

X

STATE OF WISCONSIN

PERSONNEL COMMISSION

\* \* \* \* \*

PREMA ACHARYA, \*

Complainant, \*

v. \*

Secretary, DEPARTMENT OF \*

REVENUE, \*

Respondent. \*

Case Nos. 89-0014-PC-ER \*

89-0015-PC-ER \*

\* \* \* \* \*

RULING  
ON  
MOTION

This reaches the Commission as the result of a motion filed by complainant on August 22, 1989, for the disqualification and suspension of the hearing examiner. The motion was argued before the designated hearing examiner on August 22, 1989.<sup>1</sup> Based on a review of the file and relevant parts of the hearing tapes, including the hearing on the motion before the examiner, the Commission makes the following ruling.

FINDINGS OF FACT

1. On February 14, 1989, complainant filed a charge of discrimination with the Commission alleging that respondent had failed to hire her for two Clerical Assistant 1 positions because of her national origin. (Case No. 89-0015-PC-ER.)

---

<sup>1</sup> When the motion was referred to the Commission, the parties were advised that if they wished to submit any further arguments beyond those made at the hearing, they should serve and file same by August 30, 1989, with reply briefs due September 5, 1989. Neither party filed a brief by August 30th. Complainant filed her brief on September 5th "in lieu of her reply brief." Since complainant failed to file pursuant to the schedule and there was nothing to which to reply, the Commission has not considered this brief.

2. On February 14, 1989, complainant filed a charge of discrimination with the Commission alleging that respondent had terminated her from a Limited Term Employment (LTE) Clerical Helper position because of her national origin. (Case No. 89-0014-PER-ER.)

3. On June 6, 1989, a Commission equal rights officer issued an initial determination finding no probable cause to believe that complainant had been discriminated against as alleged above.

4. On June 14, 1989, complainant filed with the Commission an appeal of such initial determination.

5. In an Interim Decision and Order issued July 14, 1989, the Commission established the following issue for hearing:

Whether there is probable cause to believe that respondent discriminated against the complainant based on national origin as set forth in her complaints of discrimination and, accordingly, whether the initial determination of "no probable cause" should be affirmed or reversed.

6. At a prehearing conference held on June 28, 1989, the parties agreed to schedule this issue for hearing on August 21 and 22, 1989.

7. At a prehearing conference held on August 16, 1989, the parties agreed to convene the hearing at 9:00 a.m. on August 21, 1989, at respondent's offices at 4638 University Avenue in Madison, Wisconsin, and to remain at this location for the morning of August 21, 1989. This was done in response to complainant's request that the hearing examiner observe complainant's as well as several other witnesses' physical dexterity in climbing on a stool and ladder located in respondent's offices at 4638 University Avenue. These other witnesses are employed by respondent at 4638 University Avenue. It was also agreed by the parties at this prehearing conference that the testimony of these witnesses would be taken at respondent's offices at 4638 University Avenue on the morning of August 21, 1989, after they were observed climbing the stool and ladder, in the interests of convenience for the witnesses, of reducing the disruption to the work place, and of administrative efficiency. The parties also agreed at this prehearing conference that, to resolve a scheduling problem for the witness, the testimony of witness Mark Bugher would be taken at 1:30 p.m. in the Commission's offices at 121 East Wilson Street which is where the

hearing would be conducted on the afternoon of August 21, 1989, and all day on August 22, 1989.

8. On July 26, 1989, the Commission designated Chairperson Laurie R. McCallum as the hearing examiner for the subject hearing and invested her with the final authority to decide the issue stated above. This was done in response to complainant's request for expedited handling of the two instant cases. The Commission, in response to such request, had taken extraordinary measures to complete the investigative and hearing stages of these two cases before complainant was scheduled to leave the country in September of 1989.

9. The hearing was convened by Commissioner McCallum at 9:00 a.m. on August 21, 1989, and the physical dexterity examination of witnesses was conducted and the testimony of witnesses was taken as agreed to by the parties at the prehearing conference. Since this examination and testimony did not consume the three hours reserved for it, it was proposed by the hearing examiner that the testimony of other witnesses employed at 4638 University Avenue who were available that morning be taken there that morning so that they wouldn't have to travel to the Commission's offices. The parties agreed to this and complainant called such witnesses in the order she designated.

10. During the testimony of several witnesses, complainant asked to offer rebuttal testimony. The hearing examiner advised her that she could call herself as a witness at any time during the presentation of her case in chief except that she couldn't do so in the middle of the testimony of another witness and that she could call herself to the stand only once during the presentation of her case in chief. The hearing examiner also advised her that rebuttal testimony would be taken after both parties had

put their cases in chief into the record and had rested. Complainant protested that she wouldn't be able to remember the testimony of each witness if she wasn't allowed to testify immediately after each one. The hearing examiner advised her to take notes to aid her memory.

11. In her written motion to disqualify and suspend the hearing examiner, complainant stated that the basis of her motion was that "Mrs. McCallum, while the witness Mr. Bugher was being examined by the plaintiff in the hearing on August 21, 1989, loudly banged on the table and shouted, this is my hearing."

