

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

<p>S.R. Seshadri 109 North Whitney Way Madison, WI 53705-2718</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>David Ward, Chancellor University of Wisconsin-Madison Bascom Hall 500 Lincoln Drive Madison, WI 53706</p> <p>John Wiley, Provost University of Wisconsin-Madison 150 Bascom Hall 500 Lincoln Drive Madison, WI 53706</p> <p>Professor Bahaa E. A. Saleh Prior Department Chair Electrical and Computer Engineering University of Wisconsin-Madison 215 Katahdin Drive Lexington, MA 02173</p> <p style="text-align: center;">Respondent</p>	<p>HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND COMPLAINANT'S MOTION FOR STAY</p> <p>Case No. 22393</p>
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BACKGROUND

On February 20, 1996, the Complainant, S. R. Seshadri, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondents, David Ward, John Wiley and Bahaa Saleh, had discriminated against him in his employment with the University of Wisconsin on the basis of his religion.

On April 11, 1996, the Respondents in lieu of answering the complaint of discrimination, requested dismissal of the complaint asserting that the Commission is without jurisdiction over the Respondents. The Complainant opposed the Respondents' motion. The Hearing Examiner requested the parties to submit briefs or written argument in support of their respective positions.

Subsequent to the submittal of written argument, the Complainant amended a previously filed and separate action in the United States District Court for the Western District of Wisconsin. Some of the allegations of the District Court complaint appear to be coextensive with the allegations in the complaint filed with the Commission. The Complainant, after invoking the jurisdiction of the

Commission, then requested the Commission to stay further proceedings pending the outcome of the District Court action. The Respondents oppose the granting of a stay and again urge dismissal of the complaint. In opposing the stay of further proceedings, the Respondents seem to take the position that filing of the District Court complaint by itself should deprive the Commission of jurisdiction.

DECISION

While the questions of the stay and the Commission's jurisdiction are somewhat intertwined, the Hearing Examiner will attempt to first address the question of the request for a stay.

The Commission's jurisdiction is in various respects concurrent with that of the State of Wisconsin Department of Industry, Labor and Human Relations Equal Rights Division (ERD) and the United States Equal Employment Opportunity Commission (EEOC). The ERD administers the Wisconsin Fair Employment Act (FEA). The EEOC administers Title VII. The Commission's jurisdiction is limited to the geographical boundaries of the City of Madison and by the grant of authority from the City Council as set forth in the Equal Opportunities Ordinance MGO 3.23 et seq. The City Council's grant of authority is limited by state law and the constitution. Despite these limitations, the Commission regulates a broader scope of activity than either the ERD or the EEOC. The Commission also protects a greater array of protected classes than either the ERD or the EEOC.

Where there is an assertion that the Commission's jurisdiction is identical to that of either the ERD or EEOC based upon the language of the ordinance and competing statutes, one must examine the purposes of the precise provisions in order to determine whether the Commission's interest is identical with that of another jurisdiction. McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W.2d 830 (Ct. App. 1988).

Where there is such identity of interests or where such identity is not clear, the Commission has often agreed to stay proceedings before the Commission in order to preserve its scarce administrative resources. If another forum can provide an investigation or adjudication that satisfies the purposes of the ordinance and the interests of the Commission either in part or in whole, it is in the Commission's interest to allow a proceeding in another forum to run to completion so that the Commission does not have to duplicate work done in that forum.

The Commission does not customarily dismiss cases simply because a similar or identical complaint has been filed in another forum. Dismissal without an analysis of whether the resolution of the complaint in the different forum meets the interests of the Commission would act as an abdication of the Commission's responsibilities under the ordinance.

Despite the above discussion, the Hearing Examiner determines that staying these proceedings at this time is not in the interests of the Commission. The parties have completed all the work necessary for the Hearing Examiner to address the jurisdictional issue. The Hearing Examiner has reviewed the materials submitted by the parties. There is little administrative savings to be had under the circumstance. The outcome of the District Court complaint may have little effect on the administrative resources to be utilized by the Commission. If the Complainant were to lose, in whole or in part, in District Court, it is likely that he would be back before the Commission seeking processing of this complaint. The Hearing Examiner would have to make the jurisdictional determination at that time. It is only in the circumstance of a total victory by the Complainant in District Court that the Commission is likely not to have to exercise any further jurisdiction. While the Commission could wait for this outcome, there is no compelling reason to do so. The Complainant alleges that his suspension from the position of tenured professor and the termination of his graduate

student privileges at the University of Wisconsin occurred as a result of his religious beliefs. In furtherance of his contentions, the Complainant has filed claims alleging discrimination, amongst other things, with the United States District Court, the Wisconsin Personnel Commission, Circuit Court for Dane County and the Commission. While the majority of these complaints allege discrimination on the part of the Complainant's employer, the University of Wisconsin-Madison, the complaint before the Commission singles out three individual respondents alleging that they discriminated against the Complainant in his employment on the basis of his religious beliefs. Except for singling out the three individual respondents, the allegations in all forums appear to be virtually identical.

