

**CITY OF LINCOLN, NEBRASKA
COMMISSION ON HUMAN RIGHTS
MINUTES**

**Thursday, February 26, 2009
City Council Chambers**

CALL TO ORDER:

The February 26, 2009 meeting of the Commission on Human Rights was called to order at 3:58 P.M. by Chairperson Wendy Francis.

ROLL CALL:

The roll was called and documented as follows:

MEMBERS PRESENT:

Commissioners Karla Cooper, David Fikar, Wendy Francis, Dick Noble, Jose Quintero.

MEMBERS ABSENT:

Commissioners Eugene Crump, Sitaram Jaswal, Lori Lopez-Urdiales, Hazell Rodriguez.

STAFF PRESENT:

Director Larry Williams, Senior Civil Rights Investigator Angela Wortman, Civil Rights Investigator Margie Kniep, Outreach Coordinator Pippi Van Slooten, and Interim Senior Office Assistant Mary Reece.

APPROVAL OF JANUARY 29, 2009 MINUTES:

Commissioner Francis moved for the correction from ‘Chairperson Fikar’ to Chairperson Francis’ in some instances in the January minutes. A motion was then made by Commissioner Francis and seconded by Commissioner Noble to approve the minutes of the previous meeting with the corrections.

Hearing no discussion, Chairperson Francis asked for the roll call. Voting “aye” were: Commissioners Fikar, Noble, Quintero and Francis. Abstaining was Commissioner Cooper. Motion carried 4-0-1.

APPROVAL OF FEBRUARY 26, 2009 AGENDA:

A motion was made by Commissioner Francis and seconded by Commissioner Noble to approve the February 26, 2009 meeting agenda. Voting “aye” were Commissioners Cooper, Fikar, Noble, Quintero and Francis. Motion carried 5-0.

CASE DISPOSITIONS:

LCHR No.: 08-0408-023-E-R

A motion was made by Commissioner Fikar and seconded by Commissioner Quintero to recommend a finding of **Reasonable Cause**. Discussion ensued.

Commissioner Noble asked what exactly Reasonable Cause pertained to, whether it was to a specific charge of quid pro quo sexual harassment, racial harassment, a hostile work environment or all of these. Investigator Wortman answered that in order to lessen confusion it was better to make one determination otherwise there would be at least six different individual charges. She continued that while there was no evidence of quid pro quo harassment, and with respect to the hostile work environment, there was obviously inappropriate behavior taking place by quite a few of the staff. She added that because there were two people making similar allegations and with some witnesses verifying the actions that went on, there was enough evidence to find cause on the hostile work environment charge. Investigator Wortman stated that for hostile work environment it has to be severe or pervasive and unwelcome. She continued that the difficulty here was in showing unwelcomeness. Investigator Wortman added that the Complainant maintains that she tried to end the relationship but the Respondent continued to behave inappropriately, whereas the Respondent admits that the relationship ended but claims that the Complainant's inappropriate behavior continued until she left. Investigator Wortman said given the past behavior of both parties, it was doubtful that the behavior had changed after the relationship ended, regardless of who ended it. Investigator Wortman stated it could have been problematic to report the Respondent's behavior since his wife was the office manager. She added that reports had been made by other staff members regarding the Complainant's inappropriate behavior but not the Respondent's. Investigator Wortman stated that for her the bottom line was that the Respondent was the owner and therefore the alter ego of the business; the Complainant could not have gone to anyone to complain about his behavior.

Commissioner Quintero asked for clarification regarding the comments towards the patient and whether the patient was asleep or had heard the comment. Investigator Wortman answered the patient had heard the comment but she did not believe the patient was offended. She added, it was an inappropriate comment, nevertheless, and the Complainant had allegedly been reprimanded for it by the Respondent.

Commissioner Cooper asked why the Complainant had waited so long to leave or register a complaint. Investigator Wortman reminded everyone that there were two cases and in this instance the Complainant had allegedly ended the consensual affair approximately three months before her termination. Investigator Wortman continued that although the affair had been ended, current staff confirms that the Complainant's behavior continued to be inappropriate and that she had allegedly been upset about another staff member flirting with the doctor after the affair had

ended. Investigator Wortman stated that an employee confirmed that the Complainant still behaved inappropriately during the time she was employed at the Respondent's; this period of time November 2007 through January 2008 coincides with the time span after the relationship had allegedly been ended.

Commissioner Noble asked what the Commission was finding cause for and that in his eyes he could only find for a hostile work environment. Investigator Wortman agreed that much was alleged with no evidence. Commissioner Fikar asked if there were any policies in place for dealing with sexual harassment. Investigator Wortman answered that in the early stages of the business a management company was hired but is no longer used in the operation of the business. Investigator Wortman added the sexual harassment information available was more directed towards how to write a sexual harassment policy rather than dealing with a complaint and evidence showed that the employees did not receive copies of this 'policy'.

Commissioner Fikar asked if it was correct that the relationship started with a text message sent by the Respondent. Investigator Wortman said this was the Complainant's allegation; the Respondent did not directly answer this but admits to sending sexual text messages early on in the relationship with the Complainant. Commissioner Quintero said that a key issue was who initiated the relationship and that anytime the Complainant said stop that was it, regardless of what she did in the past. Commissioner Noble said that the Respondent was suggesting that the Complainant did not stop her inappropriate behavior. Investigator Wortman stated that the key point for her was the fact that the Respondent is the owner of the company and that he took advantage of that position. She continued that his behavior was obviously inappropriate although it is questionable as to whether it was unwelcome. Commissioner Noble asked if it came down to a hostile work environment and not the other charges. Investigator Wortman said that was correct and there was no evidence of the quid pro quo aside from the other Complainant alleging the same thing. Commissioner Noble asked if it would be possible to specify findings for each charge. Investigator Wortman said it would be possible but then each charge would have to be voted on separately with individual motions for each charge. Commissioner Noble stated that he felt it was confusing to find Reasonable Cause across the board when, in his opinion, it wasn't there. Director Williams said that the Commissioners could certainly split up the charges and address each one individually but that is not what was recommended. Commissioner Noble stated that he would feel uncomfortable about not finding Reasonable Cause for some of the charges but also that he would feel guilty about finding Reasonable Cause for some of the charges as they had not been adequately demonstrated. Commissioner Fikar added that he felt there was a strong case for a constructive discharge.

Commissioner Cooper asked if it was normal to have staff cell phone numbers made available to others and who it was that initiated the first text messages which started the relationship. Investigator Wortman answered there was no evidence as to who started the text messaging but she believed the Respondent did. Commissioner Cooper asked if it made a difference, regarding hostile work environment, whether the Complainant initiated or participated in the relationship.

Investigator Wortman replied it made a difference when considering unwelcomeness. Commissioner Noble then asked if initiation was a moot point. Investigator Wortman said she didn't think so because it showed the Respondent was asking for the relationship.

Commissioner Francis asked how many people worked in the office and how high the turnover was. Investigator Wortman answered that between 13-15 people worked there and the turnover had not been especially high except in 2007. She continued to explain that the office added aesthetics in 2007 and many people with licenses left then.

Commissioner Noble reiterated that a Reasonable Cause finding was not specific to the findings. Investigator Wortman said that all of the Commissioners' reservations would be on record and that she was not sure if splitting the finding would affect the attorney's work later. As far as EEOC was concerned it would be a Reasonable Cause finding. Commissioner Noble stated that if the reservations were being recorded and reflected his concern, then he was fine with that. Commissioner Quintero added that he felt the same concern, yet it was not the Commissioner's task to be concerned with a possible civil suit. He continued that either the Respondent did something wrong or he didn't.

Commissioner Cooper asked about the case law and for clarification as to what exactly was meant by 'intimidation', if the affair was consensual can there be a basis for intimidation. Investigator Wortman answered the Complainant alleged that the intimidation began after the affair ended when the Respondent began calling her names. Investigator Wortman added that there was no evidence of that except for similar allegations made by a co-worker. Commissioner Cooper said there was no evidence of the Complainant's behavior being any different after the affair ended. Commissioner Fikar commented that the Complainant did not have anywhere to go with her complaint, that the Respondent had all the power. Investigator Wortman said that there were allegations that the Respondent had threatened the Complainant with blackballing or other repercussions after the affair ended.

Commissioner Fikar asked if there was any evidence of other affairs outside the company or only with people the Respondent had power over. Investigator Wortman answered there was no evidence of any other affair, but that line of questioning was not followed.

Commissioner Quintero asked if only the two women in question had benefits made available to them on a quid pro quo basis or whether benefits were available for all staff members. Investigator Wortman answered the benefits were for all staff members but only these two alleged the Respondent asked for sexual favors before performing the procedures. Commissioner Fikar asked if any males worked for the Respondent and Investigator Wortman answered no.

Hearing no further discussion, Chairperson Francis asked for the roll call. Voting "aye" were: Commissioners Fikar, Noble, Quintero and Francis. Voting 'nay' was Commissioner Cooper. Motion for a finding of **Reasonable Cause** carried 4-1.

