the Complainant in any manner.

On November 30, 2011, the Hearing Examiner conducted a Pre-Hearing Conference with the parties. The purpose of this Pre-Hearing Conference was to establish the issues for hearing, set a date for the hearing and to establish certain dates for interim actions. On December 6, 2011, the Hearing Examiner issued a Notice of Hearing and Scheduling Order encompassing the matters discussed at the Pre-Hearing Conference.

DECISION

This Decision and Order will address two motions filed by the Respondent in this matter. A third motion is now ripe for decision, but will be addressed separately. The two motions to be addressed by the Hearing Examiner include a Motion to Strike and a motion denominated as a Motion for Summary Judgment though it is more properly identified as a Motion to Dismiss for Lack of Jurisdiction.

On January 13, 2012, the Respondent, as part of its initial disclosure of witnesses, moved the Hearing Examiner to preclude the testimony of any of Complainant's witnesses not properly identified by the date for such disclosure. On February 7, the Complainant filed an objection to the Respondent's motion and asked that the motion be striken.

This matter seems, to the Hearing Examiner, to be a "tempest in a teapot". While the Respondent's overriding point that the dates contained in the Scheduling Order are important

and are to be met is sound, the Respondent fails to observe the spirit of the EOD's somewhat more relaxed approach to litigation. The intent of the provision regarding the filing and exchange of initial witness lists is to assist the parties in the discovery process, not to establish an inviolable requirement for which the penalty is so draconian as to constitute a "death penalty".

It seems likely that any possible prejudice to the Respondent by a slight delay, if any, is negligible. It is truly difficult for the Hearing Examiner to know as the Respondent does not provide any description of how it might have been harmed by the specific delay it wishes to call to the attention of the Hearing Examiner.

It is not clear whether breeches of such a provision should be judged on a prejudice to the parties basis or the somewhat more relaxed excusable neglect standard. What is clear, the bright line test proposed by the Respondent is not consistent with the approach taken by the Department with respect to these matters.

Since there seems to be no prejudice or injury to the preparation of the Respondent in this matter, the Hearing Examiner will strike the Respondent's motion. The parties are cautioned, however, not to take this as a grant of authority to ignore the requirements of the Scheduling Order. The exercise of establishing an orderly process of pre-hearing dates and requirements leading up to a hearing is embodied in the Rules of the Equal Opportunities Commission (EOC). This process works to the benefit of the parties and to the Hearing Examiner and cannot be blithely ignored.

On February 10, 2012, the Respondent filed a Motion for Summary Judgment seeking dismissal of the complaint or, in the alternative, dismissal of any claim arising out of actions occurring either before September 24, 2010 or August 1, 2010. To some extent, it is difficult to determine the Respondent's exact request for relief.

The Respondent's motion is premised on the requirement in the EOC Rules that the Commission not accept any complaint whose actions fall outside of a 300 day period of limitation. EOC Rule 3.11.

The Complainant opposed the Respondent's motion on February 28, 2012. The Complainant filed a brief and additional materials to demonstrate that his claim is not time barred. The Respondent submitted a reply to the Complainant's response on March 9, 2012.

As noted above, it is somewhat difficult to discern the exact nature of the Respondent's request. Generally speaking, it is clear that it wishes that the 300-day period of limitation be enforced. However, at one point, the Respondent seems to assert that there are no incidents that occurred within the 300-day period of limitation and on the other hand, it seems to acknowledge that some of the allegations fall within the 300-day period and yet further seems to acknowledge that some allegations that are connected with those that occurred within 300 days fall outside the 300-day period, but did not occur earlier than August 1, 2010. Given the somewhat contradictory statements made by the Respondent, it is not clear whether it seeks to have the complaint dismissed as a whole, have all allegations occurring before September 24, 2010 dismissed or having any allegation occurring prior to August 1, 2010 dismissed.

Adding to the confusion is the Respondent's failure to discern the differences between practice before the DCR and practice in Circuit Court. As the parties will remember, the Hearing

Examiner, at the Pre-Hearing Conference, indicated that the EOD does not take Motions for Summary Judgment except as those motions have a jurisdictional basis to them. In this regard, the Respondent's motion is really a motion to dismiss for lack of jurisdiction and will be treated as such. While this difference may seem simply semantic, it has important consequences for how the motion must be addressed.

Even if the Hearing Examiner were to treat this motion as one for summary judgment, the Respondent's arguments concerning the Complainant's response are misplaced. First, the standards for admissibility urged by the Respondent are not those customarily applied before administrative agencies at either the state or local level. As the EOC Rules point out at section 8.2, these proceedings are to be addressed as ones under the Wisconsin Administrative Code Wis Stats. 227. In that context, the question of admissibility is one of relevance not technical admissibility as in Circuit Court. It is widely recognized that hearsay is admissible in administrative proceedings so long as the hearsay is not the sole evidence going to the ultimate issue before the tribunal. The Respondent's perorations on the shortcomings of the Complainant's response are unfortunate given that the Respondent's submission lacks the exact same elements which the Respondent finds so lacking in the Complainant's submission. Specifically, the Respondent points to a lack of affidavits on personal knowledge to support the Complainant's response, however, the Respondent provides no affidavits to demonstrate the facts upon which it seeks to rely. If the Respondent is going to criticize the Complainant for his lack of conformity to motion practice, the Respondent need be ready to stand up to the same standards.

The above problems might, in their own right, be sufficient cause for the Hearing Examiner to deny the Respondent's motion. However, compliance with the 300-day period of limitation is a jurisdictional prerequisite which the Hearing Examiner cannot ignore. Accordingly, the Hearing Examiner will attempt to address the record as it currently stands.

We start with the generalized allegations of the complaint. In that document, the Complainant alleges that he experienced a pattern and practice of harassing conduct while employed by the Respondent. Specifically, the complaint speaks about conduct in August, September and October of 2010 and January of 2011 leading to the Complainant's constructive discharge in January of 2011. It is true that the allegations are general in nature. That is often the case in complaints filed with the EOD. The allegations of the complaint are then, in theory, fleshed out during the investigation. In the present matter much greater detail was added with respect to incidents including dates and details during the investigative process.

The Respondent seems to misunderstand the Hearing Examiner's statements about the use of the investigative file. The Respondent appears to believe that the investigative file is not admissible at the time of hearing. Presumeably, the Respondent bases this on a statement made by the Hearing Examiner at the time of the Pre-Hearing Conference. The Hearing Examiner indicated that the contents of the investigative file will not automatically be considered at the time of hearing. However, either party may introduce parts of or the whole file by offering a copy as an exhibit.

If the Respondent was misled by a statement of the Hearing Examiner during the Pre-Hearing Conference, the Hearing Examiner apologizes for the confusion he may have inadvertently created. It is clear that the evidence in the investigative record is not lost to the parties and the process does not return to "square one". However, the parties must take a step

or two before that information can be utilized. The purpose of this procedural hurdle is to limit inclusion of irrelevant or otherwise inadmissible material in the hearing record. It must be remembered, however, that the standard for admissibility in a proceeding before the Hearing Examiner is much more flexible than in circuit court.

Returning to the question of the period of limitations and the Respondent's motion to dismiss or to limit testimony, the Respondent fails to demonstrate that there is no possible claim within the 300-day period commencing with September 24, 2010 and ending on the date on which this complaint was filed. Further, the nature of that claim is unavoidably linked with facts and allegations that predate September 24, 2010.

The Complainant states two general types of claims in both his complaint and in the Notice of Hearing. First, he asserts that he was constructively discharged in January of 2011. This event, the termination of the Complainant's employment, certainly falls within the 300 day period of limitations. Second, the Complainant alleges various types of harassment on several bases that culminated in his constructive discharge. In the complaint, the Complainant specifies incidents that appear to have begun in August of 2010 and continued into and through September of 2010 and October of 2010. The Complainant then went on leave until January of 2011. The Complainant alleges that at that point, the harassment continued/began again and in order to escape that treatment, the Complainant left his employment.

In the Respondent's motion, it makes vague references to allegations relating to incidents occurring prior to August of 2010. At this point, the Hearing Examiner is not clear about what is involved in these allegations that trouble the Respondent. Had the Respondent specified the allegations over which it is concerned in this regard, the Hearing Examiner might have a clearer record. However, in the absence of such a clear record, the Hearing Examiner can only indicate that he will judge each proffered piece of testimony or documentary evidence as it is offered at the time of hearing. However, those individual items must clearly be linked to those allegations of discrimination that fall within the 300-day period of limitation.

With respect to those allegations of discrimination that are outlined in the complaint and the record leading to the Notice of Hearing, the Hearing Examiner understands that the Complainant is alleging not a series of separate and discrete claims that might fall outside of the period of limitations, but rather is alleging a series of consistent and repeated conduct during the period outside the 300-day period of limitation, extending into the 300-day period and terminating with the Complainant's constructive discharge in January of 2011. The Respondent alleges that those allegations falling within the period of August 1, 2010 to September 24, 2010 fall outside the 300-day period of limitation and are barred by EOC Rule 3.11. The Complainant asserts that those allegations are not barred and can be brought due to the language of either EOC Rule 3.11(1) or EOC Rule 3.11(2) permitting allegations of discrimination that form a part of a pattern or practice of discrimination or a continuing violation of the ordinance to be filed so long as a portion of those allegations fall within the 300-day period of limitation.

As the terms and types of harassment alleged by the Complainant in the complaint and during the investigation are tied to the allegation of the Complainant's constructive discharge, it appears that, for now, there is evidence of a possible pattern and practice of discrimination whose antecedents fall outside of the 300-day period, but which terminates within the 300-day period. This, if proven, would establish a classic pattern or practice of discrimination. As such those allegations of discrimination as outlined in the complaint as falling between August 1,

2010 and September 24, 2010 fall within the contemplation of EOC Rule 3.11(1) and/or EOC Rule 3.11(2).

As outlined in Krebs v. Don Miller Pontiac Subaru, Inc., MEOC Case No. 22127 (Ex. Dec. on jurisdiction 3/29/96), one of the primary tests of whether the conduct lying on either side of a period of limitations represents a pattern and practice of discrimination or a continuing course of conduct is whether an individual might be reasonably expected to file a complaint with respect to any individual action making up the pattern or course of conduct. In the present matter the complaint alleges generally similar incidents of harassment and conduct aimed at the Complainant such that it seems unlikely that any single incident would trigger the filing of a complaint. Given the record as a whole, it appears that the Complainant may well be able to present evidence linking the incidents occurring from August 1, 2010 to those leading up to his constructive discharge in January of 2011.

As to any incidents occurring prior to August 1, 2010, there is currently insufficient information before the Hearing Examiner to determine whether an extension of the course of conduct to a point prior to August 1, 2010 is supported or indicated. As noted above, the Hearing Examiner will reserve judgment on such allegations until they are presented at hearing.

Given the record at this point, the Hearing Examiner denies the motion of the Respondent to dismiss the complaint. The Hearing Examiner will permit the introduction of evidence of violations of the ordinance occurring between August 21, 2010 and September 24, 2010 so long as the Complaint can demonstrate a connection between those facts and alleged violations and those that may have occurred after September 24, 2010. As for evidence of violations occurring before August 1, 2010, the Hearing Examiner will reserve any ruling pending the demonstration of a continuing course of conduct or a pattern and practice of discrimination ending after September 24, 2010.

Signed and dated this 9th day of May, 2012.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Erik Samuel Olsen
William W Ehrke

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

Darwin H Vivas
125 S Franklin St
Madison WI 53703

Complainant

vs.

Summit Credit Union
4800 American Pkwy
Madison WI 53718

Respondent

HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO STRIKE EXPERT WITNESS

CASE NO. 20112109

EEOC CASE NO. 26B201100063

BACKGROUND

On July 21, 2011, the Complainant Darwin Vivas, filed a complaint with the City of Madison Department of Civil Rights, Equal Opportunities Division. The complaint alleged that Vivas had experienced racial and ethnic harassment while employed by the Respondent, Summit Credit Union, which ultimately led to his constructive discharge. The Respondent denies that it discriminated against the Complainant in any manner.

On November 30, 2011, the Hearing Examiner conducted a Pre-Hearing Conference with the parties. The purpose of this Pre-Hearing Conference was to establish the issues for hearing, set a date for the hearing and to establish certain dates for interim actions. On December 6, 2011, the Hearing Examiner issued a Notice of Hearing and Scheduling Order including dates for the identification of expert witnesses and rebuttal expert witnesses along with dates for the completion of discovery.

On February 1, 2012, the Complainant identified Gladis Benavides as an expert witness whom he intended to call. The Respondent took the deposition of Ms. Benavides on March 1, 2012. On March 22, 2012, the Respondent moved the Hearing Examiner to strike Ms. Benavides as an expert witness or to preclude certain opinions which she might be asked to render at the time of hearing. The Complainant opposes the motion of the Respondent.

DECISION

As with other motions filed and defended in this matter, there is a lack of precision that makes a clear ruling on the motion difficult. Both parties make apt points and both miss the mark with other arguments.

The Respondent's motion is really premised on two, possibly three, related arguments. First, the Respondent contends that Ms. Benavides does not possess the qualifications to be

denominated an expert witness. Second, the Respondent asserts that Ms. Benavides' opinions as outlined in her report dated February 1, 2012 contravene the domain of the Hearing Examiner and are therefore not appropriate. Thirdly and somewhat related to the second point, the Respondent contends that this type of case does not represent one for which the opinion of an expert witness might be appropriate.

The Complainant argues that due to Ms. Benavides' experience she has relevant knowledge and opinions that are probative of the issues at controversy and her opinion should be allowed. Additionally, the Complainant contends that the Respondent has not utilized the proper standard for judging the admissibility of Ms. Benavides' testimony.

The question of Ms. Benavides' qualifications as an expert is difficult to separate from the question of the opinions which she might offer. In the present matter, the question is complicated due to an incomplete record. The Hearing Examiner was not provided with the complete transcript of Ms. Benavides' deposition nor was her Curricula Vitae provided as in the context of this motion. The professional background provided as part of Ms. Benavides' report is vague and lacks a detailed enumeration of her training, professional experience and qualifications.

Having pointed out some of the deficiencies in the record, the Hearing Examiner believes that Ms. Benavides possesses valuable and pertinent experience in the field of civil rights and human resources. The fact that she has not testified in a court or administrative proceeding is, by itself, not a basis for determining that she lacks appropriate training and experience in certain areas. The parties will both understand that the qualification as an expert is a somewhat flexible process depending upon the nature of the testimony to be given and the issues before the tribunal.

At this point, the Hearing Examiner would need to hear more testimony concerning the extent and experience of Ms. Benavides to either qualify or disqualify her as an expert witness. The record as it currently exists before the Hearing Examiner is insufficient to render an informed judgment.

Whether Ms. Benavides is ultimately qualified as an expert witness will depend largely upon the issues for which she is asked for an opinion. To the extent that her report as provided with the Respondent's motion identifies four issues, the Hearing Examiner finds that three of these issues are not appropriate subjects for any expert testimony. Essentially Ms. Benavides provided opinions as to whether the Respondent had discriminated against the Complainant in a variety of manners. As the Respondent contends, the question of whether discrimination has occurred is the ultimate question to be answered in this proceeding and as such is the sole province of the Hearing Examiner. While Ms. Benavides may well possess the experience, knowledge and training to be able to offer an informed opinion with respect to the question of discrimination, her opinion does not further the Hearing Examiner's knowledge or evaluation of the facts and the law.

The Complainant asserts that in a Section 227 type proceeding, the only question is whether the testimony or evidence to be introduced is probative of the issues before the Hearing Examiner. In this regard, the Hearing Examiner understands the Complainant to be arguing that relevancy is the sole determining factor of admissibility. While generally true, the Complainant makes too broad a point from a simple principle. Even though Ms. Benavides' testimony might be relevant based upon her experience and knowledge of the area, it is immaterial to the

proceeding because she is being asked to provide an opinion that might supersede that of the Hearing Examiner. In that case, there would be no need for the Hearing Examiner. Additionally, Rule 7.2 of the Rules of the Equal Opportunities Commission (EOC) vests in the Hearing Examiner the authority to make such rulings as may be necessary to the orderly conduct of hearings. For the Hearing Examiner to permit a witness to offer this type of an opinion would create the likelihood of a trial within a trial over the exact same issues needlessly complicating and delaying the process.

It is not clear that the opinion to be offered by Ms. Benavides really advances the issues for hearing. As outlined by the motion and the Complainant's response, Ms. Benavides has had only the material contained in the Commission file as extracted by Complainant's counsel to draw upon in reaching her opinion. As the Respondent correctly points out, Ms. Benavides does not have whatever material the Respondent might offer at hearing to the extent that it is different from that already provided to her. At best, this would allow Ms. Benavides to offer an opinion that more closely approximates the finding of probable cause to believe that discrimination may have occurred as set forth in the Initial Determination. As such, Ms. Benavides' opinion would seem to only duplicate the work that has already been done in the present matter. Ms. Benavides, as of now, has not had the opportunity to hear both sides to the controversy or to weigh the credibility of opposing witnesses. With these constraints, Ms Benavides is limited to accepting the truth or veracity of the statements provided to her. This standard is much more similar to that at the Initial Determination stage than to that of a hearing on the merits. Since there has already been a finding of probable cause in this matter, Ms. Benavides' opinion would merely repeat the opinion of the Investigator/Conciliator.

In short, though Ms. Venavides may well qualify as an expert witness, the Hearing Examiner will not entertain her testimony on whether there has been discrimination or not. However, Ms. Benavides may be permitted to testify on other matters. The final question upon which Ms. Benavides offered an opinion was whether the Respondent acted appropriately or in a timely manner to address a complaint of discrimination made by the Complainant. This subject is somewhat less clear. To the extent that Ms. Benavides is being asked to offer an opinion as to what are the best industry practices about how to respond to an employee's complaint of discrimination, she may be qualified as an expert with some additional foundational questions. The answer to such a question might help the Hearing Examiner to determine whether the Respondent acted reasonably to a complaint by the Complainant. However, if Ms. Benavides were asked if the manner of the Respondent's response was discriminatory, the Hearing Examiner would exclude that question as calling for answer that would encroach upon the duties of the Hearing Examiner.

The Respondent asserts that a discrimination complaint is not appropriate for expert testimony. The Respondent seems to contend that only matters of scientific or technical natures support the need for expert testimony. While certainly such cases might best utilize expert testimony, there is a place for expert testimony in civil rights cases. Undoubtedly, there are aspects of damages including questions of future wage loss, emotional distress, mitigation and similar topics which benefit from the testimony of expert witnesses. There may be aspects of industry standards or common practices in various industries in the area of human resources that might support expert testimony. Such determinations will be highly fact dependent and it is difficult to state flatly that expert witnesses are or are not helpful in a given case.

On a somewhat unrelated matter, both parties make much of the fact that Ms. Benavides did not provide an explanation or description of her analysis in reaching her opinions. The

Complainant, in particular, points to a lack of a specific requirement in the EOC Rules requiring inclusion of the expert's analysis in his or her report. Though permitted, the use of expert witnesses in proceedings before the Commission has not been widespread. To that extent, there has been no need for the Commission to make a rule with respect to expert testimony. However, it is accepted practice and only common sense that an expert should include the methods and manner in which s/he has reached an offered opinion. A question followed by an answer does nothing to allow an understanding of the basis for the opinion. If a mathematician is asked for the value of π and only responds 3.15, one has no basis for challenging or accepting that opinion. Either one must accept it or reject it. Should the expert wish to explain that s/he rounded or utilized an alternative method for reaching the proffered opinion, there is no basis for making that inquiry. Being able to review the process of reaching an expert's opinion is a critical part of understanding and accepting the expertise of the witness.

ORDER

The Hearing Examiner denies the Respondent's motion to strike the Complainant's expert witness. However, the Hearing Examiner will preclude the testimony of Ms. Benavides to the extent that her opinion is asked as to whether discrimination has occurred. By separate cover, the Hearing Examiner will schedule a status conference to set further dates in this matter.

Signed and dated this 9th day of May, 2012.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Erik Samuel Olsen
William W Ehrke