The Complainant concedes that the Commission does not have jurisdiction to process a complaint naming an agency of the State of Wisconsin such as the University of Wisconsin-Madison. The Complainant attempts to avoid this jurisdictional bar by naming three individual employees of the University as respondents rather than their employer. Of these three respondents the Complainant only makes any specific allegation of discrimination towards David Ward. In this connection, the Complainant states that Ward issued the decision that imposed the suspension and termination of privileges. The complaint in no way explains how John Wiley or Bahaa Saleh have acted in any discriminatory manner. For this reason alone, the complaint must be dismissed as to Wiley and Saleh. The Hearing Examiner can take a guess as to the alleged discriminatory acts of Wiley and Saleh but it would be inappropriate to do so. It is the Complainant's burden to set out a prima facie case of discrimination in his complaint. Rules of the Commission 5.141. As to Wiley and Saleh he fails to do so by not indicating in what manner they allegedly discriminated against the Complainant.

Dismissal of the complaint as to Wiley and Saleh would necessarily be without prejudice. The Complainant would be allowed to refile his complaint as to those parties if he could do so within the period prescribed by Sec. 3.23(9)(c)1. However, since the Hearing Examiner concludes that the Commission is without jurisdiction over this dispute, the complainant can only refile if he can state a claim that clearly falls within the Commission's jurisdiction.

As to the general allegations of the complaint, the Hearing Examiner finds that the Commission is without jurisdiction to hear this complaint. As noted above, the Complainant attempts to circumvent the bar on the Commission's jurisdiction over state agencies by naming an individual, David Ward. However, the actions complained of by the Complainant were clearly undertaken by Ward in furtherance of his official duties and he was acting on behalf of the University when he issued his decision suspending the Complainant and terminating the Complainant's graduate student privileges. Under these circumstances, one cannot separate the individual from the institution. They are one and the same since the institution can only operate by the action of its individual employees.

The prohibition against employment discrimination in section 7(a) of the ordinance is stated in terms that it shall be illegal for any person or employer, acting individually or in concert to discriminate against an employee or individual. While this language is broad enough to contemplate an action against an individual as set forth in this complaint, it does not contemplate an action against an individual state employee engaged in conduct within his or her job responsibilities. The Complainant cites three cases in support of his contention that immunity from suit under the ordinance should not be extended to the three individually named respondents, Barnhill v. Board of Regents, 166 Wis. 2d 395, 479 N.W.2d 917 (1992), Santiago v. Leik, 179 Wis. 2d 786, 508 N.W.2d 456 (Ct. App. 1993) and Harlow v. Fitzgerald, 457 U.S. 800 (1982). As noted by the Complainant, these cases indicate that a state employee's qualified immunity is not total. There are circumstances under which a state employee can be sued. The Complainant does not discuss the application of the standards established in Harlow and applied in Barnhill and Santiago. At best, these cases indicate that the Respondents

might have the capacity to be sued in some forum. These cases do not, however, indicate that the Commission is an appropriate forum for this complaint.

The essence of this claim is an attack of an employee of an agency of the State of Wisconsin over the application of discipline and procedures stemming from his employment with the state. Looking at the complaint from this transactional point of view makes it clear that the Complainant wishes the Commission to exercise jurisdiction over an employment action at a level of government over which it has no jurisdiction. The substitution of an individual respondent for the employer does nothing to change this fact. If the Complainant had alleged some personal animus or intent on the part of Ward or the other Respondents, the Commission might be in a position to exercise some jurisdiction. However, nothing in this record indicates anything of the sort.

On this record, the Hearing Examiner finds the Commission has no jurisdiction over this complaint. The Complainant may be able to make out a claim against these individual Respondents in some other forum but it would be inappropriate for the Commission to attempt to exercise jurisdiction at this time.

ORDER

The complaint is hereby dismissed with prejudice.

Signed and dated this 7th day of August, 1996.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner