

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Konstantinos Papakonstantinou
Charging Party,
V.
Minnesota Student Association,
Respondent.

ORDER GRANTING
SUMMARY JUDGMENT
AND DENYING MOTIONS
TO EXTEND TIME FOR
DISCOVERY-AND TO
AMEND-THE CHARGE
OF DISCRIMINATION

The above-entitled matter is before Steve M. Mihalchick, Administrative Law Judge, on Respondent's alternative motions for summary judgment or for an order restricting evidence and Charging Party's motions to extend the time for discovery and for leave to amend the charge of discrimination to add additional allegations. Oral argument on the motions was held April 10, 1992, at the Office of Administrative Hearings and the record was closed that day. Charging Party submitted additional material following April 10, 1992, that has been considered by the Administrative Law Judge.

Charging Party Konstantinos Papakonstantinou, 1015 Essex Street, No. 319, Minneapolis, Minnesota 55414, appeared on his own behalf. David R. Forro, Caldecott, Forro & Taber, 607 Marquette Avenue, Suite 300, Minneapolis, Minnesota 55402, appeared on behalf of Respondent Minnesota Student Association.

Based upon the record herein and for the reasons stated in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

1. Respondent's Motion for Summary Judgment is GRANTED.
2. Respondent's Motion to restrict evidence, being moot, is not decided.
3. Charging Party's motions for an order extending the time for discovery and for an order granting leave to amend the charge of discrimination are DENIED.

4. Charging Party's Charge of Discrimination Is DISMISSED.

Dated this 6th day of May, 1992.

STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69.

MEMORANDUM

Facts

Based upon the pleadings, affidavits and depositions submitted and construing the facts in a light most favorable to Charging Party, the following facts appear.

Charging Party is Greek and was born in Greece in 1957. He came to the United States in 1981 and is a United States citizen. He is a graduate student in mathematics and is working on his Doctoral Degree.

Respondent is an association of University of Minnesota students. It is governed by a Forum consisting of a large number of students elected directly or appointed as representatives of various student organizations. It uses several different committees to manage its operations and various projects. Such committees include the Executive Committee and the Educational Affairs Committee.

In 1988, Respondent decided to renew a project initiated several years earlier that was designed to provide information to students regarding classes offered by the University. This Student Class Information Project (SCIP), or University Class Information Project (UCIP) as it was renamed, was generally designed to survey students regarding the classes and the professors, compile that information and make it available to students, particularly freshman, at

registration. Because the UCIP involves an evaluation of faculty and because the survey takes some class time, there was resistance among some of the faculty to the project.

The Educational Affairs Committee was responsible for the UCIP. In February 1989, Charging Party was selected from two finalists for the position

of UCIP Coordinator. Both of the finalists were of foreign national origin. The position paid a stipend of \$175.00 per week. Charging Party took the position because of the money and because it would be an additional research project for his resume. The Educational Affairs Committee intended to rely upon Charging Party to design the survey instrument and methods and to coordinate the collection and compilation of the data and publication of the results. However, at the time he was hired, Charging Party's duties were not well defined. Charging Party thought of himself as having overall control of the UCIP.

Shortly after Charging Party was hired, Laura Schelin took over as Chair of the Educational Affairs Committee. She took more direct control over the UCIP and supervision of Charging Party's activities than had her predecessor. Charging Party and Schelin had difficulty working together. Schelin was not happy with Charging Party's job performance. Charging Party felt that Schelin was not devoting enough time to the project so that things were not getting done and that she was obstructing the project. He tried to go over her head on occasion by talking directly to various committee members about certain issues and actively sought a replacement for Schelin.

In mid-May 1989, Eric Huang, a member of Respondent's Executive Committee, asked Charging Party to prepare a concise summary to be presented to the Senate Consultative Committee describing the UCIP. Charging Party's view of that matter was that he and Schelin decided to use a description of the project that he had been preparing for another purpose. Charging Party prepared a thirteen-page document (Papakonstantinou Deposition 2) that was far too long, complex and had too many mistakes to be useful. Even after some editing it remained a five-page document with several mistakes. An acceptable document was not ready for the June 1, 1989 presentation.

It was the opinion of Schelin, Brian Bergson, Respondent's President at the time, and other members of the Educational Affairs Committee, that there was several deficiencies in Charging Party's job performance. Charging Party was told of the problems with his performance by Schelin, Bergson and others.

On June 27, 1989, he was sent a letter regarding his job performance signed by Bergson as MSA President, Schelin as Educational Affairs Committee Chair and Steve Boland, as Speaker of the Forum. The letter stated:

In the past months it has come to our attention that you have gone outside your job description as the UCIP coordinator, missed deadlines and failed to comply with MSA policy.

As UCIP coordinator, your job is to collect viable information concerning the instruction of individual classes, analyze that information, coming up with a budget for the UCIP project, and designing a method for publication, and most importantly, turning all of your work into the Educational Affairs committee.

Your job does not include gathering support for the project from University faculty or administration, and it is not your job to find a chair for your supervising committee, the Educational Affairs committee.

The executive committee has received several complaints about your performance. If you fail to improve your performance or if you go outside your job description again your position will be terminated.

Some of the executive members have also received complaints that you have made derogatory comments to people's national origin or culture. If these comments continue, that will also be grounds for dismissal.

Charging Party disputed at the time that there was any deficiency in his performance and disputes that today. Nonetheless, in the view of Schelin, Bergson and other members of the Executive Committee and Educational Affairs Committee, Charging Party's job performance and ability to work with Schelin did not improve. At a meeting of the Executive Committee on September 6, 1989, a motion to terminate Charging Party was made and passed unanimously. The decision to terminate Charging Party was made because the Executive Committee members believed, based upon their knowledge of Charging Party's job performance and reports given to them, that his job performance was inadequate and had not been corrected. The decision was not based in any part upon Charging Party's national origin.

Respondent's bylaws regarding termination and grievance policies at the time provided certain rights to regular employees, which Charging Party is assumed to be for purposes of this motion. It provided three causes for dismissal:

- i. Direct and substantial interference with the efforts of employees or representatives of the Association to carry out their duties.
- ii. Refusal or serious inability to perform with reasonable efficiency the duties assigned.
- iii. Deliberate and/or serious mismanagement of funds, negotiable instruments, inventory, or property of the Association or under its management.

The bylaws went on to provide that in the case of a dismissal under Paragraph ii, the employee must have been provided with two written notices on prior occasions of performance below adequate level of quality. Thus, to the extent Charging Party was an employee entitled to the rights provided by the bylaws, his termination was improper because it was for inadequate performance and he had received only one prior written notice. The Executive Committee was not aware of the requirement for two written warnings when it took its action. Bergson learned of the requirement soon after the meeting and consulted with legal counsel who recommended that the Executive Committee meet again to rescind its action and issue Charging Party a second and final written warning. Bergson scheduled a meeting for September 14, 1989, for that purpose and gave notice to the Executive Committee members.

At the time of the September 6, 1989 Executive Committee meeting, Charging Party was in Florida. He returned a few days later to learn of the

Executive Committee's action. He was not aware of the meeting scheduled for September 14, 1989. Charging Party was aware of the requirement for two written notices and felt that the Executive Committee's action was illegal because of that, as well as unfounded. On September 12, 1989, Charging Party began calling members of the Executive Committee and others who attended the Executive Committee meetings as non-voting ex-officio members. Charging Party felt that someone was out to get him and asked some of the people to refrain from voting on the issue if it came up again so that he could figure out who was acting against him. He told Karin Alexander, a member of the Executive Committee at the time, that if she didn't have full knowledge of the situation, she should avoid voting because things would "get ugly." He told her that "something bad may happen". When asked to explain that, he told her that his character and reputation had been attacked and that he would try to become whole again, even if that meant going to court and the newspapers. She told him that he should write up whatever it was that he wanted her to know and send it to her. Charging Party also went to the Respondent's offices and confronted numerous individuals there and made it difficult or impossible for the staff members present to do their jobs that day.

Prior to the September 14, 1989 Executive Committee meeting, Bergson began hearing of the contacts Charging Party was making with the Executive Committee members and again contacted legal counsel. Counsel advised Bergson to determine whether Charging Party's actions could constitute a basis for immediate termination. At the Executive Committee meeting of September 14, 1989, a closed meeting was held to consider the situation with Charging Party. According to the minutes of the meeting, there was concern about Charging Party's "conduct/threats and warnings/mental stability." Bergson reviewed the bylaws regarding termination for the Committee and noted that at the prior meeting, the Committee had voted to terminate Charging Party prematurely because he had been terminated for inadequate performance, but without two prior written warnings. The Committee then decided that Charging Party's conduct in threatening Executive Committee members and employees and interfering with their duties was cause for termination under section 3a(i) of the bylaws. The Committee then voted unanimously to terminate Charging Party immediately upon that basis.

The Executive Committee's decision to terminate Charging Party at its meeting of September 14, 1989, was based upon the Committee members' findings

that Charging Party's conduct violated the prohibition against interfering with the members of the Executive Committee's function of overseeing Respondent's operations and, to some degree, upon the fact that his job performance had been inadequate. No part of the decision was based upon Charging Party's national origin.

After Charging Party was terminated, the UCIP remained dormant until the spring of 1991 when an independent contractor was hired to restart the project. However, Charging Party was terminated for the reasons previously stated and not because the position of UCIP coordinator became unnecessary or the project was terminated.

Charging Party's Motion for Additional Time

Charging Party has moved that he be allowed additional time for discovery, both for purposes of the summary judgment motion and for the hearing. The Administrative Law Judge denied the motion with respect to the summary judgment motion but did allow Charging Party until March 27, 1992, to file his response to the summary judgment motion and delayed argument on the motion until April 10, 1992, thus giving Charging Party well over a month to address the motion.

There have been many delays in this proceeding caused by Charging Party. He has requested additional time for responding to discovery, for completing discovery, responding to motions several times. He has used excuses such as class conflicts, examination conflicts and illness in requesting extensions. Generally, the Administrative Law Judge has been fairly generous in granting extensions. Charging Party has claimed throughout the proceedings to have a great deal of evidence in the many tape recordings he has made of almost every conversation he has had with people at the University. Yet he has made it difficult for Respondent to review any of those tapes by insisting on unusual security procedures and by delaying the production of tapes until the last minute. He claims that additional time is needed because he has been misled by the Respondent and its attorney while it is clear that Respondent and its attorney have maintained a consistent position and view of the facts throughout these proceedings. Charging Party has had knowledge of the facts in this case since his termination in 1989 and has, since that time, not been able to produce any evidence outside of his own testimony to support any of his positions. In the depositions and written discovery he has completed, he has not obtained any evidence with which he agrees and therefore claims that Respondent and those witnesses are misleading or surprising him. There is nothing to indicate that any further discovery would allow him to discover any material facts favorable to him and it appears that much of the discovery he has conducted is for purposes beyond issues relevant to this proceeding. Discovery has produced no evidence favorable to Charging Party to this point and there is no reason to believe that it would in the future. Therefore, no additional time will be granted for discovery.

Summary-Judgment Motion

Charging Party has presented no credible direct evidence of discriminatory intent by the Respondent's Executive Committee in terminating him. He makes only some general allegations that comments were made at various times that Respondent should not have a "Greek man" representing it on the UCIP project. In the absence of direct evidence of discrimination, Minnesota Law permits plaintiffs to prove discriminatory intent by circumstantial evidence in accordance with the shifting burden analysis adopted in McDonnell Douglas Corp. v, Green, 411 U.S. 792 (1973).
Feges v. Perkins Restaurants Inc. , N.W.2d (Minn. May 1, 1992); Sigurdson v. Isanti County, 386 N.W.2d 715 (Minn. 1986). The shifting burden of proof analysis established by the McDonnell Douglas test also applies to a Motion for Summary Judgment. Rademacher, v FMC Corporation, 431 N.W.2d 879 (Minn. App. 1988); Shea v. Hanna Mining, Co, , 397 N.W.2d 362 (Minn. App. 1986).

The first step of the McDonnell Douglas analysis requires Charging Party to establish a prima facie case. In a termination action such as this, the elements of a prima facie case are:

1. That the employee was a member of the protected class ;
2. That the employee was qualified for the position held;
3. That the employee was discharged; and
4. That the employer assigned a nonmember of the protected class to do the same work.

Rademacher v. FMC Corporation, 431 N.W.2d 879, 882 (Minn. App. 1988). For the purposes of the summary judgment motion only, Respondent concedes Elements 1, 2 and 3, but argues that Charging Party cannot establish Element 4. After Charging Party's termination, the project went dormant and was not revived for nearly eighteen months. The establishment of a prime facie case under the McDonnell Douglas analysis creates an inference of unlawful discrimination because the facts shown by the prima facie case, unless otherwise explained, are more likely than not to be based upon impermissible factors. FurnCo Construction Corp. v. Wates, 438 U.S. 567, 577 (1978). In other words, the plaintiff in discrimination cases must show that the most common reasons for discharge, nonqualification or elimination of the position, did not exist, However, in this case, Respondent does not claim that it terminated Charging Party because the position was eliminated; it specifically claims that he was terminated for cause. Therefore, it is not necessary for Charging Party to establish that his duties were assigned to a nonmember of the protected class. Moreover, the fact is that Respondent did continue to want the duties performed and ultimately replaced Charging Party with an independent contractor whose national origin is not identified. Therefore, Charging Party has established a prima facie case of discrimination based upon his national origin.

Once the Charging Party establishes a prima facie case, the burden of production then shifts to Respondent to articulate a legitimate nondiscriminatory reason for the action complained of by the charging party. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) v. United-Press_International , Inc., 330 N.W.2d 428 (Minn. 1983).

