

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

<p>Lawrence Hawkins 2501 Post Rd # 106 Fitchburg WI 53713</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Volkman Railroad Builders, Inc. 1704 Henry St. Middleton WI 53562</p> <p style="text-align: center;">Respondent</p>	<p style="text-align: center;">HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS</p> <p style="text-align: center;">Case No. 22451</p>
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BACKGROUND

On June 14, 1996, the Complainant, Lawrence Hawkins, filed a complaint with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, Volkman Railroad Builders, discriminated against the Complainant on the basis of race and in retaliation for the Complainant's exercise of rights protected by the ordinance in a number of ways. The complaint's allegations constitute alleged violations of Section 3.23 (7) and (8) Mad. Gen. Ord.

After investigation, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent discriminated against the Complainant on the basis of race with respect to certain terms and conditions of employment and no probable cause as to the remaining allegations of discrimination and retaliation. The Complainant appealed the Initial Determination's conclusions of no probable cause to the Hearing Examiner. Those issues for which probable cause were found were held in abeyance.

After giving the parties the opportunity to supplement the record and submit additional argument, the Hearing Examiner, on January 26, 1999, issued a Decision and Order on the Complainant's appeal. The Hearing Examiner for the most part affirmed the Initial Determination's conclusions of no probable cause, but did reverse as to the complaint's allegation of constructive discharge on the basis of race. The Hearing Examiner entered a finding of probable cause as to that issue and dismissed the remaining issues.

The Complainant appealed the Hearing Examiner's findings of no probable cause. Subsequent to the opportunity to submit written argument, the Commission met to consider the appeal on July 8, 1999. The appeal was considered by Commissioners: Hicks, Morrison, Poulson, Rahman, Sentmanat, Stapleton, Tomlinson, Verriden and Zarate.

DECISION

After considering the record as a whole and the arguments of the parties, the Commission adopts and incorporates by reference as if fully set forth herein, the Hearing Examiner's Decision and Order dated January 26, 1999.

ORDER

Those portions of the complaint for which there is a finding of no probable cause are dismissed. The remaining issues for which there is a finding of probable cause are transferred to conciliation.

Agreeing in this decision were Commissioners : Hicks, Morrison, Poulson, Rahman, Sentmanat, Stapleton, Tomlinson, Verriden and Zarate. There were no Commissioners in opposition or abstaining.

Signed and dated this 20th day of July, 1999.

EQUAL OPPORTUNITIES COMMISSION

De Ette Tomlinson
Vice President

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BACKGROUND

On June 14, 1996, the Complainant, Lawrence Hawkins, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint was amended on January 2, 1997. The complaint as amended charged that the Respondent, Volkmann Railroad Builders, Inc., discriminated against the Complainant on the basis of his race in his terms and conditions of employment, by permitting his racial harassment and by causing his constructive discharge from

employment. The amended complaint added allegations of retaliation against the Complainant for his exercise of rights protected by the ordinance.

After investigation, the Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the basis of his race in not making a certain light duty assignment. The Investigator/Conciliator concluded that there was no probable cause to believe that the Respondent had discriminated or retaliated against the Complainant with respect to any of the remaining allegations. The Complainant appealed the Initial Determination's conclusions of no probable cause to the Hearing Examiner.

Subsequent to a period of discovery and the submission of additional written arguments, the Hearing Examiner issued a Decision and Order on the Complainant's appeal. The Hearing Examiner concluded that there was probable cause to believe that the Respondent had permitted the Complainant's racial harassment and caused his constructive discharge from employment. However, the Hearing Examiner affirmed the remaining conclusions of the Initial Determination for which there were findings of no probable cause.

The Complainant appealed the Hearing Examiner's conclusions of no probable cause to the Commission as a whole. Subsequent to the opportunity to submit additional written argument, the Commission adopted the Hearing Examiner's Decision and Order and remanded the complaint to conciliation. Efforts at conciliation failed and the complaint was transferred to the Hearing Examiner for a public hearing on the issues for which there were findings of probable cause.

At a Pre-Hearing Conference held on October 26, 1999, the Respondent, for the first time, indicated that it had doubts about the Commission's geographic jurisdiction over the complaint. Pursuant to the Hearing Examiner's order, the Respondent submitted a motion to dismiss the complaint for lack of jurisdiction on December 3, 1999. The Complainant opposed the Respondent's motion and submitted a brief supporting the Commission's jurisdiction. The Respondent replied.

DECISION

The Complainant worked for the Respondent in two separate and distinct periods. First, the Complainant began working as a Seasonal Laborer in June of 1995. After several months, he was moved to the position of Truck Driver. This initial period of employment came to an end in December of 1995 when the Complainant was laid off due to a lack of work brought about by the increasingly cold weather. It does not appear that any of the Complainant's allegations of discrimination relate to this period of time.

The Complainant came back to work with the Respondent in March of 1996. He worked in several capacities until he quit his employment with the Respondent on June 12, 1996, alleging that conditions had become intolerable to him. It is this second period of employment that appears to have given rise to the Complainant's claims of discrimination.

Currently pending before the Commission are the Complainant's claim that he was not given "light duty" assignments after an injury because of his race, African American, and that he was racially harassed by his supervisor, Jack Mustin, and that his harassment led to his constructive discharge from employment. The question is whether any of the conduct that gave rise to these allegations occurred within the City of Madison. If the conduct occurred within the City of Madison, then the Commission will properly have jurisdiction over the complaint. If the conduct occurred outside of

Madison, then the Commission is without jurisdiction and the complaint must be dismissed.

