

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

August 29, 2013
**CITY COUNCIL CHAMBERS
555 S. 10TH STREET**

The August 29, 2013, meeting of the Commission on Human Rights was called to order at 4:07 p.m. by Hazell Rodriguez, Vice Chair.

ROLL CALL:

The roll call was called and documented as follows:

MEMBERS PRESENT:

Commissioners: Hazell Rodriguez (Vice Chair), Liz King, Takako Olson, Bennie Shobe, and Micheal Thompson. Quorum present.

MEMBERS ABSENT:

Gene Crump, Sue Oldfield, and Mary Reece.

STAFF PRESENT:

Angela Lemke, Margie Nichols, Loren Roberts, Peg Dillon, and City Attorney Jocelyn Golden.

APPROVAL OF JULY 25, 2013 MINUTES:

A motion was made by Shobe and seconded by Thompson to approve the minutes of the July 25, 2013 meeting.

Rodriguez asked for the roll call. Voting "aye" was: Rodriguez, King, Olson, Shobe, and Thompson. Motion carried.

APPROVAL OF AUGUST 29, 2013, AGENDA:

A motion was made by Thompson and seconded by Olson to approve the August 29, 2013 meeting agenda.

Rodriguez asked for the roll call. Voting "aye" was: Rodriguez, King, Olson, Shobe, and Thompson. Motion carried.

CASE DISPOSITIONS:

LCHR #12-1023-052-E-R

A motion was made by Shobe and seconded by Olson to recommend a finding of **No Reasonable Cause** on all counts.

Shobe questioned the complainant's working conditions and asked about the meeting between the Complainant and the Respondent. Lemke replied that it was not clear if the Complainant was able to state his complaint on the day he separated from employment, but it is undisputed that the high level manager would not entertain any discussions about the working conditions. Lemke explained that there were many levels of supervision and the higher operations manager denied that the Complainant filed a complaint with him, but it is clear that the Complainant sent an email about his complaints. Rodriguez questioned how we know that the email was only sent after the Complainant had resigned. Lemke stated she received the email chain and verified the time frame.

Olson asked if the content was the same in both emails. Lemke said that the Complainant sent an email in September of 2012, and that was the only email sent. Olson asked for clarification about the timing of the emails. Rodriguez said that the concern was that the Respondent's managers seemed to not be addressing or care about the bad work environment or about the complaints made by the Complainant as long as the employee is going to quit. King agreed that even though the interviews did not line up it is clear that racist language was used. Lemke replied that she thought it was clear that abusive language was used and yelling was prevalent, but denies that the evidence clearly shows racial language being used. Rodriguez said that she can see where former employees might not want to come forward about the issues.

Rodriguez asked for clarification on the rule of law. Lemke replied that the rule is preponderance of evidence, 51% or more likely than not, and that the racist name calling that occurred needed to be severe or pervasive enough to interfere with their work. Lemke further explained that all witnesses agreed that there was a lot of yelling and cussing that occurred and a hostile work environment prevailed, but the Commissioners needed to determine whether it was race based. Rodriguez asked about the claim of someone being hit. Lemke said something happened that day but it was not clear exactly what happened. It was clear that management talked to the supervisor and told them that touching an employee would not be tolerated.

Rodriguez asked if the two supervisors identified in the complaint are still employed. Lemke replied yes, both of them are still employed.

Hearing no further discussion, Rodriguez asked for the roll call. Voting "aye" was: Rodriguez, Shobe, Thompson, and Olson. Voting 'no' was King. Motion for a finding of **No Reasonable Cause** carried.

LCHR #12-1121-057-E-R

A motion was made by Olson and seconded by King to recommend a finding of **No Reasonable Cause**.

Shobe questioned the timing of the discrimination and retaliation claims. Nichols reviewed with the Commissioners the timing of the Complainant's complaint that initially did not include allegations of discrimination, and the subsequent complaint filed by the Complainant's subordinate against the Complainant, which prompted another investigation. Rodriguez asked for clarification about the investigation and questioned if there was an earlier interview that did not involve issues of discrimination. Nichols confirmed that the Complainant sent an email to the CEO and that it was during that investigation the subordinates complained about harassment. Rodriguez questioned if there were any meetings between the investigator and the Complainant addressing harassment. Nichols replied no. Nichols clarified that there were two different investigators. The Complainant made the discrimination allegations to the second investigator.

King asked for more information on the age discrimination claim. Nichols clarified that in this case no grounds were discovered to substantiate the allegation.

Rodriguez asked about the seven examples the Complainant provided to management, and the result of that investigation. Nichols said the result of that email was the investigator holding meetings about the communication issues. Nichols said it was undisputed that there were issues and they were trying to fix the problem.

Hearing no further discussion, Rodriguez asked for the roll call. Voting "aye" was: Rodriguez, King, Shobe, Thompson, and Olson. Motion for a finding of **No Reasonable Cause** carried.

LCHR #12-1205-058-E-R

A motion was made by Rodriguez and seconded by Olson to recommend a finding of **No Reasonable Cause**.

The Commissioners commented that there was some concern about the working conditions for the Complainant and the earlier Complainant. Lemke said there were inconsistencies from witnesses so the evidence was not clear on what was said and who said it. The Commissioners expressed their concern about the working environment at this company and Lemke said she could speak with Respondent's attorney to notify her of the Commissioner's concerns.

Thompson questioned the differences in the wages. Lemke said that the Complainant was the only employee within this job classification that was not a foreman or a member of a Union.

Hearing no further discussion, Rodriguez asked for the roll call. Voting "aye" was: Rodriguez, Thompson, Olson, King and Shobe. Motion for a finding of **No Reasonable Cause** carried.

LCHR #12-1205-059-E-R

A motion was made by King and seconded by Shobe to recommend a finding of **Reasonable Cause** on the **first** issue of a prohibited medical inquiry.

Thompson excused himself due to a conflict of interest and left the Chambers.

King asked if the HR director was there the whole time the Complainant worked at the company. Lemke replied that the director was only there for the last 4 or 5 years. King asked about the allegation that the direct supervisor never reported the Complainant's prior medical leaves, and Lemke confirmed this. King questioned the Respondent's lack of knowledge about the Complainant's disability, and the legality of asking for this information from the doctor's office. Rodriguez thought the Respondent resolved the issue correctly by trying to get clarification about light duty or full duty. Lemke said that the Respondent's position was that, after the start of the August 2012 leave, the Complainant's doctor's note said the Complainant could not spot other individuals and the Respondent was trying to get clarification if he was released to full duty. King thought it could be an issue for the Respondent to question how disabled the Complainant may or may not be. King argued that isn't asking about the clarifications also asking about the degree of disability? Rodriguez said that she felt the questions were not that unreasonable, and Lemke added that their questions appeared to be job related.

Hearing no further discussion, Thompson was called back to Chambers. Rodriguez asked for the roll call. Voting "aye" was: Olson and King. Voting 'no' was Rodriguez and Shobe. Abstaining was Thompson. Motion for a finding of **Reasonable Cause** failed.

At Commissioner Olson's request, a re-vote was taken for the motion of **Reasonable Cause** on prohibited medical inquiry. Hearing no discussion, Rodriguez asked for the roll call. Voting 'aye' was King. Voting 'no' was Olson, Rodriguez, and Shobe. Abstaining was Thompson. Motion for a finding of **Reasonable Cause** failed.

A motion was made by King and seconded by Shobe to recommend a finding of **No Reasonable Cause** on the first issue of a prohibited medical inquiry. Hearing no discussion, Rodriguez asked for the roll call. Voting 'aye' was Olson, Rodriguez and Shobe. Voting 'no' was King. Abstaining was Thompson. Motion for a finding of **No Reasonable Cause** carried.

A motion was made by Rodriguez and seconded by Olson to recommend a finding of **No Reasonable Cause** on the **second** issue of a hostile work environment on the basis of disability.

Thompson excused himself due to a conflict of interest and left the Chambers.

Rodriguez commented that the Respondent was informal with procedures, so when procedures were followed, it was perceived as harassment by the Complainant. Rodriguez asked for an explanation. Lemke replied that it was not clear why there was a change, but that the HR person started about four years ago, and at that time they worked on the employee handbook and it had been sent to all directors. Rodriguez said maybe it occurred because of the Complainant's number of absences in the past or the length of this absence. Lemke replied that it could be the reason but there was no proof of this.

Lemke replied that her biggest concern was what appeared to be the last minute change to the schedule. She added that many of the accommodation requests were not tied to essential functions. Rodriguez asked if there was a business necessity for the schedule change. Lemke replied that previously the Complainant's position was scheduled in 2 hour blocks, but most recently it was three-hour blocks, which were changed to accommodate other employee's work/school schedules. A discussion took place between Lemke and the Commissioners as to how the work schedule was in the past, how the Complainant had been accommodated in the past with down time between appointments, and that at the end of the interactive process the Respondent was attempting to gain more information on how much time the Complainant needed between appointments and what he could do during this down time.

Rodriguez asked how to address the hostile work environment issue. Lemke replied that it was difficult to analyze this without discriminatory comments being made at the work place, since this is usually required when discussing a hostile environment.

Hearing no further discussion, Thompson was called back to the Chambers. Rodriguez asked for the roll call. Voting "aye" was: Olson, Rodriguez, Shobe, and King. Abstaining was Thompson. Motion for a finding of **No Reasonable Cause** carried.

A motion was made by Rodriguez and seconded by Olson to recommend a finding of **No Reasonable Cause** on the **third** issue of being denied reasonable accommodations.

Thompson excused himself due to a conflict of interest and left the Chambers.

Rodriguez asked if everything requested were reasonable requests. Shobe asked if each request could be addressed separately, and a lengthy discussion took place about the reasonableness of the accommodations, whether Respondent provided each accommodation, why they denied the accommodations, and how each accommodation would or would not assist the Complainant in performing an essential function of his job.

Rodriguez stated there seemed to be somewhat of a resolution at the end of the multiple accommodation requests but it also took much too long to resolve. Lemke said that yes the involvement of both attorneys could have caused this to last longer than necessary.

Lemke also mentioned the importance of having the Complainant directly involved in the interactive process. Rodriguez said that this process could have represented an intention to harass because of the way it was drawn out. Lemke said that the question should be if the Complainant was denied a reasonable accommodation since the harassment issue had already been decided. Discussion returned to the 2-hourshift issue and the requested wellness period. Rodriguez asked, if legally speaking, was this accommodation denied? Lemke said it was not.

Hearing no further discussion, Thompson was called back to Chambers. Rodriguez asked for the roll call. Voting "aye" was: Olson, Rodriguez, and Shobe. Voting 'no' was King. Abstaining was Thompson. Motion for a finding of **No Reasonable Cause** carried.

A motion was made by King and seconded by Olson to recommend a finding of **No Reasonable Cause** on the **fourth** issue of retaliation.

Thompson excused himself due to a conflict of interest and left the Chambers.

Rodriguez asked if requesting the reasonable accommodation is the protected activity. Lemke said that there are two protected activities at issue, one relating to his request for accommodations and one for writing the CEO about disability discrimination. A short discussion ensued relating to the legal requirements for proving unlawful retaliation.

Hearing no further discussion, Thompson was called back to Chambers. Rodriguez asked for the roll call. Voting "aye" was: Olson, Rodriguez, Shobe, and King. Abstaining was Thompson. Motion for a finding of **No Reasonable Cause** carried.

A motion was made by King and seconded by Olson to recommend a finding of **No Reasonable Cause** on the **fifth** issue of constructive discharge.

Hearing no discussion, Rodriguez asked for the roll call. Voting "aye" was: Olson, Rodriguez, Shobe, and King. Abstaining was Thompson. Motion for a finding of **No Reasonable Cause** carried.

A motion was made by Rodriguez and seconded by Thompson to continue the following cases at the September 26th, 2013 Commission Meeting:

LCHR #13-0207-002-E-R, LCHR #13-027-003-E-R, and LCHR #13-0211-004-E-R.

Rodriguez asked for the roll call. Voting "aye" was: Olson, Rodriguez, Shobe, Thompson, and King. Motion carried.

PRE-DETERMINATION SETTLEMENT AGREEMENTS:

LCHR #13-0702-004-H

A motion was made by Shobe and seconded by Thompson to accept the settlement agreement as presented. Hearing no discussion Rodriguez asked for the roll call. Voting "aye" was: Rodriguez, Thompson, King, Olson and Shobe. Motion carried.

LCHR #13-0729-006-H

A motion was made by Shobe and seconded by Thompson to accept the settlement agreement as presented. Hearing no discussion Rodriguez asked for the roll call. Voting "aye" was: Rodriguez, Thompson, King, Olson and Shobe. Motion carried.

ADMINISTRATIVE CLOSURES:

LCHR #13-0604-017-E-R

A motion was made by Shobe and seconded by Thompson to accept the administrative closure for withdrawal. Hearing no discussion, Rodriguez asked for the roll call. Voting "aye" was: Rodriguez, Thompson, King and Shobe. Abstaining was Olson. Motion carried.

OLD BUSINESS:

No old business presented.

NEW BUSINESS:

New business tabled until next meeting.

Next Meeting:

The next meeting will be Thursday, September 26, 2013, at 4:00 p.m. in the City Council Chambers at the County City Building at 555 S. 10th Street. The meeting was adjourned at 5:42 p.m.