Respondent has met its burden of production by proffering legitimate, nondiscriminatory reasons for firing Charging Party: His interference with

the performance of the duties of members of the Executive Committee and Respondent's employees by attempting to prevent them from voting on his termination, combined with his poor job performance. Since the Respondent has produced legitimate reasons for the termination, Charging Party must prove his case by proving that it is more likely than not that the proffered reasons are a pretext for discrimination or not worthy of belief. *Burdine*, at 256; *Feges v. Perkins Restaurant, Inc.*, N.W.2d (Minn. May 1, 1992).

Charging Party has submitted several hundred pages of his own versions of the facts, excerpts of tape recordings he made of his discussions with

Respondent's staff, committee members and other persons, depositions and arguments. The Administrative Law Judge has read every page of that material and has found nothing to indicate that the reasons given by Respondent for Charging Party's termination were anything but the true reasons. First, it is clear that the Executive Committee members were convinced that Charging Party's job performance was inadequate and that he later interfered with the ir duties. While Charging Party denies that, there is sufficient evidence to indicate that the Executive Committee was correct. Charging Party was often late, offended University faculty and had difficulty working with his supervisor. He did interfere with the performance of committee members duties. He acted similarly in this proceeding and he was often late in responding to discovery, wasted large amounts of time on matters important only to him but irrelevant to the proceedings and blamed others for his problems. Second, Charging Party's evidence of pretext consists in large part of conclusions and allegations of wrongdoing by others that appear to arise mostly out of his failure to accept any criticism of his own work and to conjure up illegal acts by those around him. Third, Respondent's allegation that he was treated differently because he was a Greek is not supported by any credible evidence. He was treated as he was because he was doing a poor job. For example, he was told not to contact faculty directly because that was not his job and probably because his superiors had become aware that he was offending some faculty members. Finally, Charging Party's evidence of a hostile attitude toward foreign-born persons within the Association was not particularly relevant. While he was in Florida, a fellow instructor told him that he should not date American women and should only date Greek women. At some unidentified meeting of the Executive Committee or the Respondent's Forum, somebody made a comment about assigning the UCIP to a "Greek man." He was told by a foreign student of Respondent's known animosity toward persons not born in America. Such statements are too isolated and remote to prove that such opinions were held by members of the Forum generally and nothing was offered to link any of those statements or positions to any members of the Executive Committee that fired Charging Party.

The Administrative Law Judge concludes, therefore, that Charging Party has failed to demonstrate that the reasons offered by Respondent for its

decision to fire Charging Party were a pretext for discrimination or not worthy of belief. Charging Party has therefore failed to prove that he was terminated on the basis of his national origin in violation of Minn. Stat. 363.03, subd. 1(2) and his charge must be dismissed.

Respondent's Motion to Restrict Evidence

Respondent has also moved that Charging Party be barred from introducing at the hearing in this matter any tape recordings not produced by the discovery deadline of February 14, 1992, and all tapes not listened to by Respondent as a result of Charging Party's actions limiting Respondent's access to those tapes. Because summary judgment has been granted in this matter, this Motion has become moot and need not be decided,

Charging Party's Motion to Amend

On March 2, 1992, Charging Party filed a Motion for permission to amend the charges to include allegations of violations of Minn. Stat. 363.03, subd. 5(1), (2), subd. 6(1), (2), (3) and subd. 7(1) and (2) and to add several individuals as named respondents to the charge of discrimination. He also mentioned possible allegations of discrimination based on sex and affectional preference. The cited provisions make it an unfair discriminatory practice for educational institutions to discriminate in any manner from the full utilization of or benefit from any educational institution because of any of the proscribed bases, to exclude, expel or otherwise discriminate against a person seeking admission because of any of the proscribed bases, to aid and abet in any of the practices forbidden by the Human Rights Act and to engage in a reprisal against any person because that person has opposed a practice forbidden by the Human Rights Act, filed a charge or participated in an investigation under the Human Rights Act or associated with persons who are disabled or of a different race, color, creed, religion or national origin. This Motion must be denied for several reasons. First, the allegations made are far beyond Charging Party's original claim that he was illegally terminated. He claims now that he is being harassed by members of Respondent who are complaining to him about having to endure this proceeding and other lawsuits Charging Party has brought. Secondly, because the Administrative Law Judge has determined that Respondent did not illegally discriminate against Charging Party when it terminated him there can be no violation for aiding and abetting or for reprisal related to that termination. Third, the Respondent is not an educational institution. Fourth, there is simply no indication in any of Charging Party's submissions of any violation of the Human Rights Act by Respondent or any of the persons or institutions associated with it in their treatment of Charging Party. Fifth, nothing in the record would support any claim that he was discriminated against because of sex or affectional orientation. Moreover, discrimination on the basis of affectional orientation is not prohibited by the Human Rights Act. For all these reasons, Charging Party's Motion to amend must be denied.

SMM