Both parties spend some amount of time discussing the addresses of the respective parties. This discussion seems to be irrelevant to the Hearing Examiner. For example, regardless of where the Complainant lives, if conduct constituting discrimination prohibited by the ordinance occurs within the City of Madison, the Commission has jurisdiction. Rappe v. Soderholm Wholesale Foods, Inc., MEOC Case No. 21811 (Ex. Dec. 12/13/93). Even if the Complainant was a resident of the City of Madison, but was employed outside of the City, any act of discrimination occurring outside of the City would fall outside of the Commission's jurisdiction. Zabit v. Kraft Foods Inc. et al., MEOC Case No. 22563 (Ex. Dec. 5/19/98), Rappe, supra. The question from the perspective of a Respondent is similar though not necessarily as clear. If a Respondent's principle place of business is located outside of the City of Madison, the Commission will only have jurisdiction over those activities of the Respondent that occur within the City. White v. Work Bench, Inc., MEOC Case No. 19982018 (Ex. Dec. 12/15/98). If the Respondent's principle place of business is located within the City of Madison, but the incidents that give rise to a complaint of discrimination occur outside of the City, then the Commission would be without jurisdiction despite the presence of the Respondent. The question of where conduct constituting a violation of the ordinance occurs can be complicated and is usually highly fact intensive. The Hearing Examiner need not set forth any hard and fast test to resolve the issues presented in this record.

The first allegation over which there is a dispute is whether the Complainant was denied light duty work because of his race. At the times relevant to this point, the Respondent's principle place of business was 14625 W. Kaul Avenue in Menomonee Falls. It had a local operations office located at 1704 Henry Street in Middleton. It does not appear that the Complainant is willing to assert that the Respondent had any administrative presence within the City of Madison. Employees of the Respondent would go to the Middleton office to receive their work assignment for the day. They might return to the office from their individual work sites for further assignments or to get equipment. At the end of the day, an employee would return to the Middleton office to store equipment and to clock out and receive the next day's assignment if known. It does not appear and the Complainant does not assert that daily assignments were made in the field.

Under the circumstances set forth above, even if the Complainant could prove that he was not given a light duty assignment because of his race, the claim would fail before the Commission because of a lack of jurisdiction. The initial daily assignments were given out at the office in Middleton. The decision of what assignment to give seems likely to have been made in Middleton at the operations office though it is possible that it could have been made in the Menomonee Falls office. In either case, however, the allegedly discriminatory decision and assignment would have occurred outside of the City of Madison. Even if the assignment sought by the Complainant or actually made by the Respondent was to a work site within the City, the allegedly discriminatory conduct, the giving of the assignment or the decision about which assignment to give, would have been made outside of the City of Madison.

The analysis of the remaining claims is similar. Where did the acts that the Complainant asserts to constitute racial harassment occur? The claim of constructive discharge is inextricably tied to the claim of racial harassment because it is the alleged harassment that led to the constructive discharge. If the harassment occurred outside of Madison depriving the Commission of jurisdiction over that claim, then the constructive discharge claim must also fall.

The Complainant's complaint centers on his treatment by his supervisor, Jack Mustin. The Respondent asserts and the Complainant does not refute that Mustin was assigned exclusively during late May and June of 1996 to work in Middleton. From May 20, 1996 through June 10, 1996, the Complainant was supervised by Craig Wilson not Mustin. Wilson also worked out of the Middleton operations office. The only specific dates referenced in either the Complainant's initial complaint or his amended complaint with respect to Mustin's treatment are June 4, 1996 and June 17, 1996. In the first instance, the Complainant asserts that Mustin humiliated him in front of the Complainant's coworkers. In the latter allegation, the Complainant indicates that a coworker was bothering him and the Complainant sought Mustin's assistance as a manager to intervene with the coworker. Mustin apparently did not take the action requested by the Complainant. During this period, it is apparently uncontroverted that Mustin was assigned to the Middleton office. If Mustin was the primary source of the Complainant's harassment, the harassment could have only occurred outside of the Commission's jurisdiction. The Complainant makes general assertions of harassment. Unfortunately, these allegations are so unformed and vague to prevent any meaningful analysis of who might have committed the harassment or when and where it may have occurred. This allegation cannot serve as the basis of the Complainant's claim of jurisdiction.

The Complainant contends that throughout the period of his employment, he worked in several locations including the City of Madison. It is insufficient to sustain jurisdiction for the Complainant to have frequently worked within the City of Madison. As noted above, the operational question is where did the acts that constitute the alleged discrimination occur. On this record, the Hearing Examiner must conclude that they occurred in Middleton, outside of the Commission's jurisdiction.

The Respondent repeatedly cites to the Executive Director's dismissal of a complaint during investigation as some sort of precedent in this case. This approach is novel though ill-fated. There is no meaningful way for the parties and the Hearing Examiner to analyze the reasons for the Executive Director's actions in that case. There is no factual record upon which the parties in this action may rely in analyzing the differences or similarities with this case.

ORDER

Based upon the record in this matter, the Hearing Examiner concludes that the Commission is without geographic jurisdiction over the allegations of this complaint. The complaint is hereby dismissed.

Signed and dated this 17th day of February, 2000.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner