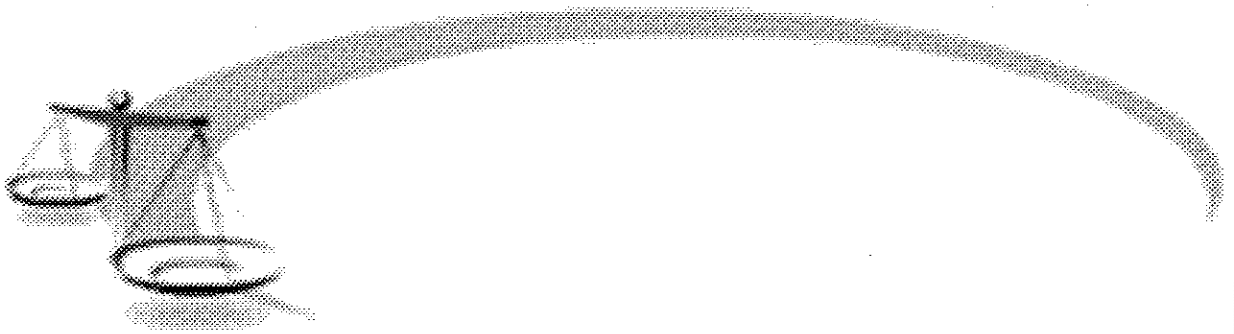


#131871-EM06 David Karemera
vs. Wayne State University

Order
Nanette L. Reynolds, Director

STATE OF MICHIGAN CIVIL RIGHTS COMMISSION
STATE OF MICHIGAN PLAZA BUILDING
1200 SIXTH AVENUE
DETROIT, MICHIGAN 48226

MICHIGAN DEPARTMENT OF CIVIL RIGHTS,
ex rel DAVID KAREMERA,

Claimant,

MDCR No. 131871-EM06

v

WAYNE STATE UNIVERSITY,

Respondent.
_____/

ORDER

At a meeting of the Michigan Civil Rights Commission held in Lansing, Michigan on the 25th day of June 2001

In accordance with the Rules of the Michigan Civil Rights Commission, a Hearing Referee heard proofs and arguments and made proposed Findings of Fact and Recommendations regarding the issues involved in this case. The parties had an opportunity to make presentations in support of or in objection to the Referee's proposals at the public meeting of the Commission held on March 27, 2001. Commissioner Simmons has issued an Opinion, adopted by a unanimous vote of the Commission, accepting these proposals. That Opinion shall be made a part of this Order. The Commission therefore makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. At all times pertinent claimant, David Karemera, a Black man from Burundi, Africa, was a resident of Detroit, Wayne County, Michigan.

2. At all times pertinent respondent, Wayne State University, is a Michigan University organized and existing under the laws of the State of Michigan, and doing business in the City of Detroit, County of Wayne, State of Michigan.

3. In August, 1989, claimant was hired by the respondent as a lecturer in economics.

4. In February, 1992, the Chairperson of the economics department recommended that the claimant's contract not be renewed.

5. The claimant's contract was subsequently renewed after the claimant filed an internal appeal.

6. On February 11, 1993, the claimant was notified that his contract would not be renewed when it expired in May, 1993.

7. The claimant was not treated differently than a white female lecturer in that claimant was given lecturer contracts in four consecutive academic years, while the comparable faculty member only received three consecutive lecturer contracts.

8. The claimant, on several occasions, applied for a tenure track position with respondent but was denied appointment to such a position.

9. Claimant's Ph.D. degree in agricultural economics did not qualify him for consideration for a tenure track position.

10. Claimant's employment with respondent ended on May 26, 1993.

CONCLUSIONS OF LAW

1. Claimant's case is not barred by the applicable statute of limitations.

2. Claimant's complaint was properly reopened by the Department of Civil Rights after the period for reconsidering the Department's initial dismissal of his complaint had expired.

3. Claimant's case is not barred by the doctrine of laches.

4. Claimant's allegations regarding respondent's refusal to select him for a tenure track position were properly before the Commission even though said allegations were not contained in the complaint which claimant filed with the Department.

5. Claimant's allegations regarding respondent's creation of a hostile work environment were not properly before the Commission.

6. Respondent's refusal to extend claimant's lecturer contract for a fifth consecutive academic year was not based upon unlawful considerations of race or national origin.

7. Respondent's refusal to appoint claimant to a tenure track position was not based upon unlawful considerations of race or national origin.

IT IS HEREBY ORDERED That claimant's complaint under the Elliott-Larsen Civil Rights Act is dismissed.

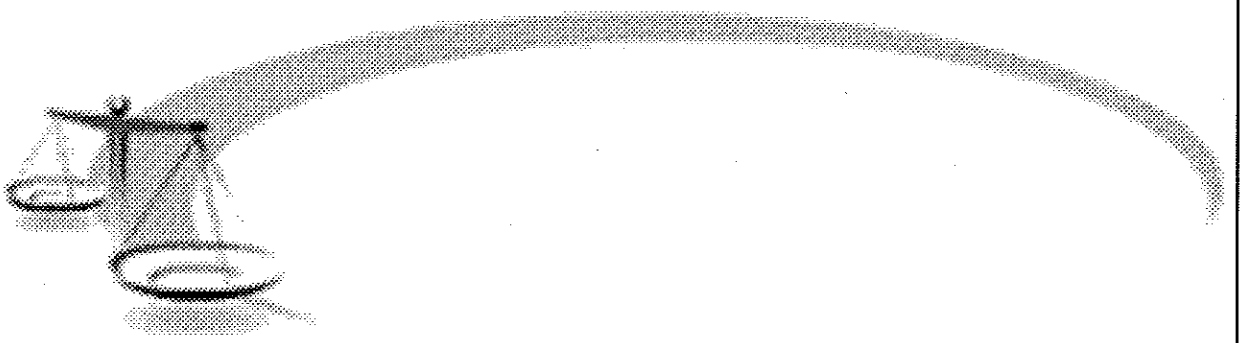
MICHIGAN CIVIL RIGHTS COMMISSION

Dated: June 25, 2001

Nanette Lee Reynolds, Ed.D., Director

NOTICE OF RIGHT TO APPEAL

You are hereby notified of your right to appeal within thirty (30) days to the Circuit Court of the State of Michigan having jurisdiction provided by law. MCLA 37.2606



#131871-EM06 David Karemera
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Opinion
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MICHIGAN CIVIL RIGHTS COMMISSION
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MICHIGAN DEPARTMENT OF CIVIL RIGHTS,
ex rel DAVID KAREMERA,

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v

WAYNE STATE UNIVERSITY,

Respondent.
_____/

OPINION

Valerie P. Simmons, Commissioner

Claimant, David Karemera, a Black man from Burundi, Africa, served as a Lecturer in respondent's Economics Department from August 1989 until May 1993, when his contract was not renewed. During that period, claimant also applied for, but was denied, a tenure track position as an assistant professor with the University in the same department.

Claimant filed a complaint with the Michigan Department of Civil Rights. This complaint was investigated and, initially, insufficient evidence was found for referring the matter to conciliation. This complaint was dismissed, but subsequently reopened by the

Department even though claimant's request for reconsideration had been untimely made. After conciliation was unsuccessful, a charge of discrimination was issued.

The charge, inter alia, alleged that respondent unlawfully discriminated against claimant because of race and national origin in refusing to extend his contract as a Lecturer and/or offering him a position as an assistant professor. In its answer, respondent denied the charge. Respondent also raised certain affirmative defenses, asserting, inter alia, that the charge was barred by the statute of limitations, equitable doctrine of estoppel, and doctrine of laches. In connection with its estoppel defense, respondent also contended that this charge was barred by claimant's failure to timely request reconsideration of his complaint after it was dismissed, following investigation, for insufficient evidence of unlawful discrimination. During the course of these proceedings, respondent further asserted that claimant was precluded from claiming denial of a tenure track position and hostile work environment because those allegations were not raised in the complaint which he had filed with the Department of Civil Rights.

I

At the outset, it is necessary to determine whether this cause, in whole or part, is barred by any of the defenses raised by the respondent.

A

Respondent argues that discrimination actions under the Elliott-Larsen Civil Rights Act are governed by the three (3) years limitations statute. Since the charge in this case

was not issued within three years from the alleged discriminatory action, respondent maintains that this matter is barred by the statute of limitations.

The three year period applies only to cases filed in circuit court and does not extend to administrative proceedings. *Criner & Robinson v Beznos Company*, 36616-H; 36617-H (1/25/82). The applicable statute of limitations for actions under the Commission's jurisdiction is set forth in the Commission Rules. Commission Rule 37.4(1) provides that "any person claiming to be aggrieved by unlawful discrimination may ... file with the Department a complaint." Commission Rule 37.4 (6) further provides that "the complaint shall be filed within 180 days of the occurrence of the alleged discrimination ... ." The Commission has jurisdiction over any complaint which has been filed in a timely manner. *Id.*

In this case, claimant filed a timely complaint following the non-renewal of his lecturer contract. See, respondent Exhibit 6. Accordingly, this cause is not barred by the statute of limitations.

B

Respondent further asserts that the Commission is estopped from deciding this case because the Department had dismissed the claimant's original complaint, after investigation, for insufficient evidence. Additionally, claimant failed to request reconsideration of this decision within the requisite time period.

There is no dispute that the complaint was dismissed after the Department's investigation failed to disclose sufficient evidence of unlawful discrimination. Nor is there

any dispute that claimant failed to request a reconsideration of the Department's disposition within the thirty (30) day limit. See Commission Rule 37.7(1). That, however, does not preclude the Department from further considering this case.

Commission Rule 37.17 allows the Department to "reopen any proceeding closed by the department in the same manner." The latter reference is to the first sentence of this rule which grants similar authority to the Commission "upon its own motion, or upon request of any party or whenever justice so requires..." Since there is no evidence to the contrary, it must be presumed that the Department properly exercised its authority when it decided to reopen this matter. Accordingly, this charge is not barred by the equitable doctrine of estoppel.

C

Respondent next asserts that the doctrine of laches should prevent the Commission from hearing and deciding this case. To prevail on the defense of laches, respondent must show: (1) that the delay in proceeding was unreasonable; and (2) that it was prejudiced as a result of the delay. *Costello* v *U.S.*, 365 U. S. 265 (1961); *Bennington Township* v *Maple River Inter-County Drain Board*, 149 Mich App 579 (1986). Both requirements must be satisfied. *Lothian* v *City of Detroit*, 414 Mich 160 (1982). The mere passage of time will not, in and of itself, demonstrate prejudice or prove laches. *Department of Treasury* v *Campbell*, 107 Mich App 561 (1981).

Although a considerable time passed between the employment decision which gave rise to this complaint and the issuance of the charge and the convening of the hearing, no

evidence was presented to show that the Department allowed unnecessary periods of time to lapse in handling this case. Moreover, there is nothing in the record to show that claimant was responsible for any delay in regard to the processing of his complaint. Since claimant had acted in good faith, he should not be penalized by having this case dismissed, even if this tribunal had found an unreasonable delay on the part of the Department. *Watson* v *Gulf & Western Ind*, 650 F2d 990, 992 (9th Cir 1981).

Our conclusion that laches has not been established is reinforced by respondent's failure to show it had been prejudiced in defending this matter by any such delay. Respondent was able to present its witnesses, the present and former Chairs of the Economics Department, neither of whom showed any loss of memory regarding the events of this case. Nor was there any indication that any of the exhibits, necessary to the defense of this claim, were missing and could not be introduced into evidence.

Accordingly, it is concluded that laches does not bar the Commission from deciding the merits of this case.

D

Finally, respondent contends that claimant's case is limited to his allegations relating to the non-renewal of his lecturer contract since that was the subject matter of his complaint. The Commission, therefore, cannot decide those claims related to the University's refusal to select claimant for a tenure track position or its creation of a hostile

work environment because they were not raised in his complaint. This argument is without merit.

It is well established that lawsuits growing out of administrative complaints "may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegation during the pendency of the case before the Commission."[1] *Sanchez* v *Standard Brands, Inc*, 431 F2d 464, 466 (5th Cir. 1970). Moreover, Commission Rule 37.9 states as follows:

> The commission on its own motion, on motion of the department, or on motion of the claimant may amend a charge at any time prior to issuance of an order based on the charge.

In this case, allegations concerning the denial of a tenure track appointment are related to those concerning the non-renewal of the lecturer contract. Both involved decisions which allegedly were based upon unlawful considerations of race or national origin and impacted upon claimant's continued employment with the University. Accordingly, the charge properly encompassed allegations related to the rejection of claimant's application for appointment as an assistant professor.

In contrast, claimant's allegations of a hostile work environment based upon race or national origin are not related to the subject matter of the complaint. Moreover, there was no admissible evidence that this claim was investigated. Nor is there any allegation of a hostile work environment set forth in the charge. Consequently, any allegations

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[1]The references in this quotation are to Title VII, with the "charge" being the equivalent to a "complaint" filed with the Department of Civil Rights, and the "Commission" being the Equal Employment Opportunity Commission.

dealing with the creation of a hostile work environment are outside the scope of this case and are dismissed.[2]

II

The issues presented in this case are whether claimant was denied an extension of his lecturer position or appointment as an assistant professor because of race or national origin.

A

Claimant is a graduate of the School of Agricultural Economics at the University of Nebraska. (I: 151). His Ph.D. is in agricultural economics. (I: 152).

Claimant was first hired as a lecturer in August 1989. Each lecturer contract is for a single academic year and covers the fall and winter semesters. (III: 104). Subsequently, claimant received three additional lecture contracts which extended through the 1992-93 academic year. (II: 324). He was denied a fifth contract for the 1993-94 academic year. (I: 64).

Executive Order 88-4 governs respondent's policy regarding the employment of lecturers. (Respondent Exhibit No. 4). Under this policy, a lecturer may only receive three consecutive employment contracts before being returned to the pool of candidates. (II: 320; III: 109-10). No other lecturer in the Economics Department has received more than three contracts. Id.

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[2]Even if there were no procedural defects, claimant did not present sufficient facts to support a hostile work environment claim. See, *Davis* v *Monsanto Chemical Co*, 858 F2d 345 (6th Cir 1988), *cert denied*, 490 US 1110 (1989).

In the course of his employment, claimant, on several occasions, applied for a tenure tract position as an Assistant Professor. (I: 34). He never received any response to these applications. (I: 36).

B

The essence of Dr. Karemera's first claim is that he was treated differently than a white lecturer with regard to the non-extension of his lecturer contract. Claimant cites Dr. Kathleen Possai as the comparable.

Section 202 of the Elliott-Larsen Civil Rights Act, provides in part,

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

MCL 37.2202 (1)(a); MSA 3.548(202)(1)(a).

A claim of race or national origin discrimination under Section 202 of this act can be established by showing disparate treatment. *Hickman* v *W-S Equipment Co, Inc*, 176 Mich App 17; 438 NW2d 872 (1989). To prevail, claimant must show that he, in fact, was treated differently and more adversely than Dr. Possai.

It is undisputed that the University's policy limits lecturer contracts to three consecutive academic years. Claimant, however, received four consecutive lecturer contracts. In this regard, claimant was the only lecturer in the Economics Department ever to receive four contracts. (II: 329). Claimant admits that he would have been the only lecturer to have ever received five consecutive contracts, had his contract been renewed

for another year. (II: 199). In contrast, Dr. Possai only received lecturer contracts for three consecutive academic years. (II: 323-24; III: 110).

The record shows that claimant was treated more favorably than his white comparable. Accordingly, he has failed to show disparate treatment on the basis of race or national origin.

C

To make out a prima facie case for denial of promotion, claimant must show that (1) he was a member of the protected group, (2) he was qualified and applied for the promotion, (3) he was considered for and denied the promotion, and (4) other employees of similar qualifications who were not members of the protected group were promoted at the time claimant's request was denied. *Bundy* v *Jackson*, 641 F2d 934 (D.C. Cir 1981). Each element must be proven for the claimant to succeed. *Grant* v *Michigan Osteopathic Med Ctr, Inc*, 172 Mich App 536; 432 NW2d 313 (1988).

If the claimant establishes a prima facie case, the burden shifts to the defendant to produce evidence of a legitimate non-discriminatory reason for its action. *Town* v *Michigan Bell Tel Co*, 455 Mich 688, 695, 568 NW2d 64 (1997). It is, however, only the burden of production, not persuasion, which shifts to the employer. Once the defendant provides a legitimate non discriminatory reason for its employment decision, the claimant retains the ultimate burden of proving discrimination. To prevail, the claimant must present admissible evidence that the employer's nondiscriminatory reason was not the true reason and that the claimant's age or religion was the motivating factor in the decision. *Town*, 455 Mich

at 696-697. The claimant must demonstrate the falsity of each reason articulated by the defendant. *Lytle* v *Malady* (On Rehearing), 458 Mich 153, 178; 579 NW2d 906 (1998).

Respondent asserts that claimant did not have an acceptable academic background to be considered for a tenure tract position at the University. (II: 296; 298). "[C]ourts ... should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters ... are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges." *Kunda* v *Muhlenberg College*, 621 F2d 532, 548 (3rd Cir. 1980).

In the present case, claimant is unable to identify any successful applicant for a tenure tract position who received his or her Ph.D. in agricultural economics. (I: 154). Claimant admitted that he knew nothing about the educational background or dissertation topics of any of the individuals hired as assistant professors during his employment at the University. (I: 152-58). In fact, respondent's Economic Department has no tenure tract faculty who obtained their Ph.D. degree from a school of agricultural economics. (II: 298-99; III: 115-20).

The record shows that claimant did not meet the requisite qualifications for consideration for appointment as an assistant professor. Accordingly, he has failed to make out a prima facie case of race or national origin discrimination.

It is clear from a review of the evidence and exhibits that claimant largely rested his discrimination claim on the testimony of Donna Hill. Ms. Hill is a former secretary to Dr. Goodman, who was the chair of the Economics Department during claimant's employment. Ms. Hill testified that in 1986 or 1987, Dr. Goodman made a racial joke. (II: 251-52). This happened only once in her presence. (II: 259-60). Ms. Hill asked Dr. Goodman to refrain from making such jokes, and, according to her testimony, he complied with her request. (II: 251; 259). Ms. Hill could not recall the contents of this joke. (II: 252).

For his part, Dr. Goodman denied making any racial jokes. (III: 127-28). In addition, Dr. Rossanna, the current Department chair, testified that he had never heard Dr. Goodman make any racial joke in the 9 or 10 years he has known him. (II: 327).

Dr. Karemera admitted that he never heard Dr. Goodman make any racial joke. (II: 385). Claimant testified, however, that another faculty member, Dr. Li Way Lee, told him that Dr. Goodman had made "nasty" racial remarks. Claimant admitted that Dr. Lee never told what had been said. Nor did claimant produce Dr. Lee as a witness in this case. (II: 385-86).

At most, there is a single alleged joke. "In order for comments in the workplace to provide sufficient evidence of discrimination, they must be '1) related [to the protected class of persons of which the plaintiff is a member]; 2) proximate in time to the [employment decision at issue]; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue.'" *Krystek* v *University of Southern Mississippi*, 164 F3d 251 (5th Cir 1999), citing *Brown* v *CSC Logic, Inc*, 82 F3d 651, 655 (5th Cir 1996).

In this case, there is insufficient evidence to show that Dr. Goodman's joke was ever made, was racial in nature, and, most importantly, could be related to any decision regarding the claimant. Any alleged joke predated claimant's employment by two or three years. In addition, Ms. Hill could not attribute Dr. Goodman's refusal to appoint claimant to a tenure track position to claimant's race. (II: 260).

Accordingly, this case should be dismissed.

Dated: 6-25-01

Valerie P. Simmons, Commissioner