LCHR No.: 08-0409-025-E-R

A motion was made by Commissioner Fikar and seconded by Commissioner Quintero to recommend a finding of **Reasonable Cause**. Discussion ensued.

Commissioner Noble opened the discussion by asking if this was not essentially the same case as the one just heard. Investigator Wortman answered that in this case the witnesses did not seem to focus as much on this Complainant and that there were fewer allegations of inappropriate behavior by the Complainant in this case. Commissioner Cooper noted that the relationship between the Complainant and the Respondent lasted much longer in this instance. Commissioner Fikar asked if it were correct that the Complainant had showed up for work on her last day and then left and Investigator Wortman confirmed this.

Commissioner Noble stated that he felt a hostile work environment and constructive discharge could be found in this case but not the other charges. Commissioner Cooper asked if the fact that the Complainant did not show up for work factored into anything. Investigator Wortman answered it factored into the constructive discharge, where it would have to be shown that the atmosphere had gotten so bad at work that the Complainant had no other choice but to quit. She continued to explain that another physician's assistant had been hired three months before the Complainant quit and that the Complainant had gone to the Office Manager (the wife of the Respondent) and expressed concerns about the safety of her job. Investigator Wortman added the Complainant allegedly went to the Office Manager and complained about the inappropriate behavior by the Respondent, however, the Office Manager denies this. Commissioner Quintero asked if no one had gone to the licensing board to report the inappropriate behavior in the office. Investigator Wortman answered that she felt the other employees—even past employees—were protecting the doctor. Commissioner Fikar commented on the fact that the staff protecting the doctor spoke to the distribution of power in the relationship. Investigator Wortman said the Complainant alleges that the Respondent called the other employees and warned them about speaking out. She continued that she did not get the impression while speaking to the staff that it had happened. Investigator Wortman stated she did have the impression that the staff was protecting the Respondent and some of the staff who were not protecting the Respondent were merely repeating the accusations made by the Complainant.

Commissioner Noble asked if the Complainant's husband had been aware of the affair. Investigator Wortman answered that the husband allegedly first became aware of the relationship when his wife left her job in January.

Commissioner Noble asked what was to be made of the fact that the Complainant received incremental raises, then went part-time and earned less accordingly, yet in the end made more money working part time than she did full time. Investigator Wortman answered that the Complainant alleges that she did not receive pay raises but that was not substantiated.

Investigator Wortman said the Complainant admitted that in Sept. 2007 the Respondent started paying back part of her student loan in lieu of the raises. Commissioner Noble asked for clarification on the point of the Complainant's student loans being paid off even after the affair had ended. Investigator Wortman said that it is alleged that the Respondent pays well to keep people quiet but that she could not say if this was true and had no earnings comparison from the health care field. Commissioner Noble asked if the Respondent was an intimidating person and if Investigator Wortman found him manipulative. Investigator Wortman answered she was not intimidated by him but some witnesses stated that he had an anger problem. However, Investigator Wortman added that many people had described the Respondent as caring. Investigator Wortman stated that she did not want to treat sexual consent as sexual harassment but the Respondent as owner of the company was problematic and expressed doubts as to whether he could actually not treat the Complainant any differently after the affair ended.

Commissioner Noble noted that in this case years had passed and that it was a weaker case than the one just heard. Commissioner Fikar asked whether it was appropriate to punish the owner for having a consensual affair with members of his staff. Investigator Wortman answered that in this instance it was because the Respondent is the owner.

Hearing no further discussion, Chairperson Francis then asked for the roll call. Voting "aye" were: Commissioners Fikar, Quintero and Francis. Voting "nay" were: Commissioners Cooper and Noble. Motion for a finding of **Reasonable Cause** carried 3-2.

LCHR No.: 08-0724-053-E

A motion was made by Commissioner Noble and seconded by Commissioner Cooper to recommend a finding of **No Reasonable Cause**. Discussion ensued.

Commissioner Francis asked for clarification on who exactly called to tell the Complainant he had been fired and the boss calling later. Investigator Wortman answered that she could not ever really determine what had happened; she believes the Complainant called the Respondent and said he was sick and not coming in. She stated that the Respondent and the Complainant had a disagreement on the phone. Investigator Wortman continued that the Respondent might not have said anything on the phone to avoid discussion; however, another employee did call the Complainant and made it official that he had been fired. Commissioner Francis then asked if it were common at this company, to have another person fire staff. Investigator Wortman answered for this employer, yes, it was.

Commissioner Fikar asked if the Complainant had been charged with shoplifting and Investigator Wortman answered no. Investigator Wortman said that she believed it came down to the Complainant calling in sick two days in a row when there was an important job to be finished and that the Respondent had had enough.

