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

Rory Rolack c/o Jacqueline Macaulay 222 S. Bedford St. Madison, WI 53703 Complainant vs. Pizza Hut 4709 Verona Rd. Madison WI 53711 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS Case No. 22355

BACKGROUND

As noted in the Hearing Examiner's Decision and Order on Appeal of Initial Determination dated March 23, 1997, this case has had an unusually complicated procedural history. While it has been recounted in the past, an additional recitation is appropriate and necessary here.

The Complainant, Rory Rolack, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission) on October 30, 1995. The complaint charged that the Respondent, Pizza Hut, had failed or refused to hire him because of his race. The Complainant is an African American. Subsequent to an investigation, the Investigation Supervisor, on February 20, 1996, issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the basis of the Complainant's race in failing or refusing to hire him. The complaint was transferred to the Hearing Examiner for a public hearing on the merits of the complaint.

Before a Pre-Hearing Conference could be held with respect to the allegations of the complaint, the Complainant indicated that he wished to amend his complaint to add allegations of sex discrimination and sex plus race discrimination. The Hearing Examiner remanded the complaint to permit such amendment. On or about April 8, 1996, the Complainant amended his complaint as indicated.

Once again, the Investigator Supervisor investigated the allegations of the complaint focusing on the additional allegations contained in the amendment. When the Complainant amended the complaint, he clearly set forth the original allegations of the complaint filed on October 30, 1995 as well as the allegations he wished to add. On August 2, 1996, the Investigation Supervisor issued an Amended Initial Determination. While the Amended Initial Determination did not specifically incorporate the findings of the February 20, 1996 Initial Determination, the discussion is limited to the additional allegations of sex and sex plus race. The Amended Initial Determination concluded that there was no probable cause to believe that the Respondent discriminated against the Complainant on the basis of sex or race plus sex in failing or refusing to hire him.

The Complainant timely appealed the conclusion of no probable cause and the complaint was transferred to the Hearing Examiner for review of the Amended Initial Determination. After a period for discovery, the Hearing Examiner prepared to address the appeal and found that he was confused about the status of the two Initial Determinations. In order to clarify the record, the Hearing Examiner remanded the complaint to the Investigation Supervisor for information concerning her intent in the preparation of the August 2, 1996 Initial Determination.

The Investigation Supervisor reported to the Hearing Examiner that she intended the August 2, 1996 Initial Determination to supplement the earlier Initial Determination rather than to supersede it. The Hearing Examiner finding the Investigation Supervisor's explanation to be satisfactory, informed the parties of the issues subject to his review and permitted the parties additional time to submit additional documentary support or argument for their respective positions. The Respondent expressed its surprise and displeasure with the Hearing Examiner's intended scope of review. The Hearing Examiner attempted once again to explain to the parties the scope of his review.

The Respondent, rather than proceed as outlined by the Hearing Examiner, filed an action in Dane County Circuit Court to prevent the Hearing Examiner from proceeding. After a preliminary conference with the judge, the Respondent withdrew its action without explanation. On March 28, 1997, the Hearing Examiner issued his Decision and Order on the Complainant's appeal of the second Initial Determination.

The Hearing Examiner concluded that there was no probable cause to believe that the Respondent had discriminated against the Complainant on the basis of his sex or his sex in combination with his race. The Hearing Examiner explicitly transferred the allegations of discrimination on the basis of race to the Investigator/conciliator for an effort to resolve the allegations of the complaint. No such conciliation was possible. The Complainant did not appeal the Hearing Examiner's finding of no probable cause.

The Respondent objected to the Commission's continued processing of the complaint alleging that the amended complaint superseded the original complaint, and the Investigation Supervisor's and Hearing Examiner's findings of no probable cause terminated the complaint. The Respondent formalized its position in a motion to dismiss filed on July 31, 1997.

