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

Nadine Rhone c/o Rhodes 2710 Granada Way, Apt. 7 Madison, WI 53713 Complainant vs. Marquip 99 South Baldwin Street Madison, WI 53703 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER. MEMORANDUM DECISION Case No. 20967

This matter came on for hearing on Complainant Nadine Rhone's claim of racial discrimination in employment on April 18 and 19, 1989. The hearing was held in the Madison Municipal Building before MEOC Hearing Examiner Harold Menendez. The Complainant appeared in person and by her attorney, Jacqueline Macaulay of the law firm of Borns, Macaulay & Jacobson. Respondent appeared by Mark Meunier, Human Resources Manager, and by Attorney Susan Maisa of the firm of Foley & Lardner.

On the basis of the evidence presented, the hearing examiner now makes the following Recommended Findings of Fact and Conclusions of Law, and enters the following Recommended Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Nadine Rhone, is an adult black female.

2. The Respondent, Marquip, Inc., is a manufacturer located in the City of Madison. Respondent employs several hundred persons in its plant in Madison.

3. On March 15, 1988, Complainant went to Respondent's plant, located at 99 South Baldwin Street, Madison, to apply for part-time employment. She was greeted by a receptionist who pointed out the application forms to her. Complainant filled out and submitted an application form. Complainant saw others in the reception area whom she assumed to be employees of Respondent, but did not speak with anyone other than the receptionist. After turning in her application form, Complainant left.

4. On her application, Complainant indicated she was seeking part-time employment in the stockroom and that she was available for work on weekday evenings. Her application form also included her employment history. It indicated she was then working as a press operator at Engineering Industries; that she had been "fired for unknown reasons" from a telemarketing job in December of 1987; and that she left a housekeeping job at the Concourse Hotel in April of 1987 because of a "job dispute".

5. Theresa Engel was employed by Respondent to screen applications and interview applicants for various positions, including positions in the stockroom. She began in August of 1987 as a temporary employment agency employee, but was eventually hired by Respondent to perform the same work. She remained in Respondent's employ until May of 1988. Engel is the only person who reviewed Complainant's application.

6. On March 23, 1988, Engel called the telephone number listed on Complainant's application. The number was that of Complainant's boyfriend, who is black. Engel did not speak with Complainant, but spoke with an individual who informed her that Complainant had full-time employment but was also seeking part-time work to supplement her income.

7. Engel then decided to reject Complainant's application because it did not reflect that she had any stocking experience, because of the reasons she gave for leaving two of the three jobs listed on her application, and because she intended to continue her full-time employment while employed by Respondent.

8. Complainant made numerous calls to Respondent to follow up on her application. On April 6, 1988, Engel was given a telephone message from Complainant. By this time, Engel had already rejected Complainant's application. On April 7, 1988, Engel called one of the telephone numbers listed on the message and spoke with Dorothy Jackson, Complainant's sister-in-law. Jackson informed Engel that Complainant was not there. Engel left a message for complainant with Jackson. The message was that Respondent would not be offering Complainant employment. Jackson is black.

9. Engel did not meet or speak with Complainant at any time prior to speaking with Dorothy Jackson on April 7, 1988.

10. Engel's office is physically separated from the reception area where Complainant made her application. Engel did not fill in for the receptionist or otherwise perform receptionist duties. The receptionist at the time Complainant made her application was Wilma Narr. She did not tell Engel Complainant's race. Complainant's application form did not indicate her race. Engel did not know Complainant's race.

11. Respondent rejected other applicants for part-time employment because they also had full-time jobs which they intended to keep while working part-time for Respondent.

12. From January 1, 1988 through July 1, 1988, Respondent hired fifteen part-time stockroom employees. None had other, full-time, jobs. All but three had prior stocking experience. One of those three was hired as a Cycle Counter. The duties of a Cycle Counter are different than those of other stockroom employees, and stocking experience is not required for the position.

13. Respondent did not reject Complainant's application because of her race.

RECOMMENDED CONCLUSIONS OF LAW

14. The Respondent is an employer subject to the Equal Opportunities Ordinance.

15. Complainant has failed to prove by a preponderance of the evidence that Respondent intentionally discriminated against her because of her race.

RECOMMENDED ORDER

16. The complaint herein is dimissed.

MEMORANDUM DECISION

This case involves a claim of racial discrimination in employment by a Complainant who is unable to prove that the individual solely responsible for rejecting her application knew her race. This is a disparate treatment case. The complainant, therefore, bears the burden of proving intentional discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); Gay v. Waiters' and Dairy Lunchmen's Union, 694 F. 2d 531, 537 (9th Cir. 1982). As the court of appeals stated in Robinson v. Adams, 830 F. 2d 128 (9th Cir. 1987); amended, 847 F. 2d 1315, (1988) (per curiam); cert. denied, ____ U.S. ____ S. Ct. ____, 104 L. Ed. 2d 1018 (1989), "[a]n employer cannot intentionally discriminate against a job applicant based on race unless the employer knows the applicant's race." 847 F. 2d at 1316. Since Complainant is unable to prove Respondent knew her race, she cannot prevail on her claim.

It is undisputed that Theresa Engel, the only individual who reviewed the Complainant's application, and the person who made the independent determination not to hire her, never saw, met or spoke with the Complainant prior to deciding not to hire her or communicating that decision to the Complainant's sister-in-law. It is also undisputed that Engel was not told that the Complainant is black. Engel testified that she did not know the Complainant's race. The Complainant insists that Engel must have learned her race and that a finding to that

effect should be made. The evidence simply does not support such a finding.

Margaret Speas, an Assistant Professor of Linguistics at the University of Wisconsin, testified that there is a dialect of English known as Black English, which is recognizable to non-linguists. She also testified that the Complainant's speech is easily identifiable as Black English. The fact that Complainant may speak Black English proves little, since it is undisputed Engel never spoke with her. Complainant instead urges that Engle must have recognized, from the voice of the person she spoke with by telephone on March 23, 1988, that Complainant is black, and that her April 7 conversation with the Complainant's sister-in-law is further proof that Engel knew the Complainant is black. Complainant's argument, which rests largely on unarticulated suppositions and assumptions, is as unpersuasive as the evidence upon which she relies.

The Complainant has attempted to prove that the reasons cited by Engel for rejecting her application are pretexts for discrimination. It is conceivable the evidence offered to show pretext would also rise to such a level of proof that it would support a finding of intentional discrimination, even in the absence of any direct evidence that Respondent knew the Complainant's race. That is not the case here.

There is undisputed evidence that for months before and after the Complainant's application and rejection, the Respondent did not hire a single person who had other full-time work into part-time employment in the stockroom. Fifteen persons were hired during this period. Only three did not have stockroom experience, and one of them was hired into a job for which such experience was not required. None of these three had full-time jobs or a work history such as the Complainant's, which included being fired from one job "for unknown reasons," and leaving another because of a "dispute." There is evidence that Respondent hired Charles Blum, who had been fired from previous employment because of absenteeism. There is, however, uncontroverted evidence that Blum had stocking experience, and that he was given an otherwise positive recommendation by the employer that discharged him for absenteeism. Thus, the apparent exceptions or inconsistencies upon which the Complainant relies do not serve to prove that the explanation offered by Engel for rejecting her is a pretext for discrimination. There has been no showing that any other applicant of any race whose circumstances and employment record even remotely resembled Complainant's was offered employment. Her complaint is, therefore, dismissed.

Dated at Madison this 31st day of July, 1984.

EQUAL OPPORTUNITIES COMMISSION

Harold Menendez
Hearing Examiner

HM:233-IA

cc: Jacqueline Macaulay
Susan Maisa

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
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Marquip 99 South Baldwin Street Madison, WI 53703 Respondent	

The Respondent in this employment discrimination case has moved for summary judgment on the ground that the material facts are undisputed and that, on those facts, Respondent is entitled to judgment as a matter of law. The Complainant has offered proofs to show that material facts are disputed and further argues that summary judgment is not appropriate in proceedings before the Madison Equal Opportunities Commission (MEOC). For the first time in this hearing examiner's experience, the latter issue is not merely raised in passing, but is addressed at length by both parties in their briefs.

In opposing the motion, the Complainant argues that summary judgment is duplicative of the investigation and Initial Determination and is therefore inappropriate. She also argues that summary judgment procedure is too complex and cumbersome to be adapted to the MEOC administrative hearing process. Finally, Complainant relies on the recent holding of Davis v. Burlington Air Express, Inc., ERD Case No. 8601781, ALJ Order and Mem. Op., Nov. 3, 1988, that the Administrative Law Judges of the Equal Rights Division (ERD), the agency which adjudicates employment discrimination complaints brought under the Wisconsin Fair Employment Act (WFEA), sec. 111.31, et seq., Wis. Stats., do not have the authority to entertain motions for summary judgment.

Complainant argues that the ruling and reasoning of Davis, id., are fully applicable to MEOC, and that, like ERD, this Commission and its hearing examiner are without authority to hear or grant motions for summary judgment.

The Respondent questions the applicability of Davis, which arose under the WFEA, to proceedings brought under the Madison Equal Opportunities Ordinance, sec. 3.23, Mad. Gen. Ord. Respondent also argues that MEOC Rule 15.32 authorizes a full motion practice before MEOC, so that summary judgment is appropriate in these proceedings, and further argues that the hearing examiner would not routinely include a filing deadline for dispositive motions in scheduling orders unless he had determined that the ordinance and rules authorize summary judgment.

As noted above, Davis arose under the WFEA. The ruling in that case was based on an analysis of the various provisions of the WFEA, the administrative rules which govern ERD proceedings[1] and the state Administrative Procedure Act, Ch. 227, Wis. Stats.[2] The Madison Equal Opportunities Ordinance exists independently of the WFEA; it was adopted by the City of Madison in the exercise of the home rule authority granted to cities in sec. 62.11(5), Wis. Stats. See, State ex. rel. Badger Produce Co. v. Equal Opportunities Commission, No. 79-CV-4405, Dane Co. Cir. Ct., Hon. G. Currie, Sep. 2, 1980; aff'd., No. 80-1906, Ct. of Appeals, Dist. IV, July 16, 1981 (per curiam); aff'd by equally divided court, No. 80-1906, Wis. Supreme Ct., Mar. 20, 1982; City of Madison v. Community Action Commission, No. 161-291, Dane Co. Cir. Ct., Hon. R. Bardwell, Aug. 31, 1979. Moreover, municipal administrative procedure is governed by Ch. 68, Wis. Stats., not by Ch. 227. Pursuant to see. 68.16, Wis. Stats., the City of Madison has adopted a procedure for the adjudication of claims arising under the Equal Opportunities Ordinance. See, sec. 3.23(9)(c), (d), Mad. Gen. Ord. The Common Council has also authorized the Commission to "adopt such rules and regulations as may be necessary to carry out the purpose and provisions" of the ordinance, sec. 9.23(9)(b)6, Mad. Gen. Ord., and the Commission has adopted such rules. See generally, MEOC Rules. Thus, Davis is not controlling, for it is clear that the Commission and the MEOC hearing examiner derive their authority from secs. 62.11(5) and 68.16, Wis. Stats., and from the Madison Equal Opportunities Ordinance and MEOC Rules, which were not at issue in Davis.

Since MEOC's authority to adjudicate complaints, and that of the hearing examiner, flow from the Ordinance and MEOC Rules, we must look first to the Ordinance and the Rules to determine proper procedure in cases before MEOC and, more specifically, whether the hearing examiner is authorized to entertain motions for summary judgment in cases certified to hearing. The Ordinance provides that, in the event an investigation of a complaint results in a determination of probable cause and attempts to conciliate are unsuccessful, "the Commission shall issue and serve a written notice of hearing" on the parties. See. 3.23(9)(c) 2.a., Mad. Gen. Ord. This provision is echoed in MEOC Rules 8.1 - 9.1. Neither the Ordinance nor the rules cited above expressly address the question of the availability of summary judgment in cases certified to hearing. Procedure in cases certified to hearing is governed by the various subparts of MEOC Rule 15. Rule 15.322 allows the hearing examiner to hear and decide motions which will expedite the administrative processing of a case.[3] Standing alone, the language of Rule 15.322

is broad enough that it may be read to permit summary judgment in eases certified to hearing. There are, however, two other provisions in the rules which militate against permitting either party to have summary judgment once a case has been certified to hearing. And, unlike the permissive language we find in MEOC Rule 15.322, the language of these two rules is mandatory.

Rule 15.13[4] states that eases certified to hearing "are required to be determined on the record after a hearing by the Hearing Examiner." MEOC Rules 15.43[5] guarantees the parties in cases certified to hearing the right to cross examination, to present the parties in cases certified to hearing the right to cross examination, to present evidence, and "all other rights essential to a fair hearing," unless "such rights have been forfeited due to default or failure to comply with discovery." MEOC Rule 15.43. It is a fundamental rule of construction that effect is to be given to every word, clause, and sentence of the Ordinance and rules. Sutherland Stat. Const. sec. 46.06 (4th Ed.); Hambleton v. Friedman, 117 Wis. 2d 460, 462, 344 N.W. 2d 212 (Wis. App. 1984); State v. Smith, 103 Wis. 2d 361, 365, 309 N.W. 2d 7 (Wis. App. 1981); aff'd., 106 Wis. 2d 17, 315 N.W. 2d 343 (1982). In construing a rule, the primary source of construction is the language of the rule. Coe v. Board of Regents, 140 Wis. 2d 261, 269, 409 N.W. 2d 166 (Wis. App. 1987). Rule 15.13 is neither ambiguous nor equivocal; it mandates that cases certified to hearing go to hearing. Allowing summary judgment in such cases would render the rule superfluous, contrary to the canon of construction requiring that effect be given to every word, clause and sentence of the Ordinance and rules.

There can also be little question as to the import or effect of MEOC Rule 15.43. The right to cross-examine witnesses may only be exercised at a hearing. The same is true of many of the "other rights essential to a fair hearing." In according parties t in cases certified to hearing rights which can only be exercised at a hearing, MEOC Rule 15.43 also accords the parties the right to a hearing. Furthermore, because it 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. See, 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 summary, although the Ordinance does not expressly allow or disallow resolution of complaints of discrimination by summary judgment, the MEOC Rules mandate that, with few exceptions, cases certified to hearing go to hearing. Summary judgment does not number among those exceptions. Based on the foregoing review of the Ordinance and rules, I conclude that summary judgment is not available in cases certified to hearing. Accordingly, the Respondent's Motion for Summary Judgment must be denied.[6]

ORDER

IT IS HEREBY ORDERED that Respondent's Motion for Summary Judgment is, denied.

Dated at Madison this 5th day of April, 1989.

EQUAL OPPORTUNITIES COMMISSION

Haro d Menendez
Hearing Examiner

HM:233-IA

cc: Jacqueline Macaulay
Susan R. Maisa

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[1]Ch. Ind. 88, Wis. Admin. Code

[2]See, Davis v. Burlington Air Express, Inc., supra, Mem. Op. at 6-13.

[3]15.32 Motions . . . 15.322. Upon receipt of any written motion, the Hearing Examiner shall determine what procedures shall be used to address said motion. Except as otherwise expressly provided in these rules, the Rearing Examiner need address only those motions which s/he determines will expedite the administrative processing of the case.

[4]15.13 Nature of Proceedings. Proceedings in contested cases are those formal proceedings conducted under the Equal Opportunities Ordinance and Section 9 of the Rules of the EOC. Such proceedings are required to be determined on the record after a hearing by the Hearing Examiner.

[5]15.43 Rights of Parties. Every party shall have the right to due notice, cross examination, presentation of evidence, objection, argument, motion and AU other rights essential to a fair hearing, except where such rights have been forfeited due to default or failure to comply with discovery.

[6]The Fact that this hearing examiner has entertained and ruled on motions for summary judgment in the past is attributable to the examiner's reluctance to decide issues raised only in passing and to advance and rule on arguments not raised by the parties themselves.