Commissioner Francis asked if there were a history of similar terminations. Investigator Wortman replied that the Respondent had frequent terminations and frequent no-shows; however there was no history of someone wanting to return to work after such a no-show. Commissioner Francis asked how many employees the Respondent had and Investigator answered 1-5, depending on how much work there was.

Hearing no further discussion, Chairperson Francis then asked for the roll call. Voting “aye” were: Commissioners Cooper, Fikar, Noble, Quintero and Francis. Motion for a finding of **No Reasonable Cause** carried 5-0.

LCHR No.: 08-1119-067-E-R

A motion was made by Commissioner Cooper and seconded by Commissioner Fikar to recommend a finding of **No Reasonable Cause**. Discussion ensued.

Commissioner Francis asked about the Respondent’s policy regarding relatives being employed. Investigator Kniep answered that the Respondent did not have a family-hire policy and that the Complainant had actually been hired by someone else besides his mother. Investigator Kniep continued that it was questionable that the Complainant’s mother even knew he had been hired until after the fact. Commissioner Francis noted that the Complainant had documented work improvement issues and asked whether he had shown an improvement in his performance. Investigator Kniep said that there had been some improvement, nevertheless, the Complainant still had some recurring issues with being away from work for appointments for a longer period of time than stated and not calling in when he was going to be absent. Commissioner Francis asked if whether there was any improvement after the Complainant’s hours had been adjusted and Investigator Kniep stated that the timesheets confirmed that there was no improvement and that attendance was consistently an issue.

Commissioner Francis asked if the Complainant had been terminated for lack of funding or a combination of reasons. Investigator Kniep replied that the Complainant was told that he was being terminated due to lack of funding.

Commissioner Cooper pointed out that there was a typo in the investigator’s report in point three, the last line. (2008 instead of 2009)

Hearing no further discussion, Chairperson Francis then asked for the roll call. Voting “aye” were: Commissioners Cooper, Fikar, Noble, Quintero and Francis. Motion for a finding of **No Reasonable Cause** carried 5-0.

PRE-DETERMINATION SETTLEMENT AGREEMENTS

1. LCHR No.: 08-0724-052-E

A motion was made by Commissioner Fikar and seconded by Commissioner Noble to accept the pre-determination settlement agreement.

Chairperson Francis then asked for the roll call. Voting “aye” were Commissioners Cooper, Fikar, Noble, Quintero and Francis. Motion carried 5-0.

ADMINISTRATIVE CLOSURES:

A motion was made by Commissioner Noble and seconded by Commissioner Fikar to accept the following Administrative Closure:

Notice of Right to Sue

1. LCHR No.: 08-0204-010-E-R

Chairperson Francis then asked for the roll call. Voting “aye” were Commissioners Cooper, Fikar, Noble, Quintero and Francis. Motion carried 5-0.

A motion was made by Commissioner Noble and seconded by Commissioner Fikar to accept the following Administrative Closure:

Lack of Jurisdiction

1. LCHR No.: 08-1031-065-E-R

Chairperson Francis then asked for the roll call. Voting “aye” were Commissioners Cooper, Fikar, Noble and Francis. Abstaining was Commissioner Quintero. Motion carried 4-0-1.

A motion was made by Commissioner Noble and seconded by Commissioner Fikar to accept the following Withdrawals:

Withdrawal

1. LCHR No.: 08-0911-058-E-R

Chairperson Francis then asked for the roll call. Voting “aye” were Commissioners Cooper, Fikar, Noble, and Francis. Abstaining was Commissioner Quintero. Motion carried 4-0-1.

2. LCHR No.: 08-1210-018-H

Chairperson Francis then asked for the roll call. Voting “aye” were Commissioners Cooper, Fikar, Noble, Quintero and Francis. Motion carried 5-0.

OLD BUSINESS:

A. 2009-2010 Budget Update / Senior Office Assistant Position

Director Williams explained that budgets had to be submitted at 91% of the previous year’s budget. Many agencies are in impossible situations trying to operate at this level. The Commission on Human Rights would not hire a Senior Office Assistant and will share a staff person with the Mayor’s office. Director Williams continued that some departments would move to the third floor of the City County building but it was yet uncertain who would be moving. The current building where LCHR is located, was being looked at to be used for more storage.

PUBLIC COMMENTS:

None

ADJOURNMENT:

The meeting was adjourned at 5:00 P.M.

NEXT MEETING:

The next meeting will be held Thursday, March 26, 2009 in the City Council Chambers at 4:00 P.M.