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

Oscar Castillo 615 Howard Place, Apt. 210 Madison WI 53703 Complainant vs. Times Square Apartment Corporation 123 E. Main Street Madison WI 53703 Respondent	HEARING EXAMINER'S DECISION AND ORDER Case No. 22322

BACKGROUND

On August 9, 1995, the Complainant, Oscar Castillo, filed a complaint of discrimination with the Madison Equal Opportunities Commission (MEOC). The complaint charged the Respondents Clifford Fisher and Time Square Apartment Corporation, with employment discrimination on the basis of the Complainant's race (Hispanic) and national origin/ancestry (Salvadoran). Subsequent to investigation, an initial determination of probable cause to believe that discrimination had occurred was issued on December 20, 1995. Efforts to conciliate the complaint failed or were waived by one of the parties. The complaint was certified to the Hearing Examiner for the holding of a public hearing.

The pre-hearing conference was held on July 15, 1996. The Complainant appeared in person and by his attorney Robert Kelly. The Respondent, Clifford Fisher, appeared in person and without representation. Subsequent to the pre-hearing conference the Hearing Examiner issued a notice of Hearing and Scheduling Order. The Notice of Hearing set the time and date for hearing to be September 17, 1996. The scheduling order provided that discovery must be completed on or before August 30, 1996.

On or about July 31, 1996, the Complainant attempted to serve interrogatories upon the Respondents. From the record available to the Hearing Examiner, it appears that this service was deficient. On September 4, 1996 the Complainant filed a motion to compel answer to the interrogatories. The Hearing Examiner scheduled a hearing on the Complainant's motion for September 13, 1996 at 11:00 a.m. On September 12, 1996, Clifford Fisher called the Hearing Examiner to inform him that Fisher would be out of state at the time of the scheduled hearing on the Complainant's motion. The Hearing Examiner informed Fisher that he would take the public hearing scheduled for September 17, 1996 off the Commission's calendar and would reschedule the hearing on Complainant's motion to compel for the same time as the originally scheduled public hearing.

The Complainant and his attorney appeared at the motion hearing. Clifford Fisher appeared and for the first time was represented by Robert Pretto. Apparently Pretto had not been informed of the Hearing Examiner's decision to remove the public hearing from the Commission's calendar. Pretto objected to the Complainant's motion to compel discovery, citing as grounds the apparent failure to

properly serve the interrogatories. The Hearing Examiner ordered the Respondent to answer the interrogatories and to set forth any objections to the interrogatories on or before October 4, 1996.

In the Respondent's answers to the Complainant's first set of interrogatories and request for the production of documents, the Respondent repeatedly raised, as an objection, failure to name a proper Respondent. On October 8, 1996, the Hearing Examiner held a status conference to determine the Respondent's compliance with the Hearing Examiner's order compelling discovery. As a result of the Complainant's interrogatories, the Respondent's answers and the status conference held on October 8, 1996, the Hearing Examiner believes that there is a significant level of confusion about who or what may constitute the proper parties.

DECISION

Under the rules of the Madison Equal Opportunities Commission, the Hearing Examiner has the authority and responsibility to regulate the conduct of proceedings in order to minimize delay and to maintain order. MEOC Rule 15.442. The current circumstances of this complaint place the Hearing Examiner in the somewhat awkward position of having to delay proceedings in order to maintain or create some order in the proceedings. Due to the fact that both parties were unrepresented for significant periods of time during the processing of this complaint, information that would have properly assisted the parties and Commission in proceedings with this matter has not been provided to the Commission. This confusion extended through the period of time when the Complainant was represented but the Respondents were not.

From the caption of the complaint, as filed, it appears that the Complainant has named two Respondents, Clifford Fisher and Time Square Apartment Corporation. From the context of the complaint, however, it appears that the complaint is primarily against Clifford Fisher. From the Respondents' answers to the Complainant's interrogatories, it appears that Clifford Fisher may have an interest in an entity known as Times Square Apartments. Fisher denies that there is a legal entity known as Time Square Apartment Corporation.

In order to promote justice between the parties and to afford the Commission with a clear record for review, the Hearing Examiner concludes that it is in the interest of the parties and the Commission to permit the Complainant a reasonable period of time to amend his complaint. Since the Commission may only proceed where there has been an investigation of the allegations of the complaint and an Initial Determination has been issued, the Hearing Examiner reserves the right to remand the complaint for further investigation should the amendment name a party or parties different from those who have already been named.

While it is unfortunate that this action will result in some further delay and undoubted expense to both parties, it is the Hearing Examiner's belief that both parties have contributed to the current circumstances. To reduce additional delay, the Hearing Examiner encourages the parties to work together to minimize the need for additional investigation.

ORDER

The Complainant may file an amended complaint of discrimination with the Commission on or before November 22, 1996. Amendment of this complaint may involve only the identity of the Respondents and their relationship to the Complainant's allegations of discrimination.

Signed and dated this 14th day of November, 1996.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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

Oscar Castillo 215 N. Frances, Apt. 305A Madison WI 53703 Complainant vs. Clifford Fisher 107 N Hancock Madison WI 53703 Marvin Hellenbrand 34 Fuller Court Madison WI 53704 Clifford Fisher Individually or in Partnership with Marvin Hellenbrand, or d/b/a Time Square Apartments 123 E. Main Street Madison, WI 53703 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER Case No. 22322

A public hearing on the merits of this complaint was held on July 17, 1997 and August 8, 1997 in room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard Madison, Wisconsin before Hearing Examiner Clifford E. Blackwell, III. The Complainant, Oscar Castillo, appeared in person and by the law firm of Kelly and Kobelt by Bret Petranech. The Respondent appeared by Clifford Fisher and by the law firm of Gergen, Gergen and Pretto, S.C. by Robert Pretto. The Respondent now is represented by the law firm of Mohs, MacDonald, Widder and Paradise by Gregory Paradise. Based upon the record in this matter, the Hearing Examiner makes the following Recommended Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The Complainant is a Hispanic from El Salvador. At all times relevant to this complaint, the Complainant was a resident of Madison, Wisconsin.
2. At all times relevant to this complaint, the Respondent Clifford Fisher lived in Madison, Wisconsin. He was a part owner in the property known as Time Square Apartments.

3. Time Square Apartments was co-owned by Marvin Hellenbrand. Hellenbrand and the Respondent have an undisclosed agreement relating to financial responsibility for Time Square Apartments.
4. In 1995, the Respondent was responsible for the construction of Time Square apartments after the original contractor defaulted on its obligations.
5. From January 1, 1995, until approximately August 15, 1995, the Respondent hired and supervised up to 100 workers in connection with the construction of Time Square Apartments.
6. The Complainant learned about possible employment in June of 1995 at the Time Square Apartments site through a contact at Centro Hispano. Centro Hispano is a service and advocacy organization located in Madison, Wisconsin working specifically with the Hispanic community.
7. The Complainant went to the Time Square Apartments worksite in search of the Respondent. The Respondent was not present and the Complainant spoke with another worker named Leif, last name unknown. Leif put the Complainant to work laying flooring. The Complainant had no previous experience laying flooring or in any other construction trade.
8. When the Respondent returned to the work site, he was introduced to the Complainant who was identified as the "new worker." The Respondent okayed the Complainant's employment.
9. The Complainant possessed no tools of his own and used those provided by the Respondent. The Complainant took work assignments from the Respondent or his agents. All work was performed on the Time Square Apartment work site. The Complainant reported his hours to the Respondent and was paid at the rate of $7 per hour without any overtime for work in excess of 40 hours per week. The Complainant did not have an employment contract with the Respondent either in writing or orally.
10. The Complainant worked whatever hours he wished, but was encouraged to work as many hours as possible. The Respondent did not subtract taxes or other amounts from the Complainant's pay.
11. Subsequent to the Complainant's termination on August 7, 1995, he filed a claim with the Wage and Hours Bureau of the Wisconsin Department of Industry, Labor and Human Relations. The claim was to recoup pay for his last week of work. The Investigator found that the Complainant was an employee rather than an independent contractor and ordered the Respondent to pay the Complainant his hourly wage plus overtime for the hours in excess of 40 worked by the Complainant. Prior to payment, the Complainant was required to produce his green card.
12. The Complainant worked almost exclusively laying flooring for the Respondent. Towards the end of his employment the Complainant was reassigned to other tasks as his work was needed. These tasks included painting or staining woodwork.
13. Laying flooring is physically demanding and unpleasant work. There were other tasks on the work site that would have been more demeaning and less favorable than laying flooring or painting.
14. The task of laying flooring was generally assigned to those new workers without much training. This included most of the Hispanic workers including the Complainant. There were other workers beyond the Hispanics that were assigned to lay flooring including Whites and women.
15. All workers were encouraged to work as many hours as possible. The Complainant and other Hispanic workers often worked in excess of 40 hours per week. While they were not paid overtime, no other workers were paid overtime either.
16. The Time Square Apartments work site was a construction site and yelling and profanity might be expected. From time to time, the Respondent would yell or swear at the Complainant as well as other employees. The Respondent's actions in yelling at or verbally disciplining the Complainant may have been more harsh than with other employees. The Respondent's occasional harsh treatment of the Complainant, while unpleasant, did not make the Complainant's job harder to do.

17. The Respondent never used racial or ethnic slurs on the job site and did not tolerate their use by other workers.
18. On August 7, 1995, the Respondent terminated the employment of the Complainant. The Respondent believed that the Complainant had been over-reporting his hours.
19. The Complainant believes that the Respondent told him, "fucking Salvadoran, get out of here."
20. Dawn Edseth, a coworker on the project and friend of the Respondent, did not hear the words "fucking Salvadoran" from the Respondent in connection with the Complainant's termination on August 7, 1995. Edseth was in a position to observe the interaction between the Complainant and the Respondent.
21. The Respondent appears to be somewhat of a bully and does not treat those with whom he disagrees with any level of respect.
22. The Complainant appears to be more sensitive than usual to criticism.
23. The Respondent insisted on the Complainant's production of a green card before payment of the Complainant's final wages. The Respondent needed this document for tax purposes. The Respondent should have insisted upon production of the green card at the inception of the Complainant's employment.
24. On August 7, 1995, the day of the Complainant's termination, the Respondent hired Henry Vargas. Vargas is a Hispanic.

CONCLUSIONS OF LAW

25. The Complainant is a member of the protected class "race".
26. The Complainant is a member of the protected class "national origin/ancestry."
27. The Respondent is an employer within the meaning of the Madison Equal Opportunities Ordinance Section 3.23(7)a. Mad. Gen. Ord.
28. The Respondent did not violate the ordinance by affording the Complainant terms and conditions of employment different from those not of his race in that the Complainant was not treated differently from those not of his race.
29. The Respondent did not violate the ordinance by affording the Complainant terms and conditions of employment different from those employees not from El Salvador in that he was not treated differently from those not from El Salvador.
30. The Respondent did not terminate the Complainant's employment because the Complainant is Hispanic.
31. The Respondent did not terminate the Complainant's employment because the Complainant is from El Salvador.

ORDER

The complaint is dismissed without cost or fees to either party.

MEMORANDUM DECISION

The first issue that must be resolved on this record is whether the Complainant was an employee of the Respondent or an independent contractor. If the Complainant was an independent contractor, the Commission would be without jurisdiction to hear this complaint. Kabir v. Electrolux, MEOC Case No. 22485 (Ex. Dec. 11/11/96).

The Complainant asserts that he was an employee of the Respondent. The Respondent contends that all of the persons working on the project in question were independent contractors. On this record, the Hearing Examiner finds that the Complainant was an employee of the Respondent.

The Complainant first came to work for the Respondent in June, 1995 pursuant to a referral from Centro Hispano. Centro Hispano is an advocacy and service agency working with Hispanics in the Madison area. The Complainant was referred to the Time Square Apartments project by one of the people at Centro Hispano because that individual had placed others at the same project.

Time Square Apartments was apparently a partnership of several individuals including Respondents Clifford Fisher and Marvin Hellenbrand. It is not clear from this record whether there were additional partners or owners. Respondent Fisher became heavily involved with the construction of the apartment building when the general contractor failed to meet construction deadlines and jeopardized rental contracts that were to begin on or about August 15, 1995. Fisher undertook the responsibility for completion of the project. Apparently Fisher and Respondent Hellenbrand have some agreement relating to financial responsibility for actions arising out of this project. For purposes of this decision, from this point forward the Hearing Examiner will refer to Fisher as Respondent though that term is intended to cover all of the named Respondents.

The Complainant went to the work site in search of the Respondent. He first met a person named Leif (last name unknown) who indicated that the Respondent was not there, but put the Complainant to work. The Complainant had no construction experience, training or skills. He came to Madison from El Salvador where his education at the university level was in agronomy. He came to the U.S. to escape political instability in El Salvador and to continue his education. Because of his lack of prior training or experience, the Complainant was shown how to lay wooden flooring. For the most part, that is what the Complainant did until August 7, 1995, when his employment was terminated.

All of the Complainant's work was performed at the Time Square Apartments (TSA) site. At all times, the Complainant's work duties were assigned and overseen by the Respondent or his agents. The Complainant did not have his own tools. The Complainant did not bid on specific work and there was no written contract between the Complainant and the Respondent. The Complainant was paid an hourly wage, not a flat fee for a specified project.

The Respondent did not pay the Complainant or others overtime for work in excess of 40 hours per week until required to do so by the State of Wisconsin Department of Industry, Labor and Human Relations, n/k/a the Department of Workforce Development. The Respondent paid the Complainant in cash or by personal check on a weekly basis and did not deduct any taxes from the amount paid. The Respondent did not regulate the number of hours worked by each person, but required them to report their hours at the end of the week.

As a matter of common sense, what the Complainant was doing for the Respondent is more typical of an employee than an independent contractor. The Complainant brought no tools with him. He performed all work at the Respondent's site. He reported to and received work assignments from the Respondent or his agents. All of these factors are common indicia of employment, not of contract. The Complainant did not bid on the work to be done and there was no written or explicit oral employment contract between the Complainant and the Respondent.

It is clear that the Respondent wished to establish his workforce to be independent contractors. The Hearing Examiner presumes that the Respondent sought this arrangement to minimize tax liability and give him the maximum degree of flexibility in getting the work done as quickly as possible rather than to avoid the jurisdiction of the Commission. While the Respondent did not deduct taxes from the Complainant's or any other person's pay, this effort on the Respondent's part to establish one of the indicia of an independent contractor relationship does not overcome the other indicia that more clearly establish the Complainant to have been an employee. Similarly, the fact that the Respondent did not

pay overtime for work in excess of 40 hours per week does not overcome those factors that mediate in favor of an employment relationship. This is particularly true in light of the state's finding that such pay was in fact due. Inherent in that finding is that the Complainant and other similarly situated workers were employees, not independent contractors.

The Hearing Examiner is not convinced by the testimony of Dawn Edseth (Edseth) that all of the workers knew that they were independent contractors. Edseth was not able to testify about the Complainant's understanding or what, if anything, had been said to the Complainant at the time the Complainant began work. Edseth, who has worked for the Respondent on several different projects, brings her own tools and a different level of experience and training to the work site than the Complainant. Her job was different from that of the Complainant. It is inappropriate for Edseth to compare her situation with that of the Complainant.

For purposes of this complaint, the Hearing Examiner finds that the Complainant was an employee of the Respondent. Being an employee, the Complainant's complaint falls within the jurisdiction of the Commission.

The Complainant makes four general allegations of discrimination. First, he contends that he was afforded terms and conditions of employment different from those not of his race, Hispanic. Second, he charges that he was afforded terms and conditions of employment different from those not of his national origin/ancestry, El Salvadoran. Third, the Complainant alleges that his employment was terminated because of his race, Hispanic. Finally, the Complainant asserts that his employment was terminated because of his national origin/ancestry, El Salvadoran. The Hearing Examiner will first address the allegations of discrimination in the terms and conditions of employment and then will move on to the claims of discrimination in the Complainant's termination.

The Complainant makes four claims regarding how his terms and conditions of employment were less favorable than those for other workers not of his race or national origin/ancestry. First, the Complainant alleges that he and other Hispanic workers were assigned exclusively to lay flooring. He contends that this job was physically more demanding and was less desirable than other positions at the TSA work site. There is nothing in this record that convinces the Hearing Examiner that such assignments were made on a discriminatory basis.

On this record, it does not appear that the Complainant had any training or experience in any construction trade. He had to learn as he went along. While he may wish that he could have been trained in some other area, the flooring work had to be done and required the least amount of training and supervision. The Complainant was put to work laying flooring on his first day before meeting the Respondent. While there is no doubt that it is a physically demanding and unpleasant job, it is one of the things necessary to construction of a building. As the Respondent points out, there were other tasks available that could have been considered more demeaning such as cleaning up the site at the end of the day that were not assigned to the Complainant or other Hispanics.

The Complainant, while recognizing that non-Hispanics were assigned to lay flooring, contends that it was not until other tasks were completed. All this demonstrates to the Hearing Examiner is that workers were assigned to where they were most needed.

Once the Complainant was trained to lay flooring, it made the most sense to keep him working on flooring rather than attempt to retrain him on another task. The project was being completed under a tight deadline; the Hearing Examiner can accept that there was little time to expand the Complainant's

knowledge base. Besides, the record demonstrates that when he was needed in other areas, the Complainant was assigned to work in those areas. The incident relating to a painting project is an example of the other work done by the Complainant.

The Hearing Examiner agrees that if there is a pattern of assigning less favorable work to persons in a protected class, discrimination can be found if the assignment is made because of the protected class. However, the Hearing Examiner does not believe that this record establishes such a causal connection. This was a project that had been poorly managed and the Respondent took it over under less than desirable circumstances. The time line for the project was short. He hired anyone who was willing to work and put them to work doing whatever needed to be done and doing that for which they could be quickly trained. The lack of previous construction experience rather than their race or national origin/ancestry seems to have dictated the Hispanics, including the Complainant's, assignments.

The Hearing Examiner simply does not find it credible that there would be only one crew laying flooring in a 4 story, multi-unit building. On this point, the Hearing Examiner finds the testimony of Dawn Edseth, another worker at the site, and that of the Respondent to be more credible. They both testified that Hispanics were not the only persons assigned to lay flooring.

Second, the Complainant contends that only Hispanics were given the opportunity to work extra hours in excess of the regular 40 hour week. Those workers who opted to work the extra hours were not paid overtime until the state ordered such payment. The Complainant seems to say that some degree of pressure was applied in order to get these workers to work the additional hours.

The Hearing Examiner does not see how this allegation represents an adverse employment condition. There is nothing in this record to indicate that anyone who did not wish to work additional hours would be penalized in any manner for the refusal. The Complainant indicates that he worked the extra hours because he wanted the extra pay that came along with more hours. The fact that no overtime was paid is a neutral factor as the record is clear that the Respondent paid no one overtime until he was ordered to.

Accepting the Complainant's contention that only Hispanics were given the opportunity to work additional hours, that would appear to be a benefit rather than an adverse employment condition. Discrimination in favor of a protected group cannot be the basis of a complaint by that group.
The Complainant's third and fourth contentions regarding his terms and conditions of employment are really part of a single claim. The Complainant asserts that the Respondent yelled and used profanity with him and other Hispanic employees more frequently than with employees not of the Complainant's protected classes. He also contends that the Respondent disciplined him more harshly than other employees. There is no specification of what this discipline consisted of other than being yelled at. Absent some actual discipline such as reduction in hours or some other measurable item, the Hearing Examiner can find no difference between the two allegations and will treat them as one.

Bearing in mind that this was a construction site, the Complainant contends that the Respondent did not yell or swear at other employees as badly as he did at the Complainant. By way of proof, the Complainant offered written statements of Michael Clagett. Clagett is a White individual who frequently worked with the Complainant at the Respondent's work site. Clagett was unavailable to appear at the hearing because he was in the military and stationed away from Madison.

The Complainant argued that Clagett was unavailable at least in part because of the delay in bringing this matter to hearing. The Complainant conveniently ignores that much of that delay was occasioned

by several amendments to the complaint because of his inability to decide who the proper Respondent might be.

The Hearing Examiner admitted Clagett's statements into evidence over the objection of the Respondent. While the statements are part of the record, the Hearing Examiner is hard pressed to give them much weight. Admission of the statements was based upon the very broad rules of evidence applied in Chapter 227 hearings. The Commission has adopted this standard by rule. This rule is one of admissibility not of weight. Clagett's absence from the hearing room prevented his cross-examination. Such questioning might reveal bias or other weaknesses inherent in Clagett's testimony. Given this lack of probing or testing of veracity or accuracy of memory, the Hearing Examiner is unwilling to give Clagett's statements the weight suggested by the Complainant.

The ordinance and other discrimination laws are not intended to cushion employees from abuse or unpleasantness at the work site. One of the critical issues in any harassment claim, is did the harassment make the victim's job harder to accomplish. It is not enough to assert that because of harassment or verbal abuse, they had a more difficult time at work. On this record, the Hearing Examiner finds that there is insufficient evidence to support a finding that the Complainant had a more difficult time accomplishing his job because of harassment based upon his race or national origin/ancestry.

This was a construction site and a certain amount of yelling and profanity might be expected. Even though the record demonstrates to some extent that the Respondent is a bully, there is no indication except for the incident on the Complainant's final day of employment, that he (the Respondent) tolerated or permitted racial or other types of harassment on the work site. The Complainant conceded that he never heard the Respondent use racially objectionable language except for his last day of employment. This testimony was reinforced by Dawn Edseth. This does not support the Complainant's claim of a hostile environment based upon his race or national origin/ancestry.

Even crediting Clagett's statements and the concerns expressed by the Complainant, there is nothing in the record demonstrating that the Respondent's treatment of the Complainant created an environment which made achievement of his work unusually difficult. Meritor Savings Bank v. Vinson, 477 U.S. 57, 40 FEP Cases 1822 (1986), Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). The Complainant's testimony about the embarrassment and humiliation he felt does not by itself establish that the Respondent's conduct violates the ordinance. Though the Respondent's conduct may not of itself violate the ordinance, it may be evidence relevant to other claims.

The Complainant contends that his termination on August 7, 1995, was motivated at least in part "by either his race (Hispanic) or his national origin/ancestry (El Salvadoran)." Of these claims, the only one which is viable is the one based upon national origin/ancestry. The record is clear that the Respondent hired Henry Vargas, another Hispanic, on the same day that the Complainant was fired. This is clear evidence that being a Hispanic was not likely a motivating factor in the Respondent's action. While it is true that one's more favorable treatment of other members of the same protected class does not necessarily eliminate a discriminatory motive in the treatment of another, it does make demonstration of the connection between one's protected class and an adverse action much more difficult.

In the current case, the Complainant fails to overcome the inference of a lack of discriminatory motive raised by Vargas' hire. The Complainant is not able to point to any explicitly racist language

used or tolerated by the Respondent. Other than the general unpleasant working conditions, the Complainant points to no evidence to support his claim that he was terminated, at least in part, because he is a Hispanic.

The Complainant's claim of termination because of his national origin/ancestry has one additional important fact in support. The Complainant alleges that during the confrontation that arose at the time of the Complainant's termination on August 7, 1995, the Respondent called him a "fucking Salvadoran" while he was telling the Complainant to leave. The Respondent denies having made this statement. The only witness testifying at the hearing other than the parties stated that she did not hear any statement like that.

The Complainant's testimony arguably presents a prima facie claim of discrimination. He clearly suffered an adverse employment action, i.e. termination. His statement about the Respondent's conduct and statement is credible given the Hearing Examiner's observation that the Respondent frequently appears to operate by intimidation. The Complainant testified in a quiet and generally consistent manner. His claim of damages does not indicate that he is pursuing this claim for strictly monetary purposes. He is perhaps somewhat more sensitive to criticism than customary, but that does not diminish his overall appearance of veracity. On the other hand, the Respondent testified in an alternately sullen and combative manner. While the Hearing Examiner understands that the accusation of discrimination is likely to place the accused on the defensive, the Respondent's demeanor went to the extreme in its uncooperativeness and evasion.

Edseth's testimony is a somewhat different matter. She testified in a calm and assured manner. She took pains to demonstrate her lack of bias. However, the Hearing Examiner notes that Edseth has a long working relationship with the Respondent and clearly likes him. Despite an arguable bias, Edseth's testimony was internally consistent and credible. She is not currently in the employ of the Respondent and did not expect to benefit by way of employment or in any other manner as a result of her testimony.

The Complainant attempts to portray Edseth's testimony as inconsistent and biased by her loyalty to the Respondent. The Hearing Examiner does not agree with the Complainant's characterizations of Edseth or her testimony. Her testimony is clearly contradictory to that of the Complainant, but within itself, her testimony was consistent and believable.

The Hearing Examiner is placed in the unenviable position of choosing between two stories that are internally believable, but entirely contradictory to each other. In such a circumstance, the Hearing Examiner may not arbitrarily choose whom to believe. The record does not give the Hearing Examiner any method for determining whether the Complainant or Edseth is more credible. That leaves the Hearing Examiner with no alternative but to rely on the parties' respective burdens of proof.

In a claim of discrimination, it is always the complainant's burden to demonstrate discrimination by a preponderance of the evidence. In this circumstance, where the Complainant fails to demonstrate that his testimony is more credible than that of an opposing witness (Edseth) the Hearing Examiner must find that the Complainant fails to meet his burden of proof. Without a finding that the Respondent told the Complainant to leave and called him a "fucking Salvadoran," there is not much to base a claim of national origin/ancestry discrimination upon. Both parties spent much time over the issue of whether the Respondent required the Complainant to produce a green card before paying the Complainant his final wages. Where the primary thrust of this argument seems to be focused on the issue of employee versus independent contractor, it may have some bearing on the national origin/ancestry claim. Only

those from outside of the United States need obtain a green card before employment.

The Complainant appears to argue that the fact that the Respondent did not require him to produce his green card until his termination supports his claim of discrimination. The Hearing Examiner disagrees. The testimony was generally consistent that the Respondent was not very good at paperwork or general organization. While federal law may require that an employer must obtained proof of citizenship or a green card at the time of hire, the failure to do so does not necessarily equate with discrimination. Edseth convincingly testified that some workers produced their work documents at the time they came aboard, but that it was commonly understood that so long as the Respondent had the documents at the end of the project or when the worker left the project that was sufficient. Clearly, the Respondent needed the Complainant's proof of eligibility for employment before the Complainant left. Not to have such documentation could place the Respondent in trouble with the Internal Revenue Service and other governmental agencies.

Rather than being evidence of a discriminatory motive, the Hearing Examiner views the conflict over presentation of the Complainant's green card as a demonstration of the Respondent's poor grasp on general business procedures and his desire to avoid entanglement with the government and the Complainant's concern for the proper procedure. Edseth testified that she had heard the Respondent on an earlier occasion ask the Complainant for his green card. The Complainant told the Respondent on that occasion that he did not have it on him. Apparently the Complainant generally carried his green card with him and did not wish to produce it. This is somewhat contradictory to the Complainant's testimony that he had produced his green card at each of his earlier jobs and hence, knew the requirement for production.

Even if the Complainant had made out a prima facie claim of national origin/ancestry discrimination with respect to his termination, the Respondent presented a legitimate, nondiscriminatory explanation for the Complainant's termination. The Respondent asserts that he had been informed the previous week by several workers that the Complainant had been over-reporting his hours. The Respondent began to more closely observe the Complainant. On August 4, 1995, the Respondent believed that he observed the Complainant clock in and then take lunch. It was common knowledge that the Respondent provided food for lunch, but did not pay during the lunch break. Whether the Complainant actually over-reported hours or not is irrelevant. So long as the Respondent had a reasonable belief and acted upon that belief, it represents a legitimate, nondiscriminatory reason for the Complainant's termination.

The Complainant attempts to demonstrate that the Respondent's stated reason for the Complainant's termination is either not credible or is a pretext for other discriminatory motives. Edseth testified that though she did not supervise the Complainant, on some occasions where she was to have worked with the Complainant, he could not be found. It is not clear on this record whether on those occasions, the Complainant was on the site, but just not available or was not even clocked in and working. What is important is that there was a belief founded upon experience that the Complainant might be less than honest about his hours. The Hearing Examiner wishes to make clear that he makes no finding about the Complainant's actual honesty, only that given the lack of organization and supervision at the site, the Respondent's belief was not unreasonable. At any rate, the record lacks evidence to support an allegation that the Complainant's belief that the Complainant had falsified his hours was discriminatorily motivated or is without any credibility.

This case presents a clear example of the problems that an employer can have when he fails to put in place and maintain good management procedures. By attempting to skate along the edges of good

employment practice, the Respondent created the impression of bias and discrimination. While the Hearing Examiner finds that the Complainant did not ultimately carry his burden of proof, the complaint strikes the Hearing Examiner as anything but frivolous. The Respondent's approach may win the loyalty of those like Edseth, but his bullying, which was demonstrated during this hearing and at earlier appearances in this matter, can only bring the Respondent more claims of unfair treatment and probably more claims of discrimination.

Signed and dated this 12th day of March, 1999.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Oscar Castillo 215 N. Frances, Apt. 305A Madison WI 53703 Complainant vs. Clifford Fisher 107 N Hancock Madison WI 53703 Marvin Hellenbrand 34 Fuller Court Madison WI 53704 Respondent	COMMISSION'S DECISION AND FINAL ORDER Case No. 22322

BACKGROUND

On August 9, 1995, the Complainant, Oscar Castillo, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, Clifford Fisher and others, discriminated against the Complainant on the bases of his national origin/ancestry and race in the terms and conditions of the Complainant's employment and in the Complainant's termination.

Subsequent to investigation, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant as alleged. Efforts at conciliation of the complaint proved unsuccessful. The complaint was then transferred to the Hearing Examiner for a public hearing on the merits of the complaint.

Subsequent to the Pre-Hearing Conference conducted by the Hearing Examiner, the Complainant twice amended the complaint to change and add respondents. This entailed a remand of the complaint for issuance of an amended Initial Determination. The Investigator/Conciliator issued an amended Initial Determination again concluding that there was probable cause to believe that discrimination had occurred as alleged.

Efforts at conciliation of the complaint failed and the complaint was once again transferred to the Hearing Examiner. After a Pre-Hearing Conference and other Pre-Hearing procedures, a hearing was held on July 17 and August 8, 1997. Subsequent to the opportunity to submit written argument after the close of the record, the Hearing Examiner issued his Recommended Findings of Fact, Conclusions of Law and Order on March 19, 1999. The Hearing Examiner found that the Complainant had not carried his burden of proof to establish that the Respondent had discriminated against him as alleged in his complaint as amended.

The Complainant timely appealed the Hearing Examiner's decision. After the parties were given the opportunity to submit written arguments in support of their respective positions, the Commission met on October 14, 1999 to act upon the Complainant's appeal. Participating in the Commission's deliberations were Commissioners Hicks, Morrison, Poulson, Rudd, Sentmanat, Stapleton, Zarate and Zipperer.

DECISION

The Complainant asserts that the Hearing Examiner failed to properly find that the Complainant was more credible than the Respondent or his witness. As a result of this failure, the Complainant contends that the Hearing Examiner reached an erroneous conclusion regarding the allegations of the complaint.

The Commission disagrees with the Complainant's position. The record demonstrates that the Hearing Examiner considered the credibility of both the Complainant and Dawn Edseth, the Respondent's primary witness. On this record, the Commission cannot find that the Hearing Examiner erred in concluding that the Complainant failed to carry his burden of proof to establish his claim by a preponderance of the evidence.

The record contains adequate evidence of Edseth's credibility such that the Commission cannot find, as a matter of law, that the Hearing Examiner's conclusion lacked substantial evidence. The Complainant's contention that the extended period of time between the hearing of this matter and the Hearing Examiner's issuance of his decision deprived the Hearing Examiner of the ability to properly assess credibility is without merit. While the Commission would have preferred that the Hearing Examiner be more expeditious, it is clear that the record supports the Hearing Examiner's conclusion. Edseth's testimony and potential motivation for testimony, as well as that of the Complainant, was examined by the Hearing Examiner in his decision.

The general contention that the record does not support the Hearing Examiner's conclusion is not borne out by the record. It does appear that the Respondent did not employ good employment practices in either hiring or in how he dealt with his employees. However, the record supports the conclusion that the Respondent did not discriminate against the Complainant on the basis of race or national origin/ancestry. Other Hispanic workers were assigned to positions other than that of Flooring Installer and employees of races and national origins/ancestries different from those of the Complainant were assigned to tasks similar to those of the Complainant. The fact that the Respondent hired another Hispanic on the day on which the Complainant was fired tends to demonstrate that the

Respondent did not act with a discriminatory motive.

The Commission does not condone the manner in which the Respondent treated his employees, but on this record, finds that the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order are supported in the record. Accordingly, the Commission adopts the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order as its own.

ORDER

The complaint is dismissed.

Participating in the Commission's decision are Commissioners Hicks, Morrison, Poulson, Rudd, Sentmanat, Stapleton, Zarate and Zipperer. Recusing themselves from this matter were Commissioners Fieber and Tomlinson.

Signed and dated this 1st day of November, 1999.

EQUAL OPPORTUNITIES COMMISSION

Bert G. Zipperer
President