12. Witness Mark Bugher testified at 1:30 p.m. on August 21, 1989, at the Commission's offices as agreed at the prehearing conference on August 16, 1989. Complainant, after witness Bugher had testified for several minutes, asked witness Bugher whether he knew the English language. The hearing examiner advised the complainant that the question was unnecessary in view of the fact that witness Bugher had been testifying in English and wouldn't be allowed. Complainant's husband, who was serving as her representative, became agitated with this ruling and raised his voice and would not allow the hearing examiner to continue. The hearing examiner, after her repeated attempts to address complainant's husband were loudly interrupted by him, used the palm of her hand in the place of a gavel and hit the hearing table while raising her voice slightly in order to get complaint's husband's attention. The hearing examiner, in a conversational tone of voice, then advised complainant's husband that, as the hearing examiner, this was her hearing and, if she was speaking, she would appreciate it if he would be polite just as she tried to be polite when he was speaking. The hearing examiner went on to say that, when she

rules on an objection, that was the end of it and if complainant wanted to appeal her ruling, she should do so.

13. In the hearing on such motion on August 22, 1989, complainant also argued that the motion should be granted because the witnesses were not called in the order required by the decision in McDonnell-Douglas v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S. Ct. 1817 (1973); that documents were allowed to be identified by witness Gary Muskat and to become a part of the record which were not signed by witness Muskat; that the hearing examiner incorrectly ruled, in response to an objection by the attorney for respondent that witness Bugher's educational background was not relevant; and that complainant was not given the opportunity to rebut the testimony of certain witnesses either during or immediately after such testimony was given.

14. During his testimony, witness Gary Muskat identified documents which he described as evaluations he had written of complainant's work performance. Witness Muskat had not signed these written evaluations. These documents were not offered or received into the record as of the time of the filing of the subject motion. The hearing examiner had explained to complainant that any objection as to the authenticity of the documents should be made at the time they were offered into the record.

15. During the testimony of witness Bugher, complainant asked the witness to describe his educational background. The attorney for respondent objected to this question on the grounds that it had no relevance. The hearing examiner asked complainant to respond to respondent's objection. Complainant's husband, acting as complainant's representative, responded that, since witness Bugher had characterized complainant's movements as "awkward" in a letter to complainant explaining

the reasons she was not selected for the subject Clerical Assistant 1 position, it was relevant to inquire whether witness Bugher, as a result of his education, had reason to know that his use of the word "awkward" in this context would constitute libel within the meaning of the law. The hearing examiner sustained the objection. The hearing examiner, in explaining her ruling to the parties, indicated that the issue in the subject cases was that of employment discrimination, not libel; that it would be the fact that a word had been uttered, not the legal knowledge of the utterer, that would be relevant in the context of an employment discrimination case such as the instant ones; and that complainant had failed to offer any basis upon which the hearing examiner could find that witness Bugher's educational background was relevant to the issue being heard. The hearing examiner also explained that her ruling could be appealed.

#### DISCUSSION

In the opinion of the Commission, complainant has not supplied any grounds for the disqualification of the examiner on the basis of bias or prejudice. Based on a review of the hearing tape, the examiner's action of hitting the table with her hand and slightly raising her voice was not an inappropriate response in the context of trying to maintain control of the hearing.

With respect to the examiner's evidentiary rulings, they appear to have been well-founded legally and in any event, by no means indicative of partiality. Complainant contends that the hearing examiner somehow interfered with the presentation of the evidence pursuant to the framework provided by McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S. Ct. 1817 (1973). However, it is well settled that the method of

analysis set forth in the McDonnell Douglas "is merely a sensible, orderly way to evaluate the evidence," Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, 57 L.Ed.2d 957, 98 S. Ct. 2943 (1978); U.S. Postal Service v. Aikens, 460 U.S. 711, 715, 75 L.Ed.2d 403, 410, 103 S. Ct. 1478 (1983); and that "the three-step framework of McDonnell Douglas and Burdine does not necessarily mean that the evidence actually must be presented to the court in that order, and it frequently is not." Schlei & Grossman's Employment Discrimination Law (Second Edition) (1983-1985 Cumulative Supplement), p. 6. Furthermore, complainant was not prevented from testifying first.

Complainant asserts the right to have testified in rebuttal after each of respondent's witnesses who testified adversely as part of her case. Such an approach is contrary to the normal method of proceeding, is unwieldy, and is not supported by any authority. The examiner advised complainant that she would have an opportunity to testify, but not after each such witness.

Complainant also takes issue with the hearing examiner sustaining a relevancy objection to a question seeking Secretary Bugher's educational background. Complainant's rationale for this inquiry was that Secretary Bugher had signed a letter which characterized her movements in a work simulation exercise as "awkward," and complainant felt it was relevant whether he had reason to know whether the use of this word would be considered libelous. The Commission cannot see how this inquiry has any possible relevance to the issue of whether there is probable cause to believe respondent discriminated against complainant on the basis of national origin.

Finally, complainant objected to the fact that a witness testified that he had written certain evaluations of complainant, but that he had not signed them. However, these documents had not been offered into the record at the time this motion was filed and argued. Furthermore, the Commission notes parenthetically that the fact that these documents were not signed is not necessarily fatal to an adequate foundation.

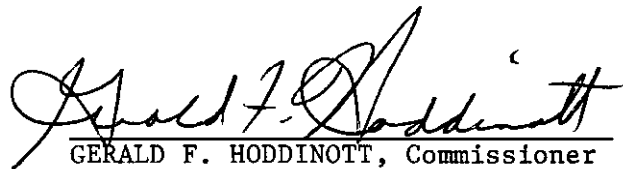
ORDER

Complainant's motion to disqualify Mrs. McCallum as hearing examiner is denied.

Dated: September 11, 1989 STATE PERSONNEL COMMISSION

LRM/AJT:gdt  
JMF11

  
DONALD R. MURPHY, Commissioner

  
GERALD F. HODDINOTT, Commissioner