DECISION

The Respondent cites several decisions of the courts of Wisconsin in support of its position. These decisions all apply the principle that an amended complaint supersedes an original complaint in a judicial setting. None of the cases cited by the Respondent seek to apply this principle in a somewhat more flexible administrative agency setting. For a variety of reasons, this general principle is inapplicable to the current action.

First, in the present case, the Complainant carefully incorporated the claims of his original complaint into the amended complaint. The Initial Determination of August 2, 1996 did not specifically address the allegations of the original complaint as incorporated in the amended complaint as it should have. In this circumstance, the Commission is to blame for the apparent confusion over the status of the original allegations. The Complainant did all that can be reasonably expected of him to properly preserve his original allegations.

While the amended Initial Determination failed to properly address all of the allegations before the Commission, the Respondent's remedy is not the dismissal of the complaint. At most, the Respondent

might be entitled to a remanding of the complaint to the Investigation Supervisor for further findings consistent with the issues stated in the complaint. Under the circumstances of this complaint, however, this formality seems to be unnecessary.

The Hearing Examiner's remand of the complaint on January 17, 1997 and the Investigation Supervisor's response of January 27, 1997 accomplish the same thing. The Investigation Supervisor made it clear that the August 2, 1996 Initial Determination was to supplement the Initial Determination issued on February 20, 1996 and did not replace it in its entirety. There can be no additional benefit to a formal remand of the complaint for issuance of an amended Initial Determination that simply merges the findings of the previously issued Initial Determinations.

The Respondent does not appear to contend that the Complainant's amendment of the complaint is not timely. Under the case of Schlumpf v. Yellick, 94 Wis. 2d 504, 288 N.W.2d 834 (1980) the amended complaint would "relate back" to the filing date of the original complaint the timeliness of which has not been controverted. Had the Complainant made allegations relating to a different set of circumstances, facts or incidents, the relation back doctrine might not apply. However that does not seem to be the case.

Second, as noted in his Decision and Order denying a similar motion in Rolack v. Speedway, MEOC Case No. 22354, the Hearing Examiner finds that the logic behind the judicial rule cited by the Respondent does not fit the requirements of an administrative process. Rolack v. Speedway Self Service, MEOC Case No. 22354 (Ex. Dec. 12/05/97). The Hearing Examiner's opinion in that case applies with equal effect in the current case. A copy of that opinion is attached for the reference of the parties. In short, the administrative process is one that imposes an increasing burden of proof on complainants and that process along with the investigatory process, may add or delete claims as the process occurs. This sifting and winnowing effect creates a fluid or dynamic condition with respect to a complaint of discrimination that is not present in a complaint filed in court.

As noted in the Speedway case, the real test is whether the Respondent has been deprived of due process by the administrative process. As in the Speedway case, the Hearing Examiner determines that the Respondent has been deprived of no due process right. The Respondent has had more than adequate notice of the claim against it. The Commission's hearing will give the Respondent the opportunity to defend itself against the Complainant's claim. The only thing that the Respondent may be deprived of is an "easy out" based upon a technicality. The Commission's process should not be used by either party to escape or impose liability on such a technicality. Instead, as the Hearing Examiner found in Rhone v. Marquip, MEOC Case No. 20967 (Ex. Dec.04/05/89), once a claim is certified to hearing, both parties should be given their day in court.

ORDER

The Respondent's Motion to Dismiss is denied. By separate cover, the Hearing Examiner will issue further orders relating to scheduling.

Signed and dated this 22nd day of January, 1998.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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

Rory Rolack 222 S. Bedford St. Madison WI Complainant vs. Pizza Hut 4709 Verona Rd. Madison WI 53711 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 22355

BACKGROUND

The above-captioned matter came on for a public hearing on the merits of the complaint before Hearing Examiner Clifford E. Blackwell, III, on June 16, 1998, in room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard. The Complainant, Rory Rolack, appeared in person and by attorney Jaqueline Macaulay. The Respondent, Pizza Hut of Southern Wisconsin, Inc. appeared by its corporate representative, Terry Turner, and by attorney David S. Knoll of the law firm of Knoll, Hart and Greller, S.C. Based upon the record in this matter, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The Complainant is an African American male. During the period November, 1994 to March, 1995, he lived in and about the Thurston Lane area in Madison. In early April, 1995, the Complainant and his then girlfriend, Juli Philumalee, moved to Minneapolis, Minnesota.
2. The Respondent operates restaurants throughout Madison including one located at 4709 Verona Road.
3. On or about November 30, 1994, the Complainant submitted an application for employment at the Respondent's Verona Road store. After submitting his application, the Complainant called the Respondent repeatedly to check on the status of his application. After approximately two weeks, the Complainant was told to come to the restaurant for an interview.
4. The Complainant interviewed with a White male who apologized to the Complainant. The interviewer, probably either Pat Augustine or Karl Krug, indicated that two other managers/assistant managers had quit and he had come to open the restaurant. The Complainant felt good about the interview which lasted approximately 20 minutes. The interviewer told the Complainant that the managers would be meeting in about a week and the Complainant might be contacted for a second interview after that meeting.
5. The Complainant was not contacted for another interview and was not told that he would be hired or that he wouldn't be hired.
6. The Complainant kept inquiring about employment at the Verona Road restaurant throughout January, 1995.

7. During the period from November, 1994 through January, 1995, the Respondent hired eight individuals at the Verona Road location. None of the eight individuals hired were of the Complainant's race.
8. Though it is not clear whether they were employed during the period of December, 1994 through January, 1995, the Respondent did employ five individuals of minority status at the Verona Road location shortly before and after the period in question.
9. Philumalee applied for a position at the Verona Road restaurant on or about January 2, 1995. She was called for an interview within a few days and was hired within a week of submitting her application. Philumalee is White. She quit her employment within a week of being hired. Her time was composed of several days of training and one actual work shift. Philumalee was uncomfortable with what she perceived to be a racist attitude at the restaurant. She did not tell any supervisor of her concerns and did not indicate that her concerns were the reason for her quitting.
10. The Complainant did not believe that he had been discriminated against until some time after Philumalee had applied for a job with the Respondent. The Complainant filed his complaint on October 30, 1995.
11. The Respondent never found a copy of the Complainant's application. It could not find copies of the applications of several of the individuals hired in December, 1994 and January, 1995. The Respondent was almost constantly hiring during this period and was short-handed in management as well as other positions.
12. At the time of his application, the Complainant did not have any restaurant experience, though he had limited experience with direct customer contact. None of the positions for which the Complainant applied required any great deal of training or experience.
13. The Respondent generally hired individuals on the basis of a referral from another employee. While working for the Respondent, Philumalee told a manager that Philumalee's boyfriend had submitted an application and wished to work. The manager, Carrie Huesslemann, told Philumalee that she would look for the application. Philumalee quit before Huesslemann could report to Philumalee about the application. There is no indication on this record that Huesslemann knew that Philumalee's boyfriend, the Complainant, was an African American. Philumalee is White.
14. Subsequent to his initial interview in late December of 1994, the Complainant was not contacted again by the Respondent for a second interview or employment. The Complainant did not submit a second application.

CONCLUSIONS OF LAW

15. The Complainant is a member of the protected class "race."
16. The Respondent is an employer within the meaning of the ordinance and is subject to the regulation of the ordinance.
17. The Complainant's complaint was timely filed and the Commission has jurisdiction over the complaint.
18. The Respondent did not discriminate against the Complainant on the basis of his race when it failed to employ him in December of 1994 or January of 1995.

ORDER

The complaint is hereby dismissed. Each party shall bear its own costs.

MEMORANDUM DECISION

The complaint in this matter was thoroughly litigated over an extensive period of time. After receiving a finding of probable cause to believe that discrimination had occurred on the original allegations of the complaint, the Complainant sought and was granted permission to amend his complaint to add an allegation of discrimination on the basis of sex. After investigation of the amended allegations of discrimination, the Investigator/Conciliator issued an amended Initial Determination incorporating the finding of probable cause on the allegation of discrimination on the basis of race and adding a finding of no probable cause on the additional allegation of discrimination on the basis of sex.

The Complainant appealed the finding of no probable cause on the allegation of discrimination on the basis of sex. The Complainant was really arguing that the Complainant had been discriminated against because he is an African American male. After the submission of additional argument, the Hearing Examiner concluded that there was no probable cause to believe that the Respondent had discriminated against the Complainant on the basis of his sex regardless of how the Complainant formulated his claim.

Upon remand to the Hearing Examiner for conduct of a public hearing on the remaining claim of discrimination on the basis of race, the Respondent objected to the Commission's jurisdiction asserting that the finding of no probable cause superceded the finding of probable cause and essentially eliminated the original finding of probable cause and deprived the Commission of jurisdiction. The Hearing Examiner considered the Respondent's argument and found it entirely without merit. In an attempt to carry the day with its jurisdictional claim, the Respondent filed an action for declaratory judgment in Dane County Circuit Court on or about March 4, 1997, to block further proceedings. On or about March 11, 1997, the Respondent withdrew its pending action. One can only surmise that the Respondent recognized that its claim bordered on the frivolous and withdrew to avoid such a finding.

Finally, a hearing was held on June 17, 1998, on the merits of the complaint. At that time, the Respondent once again floated its unique jurisdictional defense. On this occasion, however, the Respondent consented to proceed with the hearing. In post-hearing arguments, the Respondent again indicates that it wishes to preserve its jurisdictional defense. Once again the Respondent, though asserting its belief in the lack of Commission jurisdiction, proceeded to argue its position.

Separate from the Respondent's jurisdictional claim, the Hearing Examiner was concerned about a jurisdictional issue not raised by either party. The record discloses that the Complainant filed one application for employment with the Respondent on or about November 30, 1994. It is clear that the Complainant filed no other applications with the Respondent. The Complainant had an interview with a manager sometime in late December, 1994, and was not hired thereafter.

The ordinance confers jurisdiction on complaints that are filed no later than 300 days after the last act of discrimination. In the present case, the complaint was filed on October 30, 1995. Given the filing date, there must be some evidence that arguably shows an act of discrimination no earlier than January 1, 1995, for the Commission to have jurisdiction. On this record arguably, the acts of discrimination took place during December of 1994 and fall outside of the Commissions jurisdiction.

The 300 day period may be altered in several different circumstances. If there is a demonstration of a continuing course of conduct extending beyond the jurisdictional period so long as there is at least one act of alleged discrimination within the jurisdictional period, the Commission may exercise jurisdiction over the allegations falling outside of the period. Krebs v. Don Miller Pontiac Subaru, Inc., MEOC Case No. 22127 (Ex. Dec. 03/29/96, Ex. Dec. 03/16/95). Where a Respondent has

engaged in conduct to confuse or intimidate a Complainant into missing the filing deadline, a complaint filed outside of the jurisdictional period may nevertheless be considered to be timely. Dunn v. South Central Library System, MEOC Case No. 19982195 (Ex. Dec. 06/24/99). If a reasonable person would not suspect that he or she has been the victim of discrimination until sometime well after the actual act of discrimination, the period for filing will begin when the reasonable person would have suspected a possibly discriminatory motive, instead of running from the date of the actual act of discrimination. Ennis v. Local 965 IBEW, MEOC Case No. 22118 and Ennis v. WP&L, MEOC Case No. 22119 (Ex. Dec. on juris. 02/03/95, 3/17/95).

In the present case, the Complainant testified in response to the questions of the Hearing Examiner that he had not begun to believe that his race might be a factor in the Respondent's failure to call him back for a second interview or to offer him employment until after Juli Philumalee, a White person who was then his girlfriend, applied for a job in January, 1995, and was quickly interviewed and hired. Though the Complainant's application was submitted and he was interviewed outside of the 300 day period, a reasonable person would not necessarily have concluded that a possibly discriminatory motive was in operation until later. The timelines of application and interview cannot be established with any precision on this record. At best, the parties are willing to agree that the Complainant applied on or about November 30, 1994, and that he was interviewed a few weeks later in December of 1994. At the interview, an event which the Complainant felt good about at the time, the Complainant was told that there could be some action on his application after the managers met about a week after the interview. It would be reasonable for someone not to suspect discrimination until some time at least a week after the interview. Given this timeline and the Complainant's estimation that his initial interview went well, it would be reasonable for the Complainant not to have suspected possible discrimination until some date after January 1, 1995, a date that would lie within the jurisdictional period. The Hearing Examiner concludes that the Commission properly exercised jurisdiction over the complaint because the Complainant did not reasonably suspect discrimination until a date within the 300 day period for filing a complaint.

As with most cases of discrimination today, the Complainant lacks direct evidence of discrimination. The courts and administrative agencies must examine the record for indirect evidence of discrimination. In this approach, the Commission utilizes the burden shifting paradigm set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). In this approach, the Complainant must first set forth evidence that by itself is sufficient to demonstrate a prima facie claim of discrimination. If the Complainant meets this initial burden, the burden shifts to the Respondent to present a legitimate, nondiscriminatory reason for its action. If the Respondent presents such an explanation for it action, the burden once again shifts, this time back to the Complainant to demonstrate that the reason proffered by the Respondent is either not credible or is otherwise a pretext for discrimination. The ultimate burden of proof remains with the Complainant to demonstrate discrimination.

In the present case, there is no dispute that the Complainant is a member of a class of individuals who are protected by the ordinance. Equally there is no question that the Respondent is an employer and is subject to the requirements of the ordinance. The Respondent is willing to concede that the Complainant applied for employment on or about November 30, 1994, and was interviewed at some time during the month of December, 1994. There is no question that the Respondent had vacancies during December of 1994 and January of 1995. Finally, there is no dispute that the Complainant was not interviewed further or offered employment.

The only element of a prima facie case that remains in dispute is whether the adverse employment action of not being hired occurred, at least in part, because of the Complainant's race. The Complainant points to two facts in order to establish this final element. First, the Complainant asserts, apparently without challenge, that none of the other applicants who were actually hired in December of 1994 and January of 1995, were of the Complainant's race. Second, the Complainant points to the experience of Philumalee who testified that while she was briefly employed by the Respondent, she observed racist conduct on the part of coworkers and assistant managers.

By themselves, these allegations are barely sufficient to establish a prima facie claim of discrimination. The Hearing Examiner is not entirely convinced that the Complainant has established that he was at least as qualified as all of the successful applicants in the December, 1994 through January, 1995 period. This is a point upon which the Respondent heavily relies.

Equally, the circumstances to which Philumalee testified that caused her to be concerned about racism at the Respondent's restaurant are not necessarily compelling. First, there is no evidence that the Complainant was sufficiently concerned to complain to a manager. While some of Philumalee's concerns, if true, might indicate racially hostile views on the part of a co-worker, other examples are not clearly a manifestation of racism. Further, the small number of examples provided by Philumalee do not establish a racially hostile work environment or that management knew or reasonably should have known about the statements.

Despite these problems with the Complainant's argument, the Hearing Examiner concludes that the Complainant demonstrated a prima facie claim of discrimination. In reaching this conclusion, the Hearing Examiner is viewing the evidence in the light most favorable to the Complainant. The result of this conclusion is that the burden shifts to the Respondent to present a legitimate, nondiscriminatory explanation for its failure to hire the Complainant. This is a burden of presentation, not necessarily one of proof.

The Respondent is hampered in its presentation by the fact that it did not have a copy of the Complainant's application or any record of the Complainant's December, 1994 interview. On this record, it is impossible to determine whether the Complainant's application was merely lost or was affirmatively discarded. If the application was discarded, it cannot be determined whether it was discarded for an improper reason or because the Complainant was not considered to be a likely candidate.

The Respondent really presents only one argument for why the Complainant was not hired. The Respondent contends that the Complainant was not as qualified for any of the jobs for which other applicants not of the Complainant's race were hired. The Respondent bases its argument on the fact that other job applications submitted by the Complainant to other potential employers do not show any restaurant experience or direct customer experience. Not being as qualified as a successful applicant represents a legitimate, nondiscriminatory reason for not hiring the Complainant. It is not the Respondent's burden at this stage to prove that its explanation is true or not. Mere presentation is sufficient to shift the burden back to the Complainant.

It is at this point in the analysis that the arguments of the parties and the state of the record become particularly muddy. The Complainant must demonstrate that the Respondent's proffered explanation is either not credible or represents a pretext for an otherwise discriminatory motive. The Complainant starts by attempting to demonstrate that the Complainant was at least as qualified as the successful White candidates by showing that he had direct customer contact in his job with the moving and

storage company. The Respondent counters with the claim that "relevant" job experience was a critical factor to the Respondent. The Hearing Examiner finds the argument tiresome and off target. As to the Respondent's points about qualifications and direct experience, the Hearing Examiner points out that the positions here were entry-level, unskilled jobs in a fast food restaurant. These positions did not require vast amounts of technical training or knowledge. The Respondent's arguments strike the Hearing Examiner as a feeble attempt to justify conduct when there is no real way for the parties to know exactly what happened.

The record indicates that the restaurant was in significant turmoil from a Human Resources position in December of 1994 and January of 1995. In December of 1994, around the time of the Complainant's interview, the Respondent lost at least two managers. The restaurant was under-staffed based upon the number of hires made during the period. The Respondent's records management was clearly abysmal. It not only couldn't find any record of the Complainant's application or interview, but couldn't find similar information for some of the individuals it ultimately hired. This organizational chaos is most likely the reason that the Complainant was not further interviewed or hired.

The Respondent did employ at least five other minority employees at about the same time that the Complainant was seeking employment or thereafter. The record indicates that these individuals were hired at a time prior to the Complainant's filing of his complaint. This timing indicates that the Respondent was not hiring these individuals simply to respond to a complaint of discrimination.

While the Respondent's conduct in this matter was less than faultless, the Hearing Examiner cannot, on this record, conclude that it was illegally discriminatory. The conduct and arrogant attitude of the Respondent's counsel only adds to the impression that the Respondent was attempting to hide facts or motives. While the Hearing Examiner recognizes the obligation of counsel to zealously represent the client, the unreasonable efforts to avoid hearing on this matter and the sneering approach taken by Respondent's early counsel in particular did not serve the Respondent well.

While the Hearing Examiner agrees that the Respondent's conduct and practices in this matter are open to question, the Hearing Examiner cannot find that the Complainant met his burden of proof to demonstrate that his race played a part in his failure to gain employment with the Respondent in December of 1994 and January of 1995. The absence of the Complainant's application and those of other applicants makes it difficult if not impossible to compare their respective qualifications. It seems as likely to the Hearing Examiner that the applications were lost as a result of mismanagement and poor business practices as it is to have been the result of intentional discrimination. Had Philumalee remained on the job a few more shifts, the record might be more clearly established in one direction or the other. Unfortunately, we will never know for sure what happened to the Complainant's application.

For the foregoing reasons, the Hearing Examiner concludes that the Complainant did not meet his burden of proof to establish that his race played a part in the Respondent's failure to hire him.

Signed and dated this 11th day of February, 2000.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner