

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

Thursday, September 24, 2015
City Council Chambers

CALL TO ORDER:

The September 24, 2015, meeting of the Commission on Human Rights was called to order at 4:02 p.m. by Bennie Shobe, Chair.

ROLL CALL:

The roll call was called and documented as follows:

MEMBERS PRESENT:

Commissioners: Bennie Shobe (Chair), Mary Reece (Vice-chair), Amanda Baron, Liz Kennedy-King, Susan Oldfield, Micheal Q. Thompson, Jon Rehm and Melanie Ways. Quorum present.

MEMBERS ABSENT:

Commissioners: Takako Olson.

STAFF PRESENT:

LCHR: Kimberley Taylor-Riley, Jocelyn Golden, Margie Nichols, Abigail Littrell, Loren Roberts and Mary Carol Bond.

APPROVAL OF AUGUST 27, 2015, MINUTES:

A motion was made by Thompson and seconded by Baron to approve the minutes of the previous meeting.

Hearing no discussion, Chairperson Shobe asked for the roll call. Voting "aye" was: Shobe, Baron, Kennedy-King, Reece and Ways. Oldfield, Thompson and Rehm abstained. Motion carried.

APPROVAL OF SEPTEMBER 24, 2015, AGENDA:

A motion was made by Reece and seconded Oldfield to approve the meeting agenda.

Chairperson Shobe asked for the roll call. Voting "aye" was: Shobe, Baron, Kennedy-King, Oldfield, Thompson, Reece, Rehm and Ways. Motion carried.

CASE DISPOSITIONS:

LCHR #15-0403-001-PA

A motion was made by Ways and seconded by Kennedy-King to recommend a finding of **no reasonable cause** on both issues.

Kennedy-King questioned how the conflict over a generic prescription arose. Littrell clarified that the Respondent generally was dissatisfied with public insurance programs which the Complainant felt was directed at him.

Reece noted the Respondent's insensitivity to the Complainant's disability and related unemployment and thus need for publicly provided insurance. Kennedy-King supported this sentiment, and said the first allegation seemed supported by the investigation. Littrell explained that had the complaint been analyzed under a disparate impact theory, the result may be different, but that the Complainant alleged disparate treatment based on his disability, not disparate impact of a facially neutral policy.

Rehm asked if there was evidence that the Respondent knew about the Complainant's disability. Littrell answered that the Respondent says he did not know, but Complainant's statement and Complainant's file with Respondent's office indicate that Respondent had knowledge of the disability.

Hearing no further discussion, Chairperson Shobe asked for the roll call on the motion of No Reasonable Cause on both counts. Voting "aye" was Shobe, Baron, Thompson and Ways. Voting "no" was Reece, Kennedy-King, Oldfield, and Rehm. Motion failed as the tally was 4-4.

A motion was made for a finding of **Reasonable Cause** for the first allegation, "subjected to different or unequal treatment on the basis of a disability" by Reece and seconded by Kennedy-King.

Further discussion ensued as to whether or not the Respondent's treatment of the Complainant was based on his disability or if Respondent interacted with other patients, with no protected status, in the same manner. Littrell explained that Lincoln city code does not provide source of income protection that exists in some jurisdictions.

Rehm asked about the burden of proof in a case of public accommodation discrimination. Littrell affirmed that the commissioners are to apply the same reasonable cause standard to employment, public accommodation and housing cases. Shobe summarized that the Respondent was angry with the system, not the patient, and although Complainant was justifiably offended, the incident likely did not rise to the level of unlawful discrimination. Reece noted that the incident caused the Complainant to not return to the business, because he did not feel welcome in Respondent's office. Reece queried whether making certain individuals unwelcome was tantamount to discrimination. Taylor-Riley noted that the negative treatment of the Complainant

must be based on his disability specifically. Adverse treatment based on the insurance carrier is not protected by the law.

Hearing no further discussion, Chairperson Shobe asked for the roll call on the motion made by Reece and seconded by Kennedy-King of a Reasonable Cause finding on the first charge. Voting “no” was Shobe, Baron, Kennedy-King, Oldfield, Rehm, Thompson and Ways. Voting “yes” was Reece. Motion failed as the tally was 1-7.

A new motion was made by Ways for **No Reasonable Cause** finding on the first allegation, seconded by Thompson.

Rehm noted that the investigation was thorough and the elements of discrimination based on disability had not been established.

Hearing no further discussion, Chairperson Shobe asked for the roll call. Voting “aye” was Shobe, Baron, Kennedy-King, Oldfield, Rehm, Thompson and Ways. Voting “no” was Reece. Motion carried 7-1.

A motion for a **No Reasonable Cause** finding on the second allegation in the complaint was made by Oldfield and seconded by Ways.

Hearing no discussion, Chairperson Shobe asked for the roll call. Voting “aye” was Shobe, Reece, Baron, Kennedy-King, Oldfield, Rehm, Thompson and Ways. Motion carried 8-0.

LCHR #15-0414-008-E-R

A motion was made by Reece and seconded by Kennedy-King to recommend a finding of **no reasonable cause** on all issues.

Shobe questioned how the Complainant could be aggrieved under the discrimination laws. Nichols explained that the employment discrimination laws protected individuals who asserted the rights of others they believed were aggrieved and that the law also protected individuals who reported suspected unlawful discrimination from retaliation.

Reece commented that the strongest evidence presented by the Complainant was the temporal relationship between the Complainant’s complaint on behalf of the other employee and her termination.

Thompson asked whether the investigator confirmed that the co-worker did not wish to pursue a complaint. Nichols answered that it was confirmed through other sources but not the allegedly harassed party as she was not available.

Baron confirmed the date of the written warning with the investigator.

Hearing no further discussion, Chairperson Shobe asked for the roll call. Voting "aye" was: Shobe, Baron, Kennedy-King, Oldfield, Thompson, Reece, Rehm and Ways. Motion carried.

LCHR #15-0515-013-E-R

A motion was made by Thompson and seconded by Ways to recommend a finding of **No Reasonable Cause** on both issues.

There was discussion on the accuracy and the fairness of the payroll procedures. Littrell commented that there may have been some problems with payroll procedures but all employees were treated the same. Rehm asked why retaliation was not alleged in the charge. Littrell replied that the Complainant did not allege he was retaliated against for engaging in protected activity under the employment discrimination laws. There was discussion about the interaction between wage and hour laws and discrimination law and what agencies have jurisdiction to investigate wage and hour violation allegations.

Oldfield commented that the Complainant complained about the payroll. Littrell replied that, for the Commission's purposes, the complaint must be about national origin discrimination to qualify for protection under the employment discrimination laws. There was no evidence that other employees, outside the Complainant's protected class, were treated more favorably than the Complainant in regard to wages.

Hearing no further discussion, Chairperson Shobe asked for the roll call. Voting "aye" was: Shobe, Baron, Kennedy-King, Oldfield, Thompson, Reece, Rehm and Ways. Motion carried.

LCHR #15-0528-010-H

A motion was made by Oldfield and seconded by Baron to recommend a finding of **No Reasonable Cause** on all issues.

Oldfield asked about the Respondent's decision to repair the roof of an unoccupied unit prior to repairing the Complainant's roof. Littrell replied that the repairs were completed in the order in which they were reported, but the vacant one was much worse and could not be rented without making the repair.

Hearing no further discussion, Chairperson Shobe asked for the roll call. Voting "aye" was: Shobe, Baron, Kennedy-King, Oldfield, Thompson, Reece, Rehm and Ways. Motion carried.

LCHR # 15-0529-015-E-R

A motion was made by Kennedy-King and seconded by Reece to recommend a finding of **No Reasonable Cause** on the first issue.

Hearing no discussion, Chairperson Shobe asked for the roll call. Voting "aye" was: Shobe, Baron, Kennedy-King, Oldfield, Thompson, Reece, Rehm and Ways. Motion carried.

A motion was made by Oldfield and seconded by Kennedy-King to recommend a finding of **No Reasonable Cause** on the second issue.

Hearing no discussion, Chairperson Shobe asked for the roll call. Voting "aye" was: Shobe, Baron, Kennedy-King, Oldfield, Thompson, Reece, Rehm and Ways. Motion carried.

A motion was made by Ways and seconded by Kennedy-King to recommend a finding of **Reasonable Cause** on the reasonable accommodation allegation.

Commissioners asked about the five accommodations requested by the Complainant. Thompson asked if the standing and lifting accommodation was required. Littrell replied that the Complainant was required to work in the file room and the request would have allowed her to limit her time performing this task. There was discussion about how many requests were granted by the Respondent.

Rehm noted that the Complainant was allowed FLMA leave.

There was further discussion about the Respondent's acknowledgement of the Complainant's reasonable accommodation requests and the supervisors continued scrutiny of the Complainant's performance. Littrell replied that the Respondent said that they granted all of the accommodation requests but that the documentary evidence indicated that they did not acknowledge two of Complainant's requests. Oldfield asked for the investigator's opinion on the change to the spreadsheet that was used to track the Complainant's tasks. Littrell replied that she didn't think the supervisor made the changes to confuse the Complainant; however, the result was not the accommodation the Complainant was seeking.

Rehm asked if the Complainant was promoted in April by a different supervisor. Littrell replied yes. The Commissioners discussed whether the change in supervisors and changes within the company should have resulted in allowing the Complainant more time to adjust. Littrell said that the Respondent reported that they tried to work with the Complainant to help her adjust and improve her performance. Around that time the Complainant's health was declining and these combined could have aggravated some of the performance issues.

Thompson asked about the petty cash and how much should have been there. Littrell said the Complainant reported that it was in the desk when she took over the position and she didn't do anything with it.

Rehm asked about other complaints by other employees about the management style of the Complainant. Littrell said that the Complainant was well liked by the employees, but they were

more comfortable seeking direction from Complainant's supervisor. They all agreed that it was a much better working environment with the Complainant gone from the office.

Baron asked about the days needed to show improvement of performance at work. Littrell said that 27 days passed between the reasonable accommodations request and Complainant's discharge. Respondent believed this was enough time to establish whether the accommodations were sufficient and effective.

Hearing no further discussion, Chairperson Shobe asked for the roll call. Voting "aye" was: Kennedy-King, Oldfield, and Ways. Voting 'no' was Thompson, Reece, Rehm, Shobe, and Baron. Motion for **reasonable cause** failed.

A motion was made by Rehm and seconded by Reece to recommend a finding of **No Reasonable Cause** on the reasonable accommodation issue.

Rehm said he did not believe the Complainant was qualified to do the job she was hired for. The Respondent made accommodations for the Complainant and she still was not able to do the job. Littrell discussed the FLMA leave and noted that it is not, in this instance, considered to be a reasonable accommodation.

Oldfield said that they seemed to only grant the three accommodations listed in an email. Rehm replied that the Complainant's disability have been too severe to be accommodated. Kennedy-King said she thought the employer did not make good faith effort in accommodating the Complainant. Reece said that as time went on the Complainant, due to declining health, seemed to have more difficulty performing her duties as a manager.

Littrell said case law creates an obligation for employers to engage in an interactive process to determine what, if any, reasonable accommodations may be effective and that failure to engage in the interactive process is indicative of the employer's bad faith. Reece noted that it is hard to decide how much the employer should try to accommodate.

Hearing no further discussion, Chairperson Shobe asked for the roll call. Voting "aye" was: Shobe, Baron, Thompson, Reece, and Rehm. Voting 'no' was Kennedy-King, Oldfield, and Ways. Motion carried.

A motion was made by Oldfield and seconded by Kennedy-King to recommend a finding of **Reasonable Cause** on the issue of being terminated on the basis of disability.

Hearing no discussion, Chairperson Shobe asked for the roll call. Voting "aye" was: Kennedy-King, Thompson, Oldfield, and Ways. Voting 'no' was Shobe, Baron, Reece, and Rehm. Motion for **reasonable cause** failed.

A motion was made by Rehm and seconded by Reece to recommend a finding of **No Reasonable Cause** on the issue of being terminated on the basis of disability.

Hearing no discussion, Chairperson Shobe asked for the roll call. Voting "aye" was: Shobe, Baron, Thompson, Reece, and Rehm. Voting 'no' was Kennedy-King, Oldfield, and Ways. Motion carried.

LCHR # 15-0610-017-E-R

A motion was made by Kennedy-King and seconded by Thompson to recommend a finding of **No Reasonable Cause** on all issues.

Shobe asked about whether the Complainant wanted the Director position and why she remained an interim director. Nichols replied the Complainant was hesitant to assume the director title because she believed the Respondent didn't run the company correctly and she disagreed with some of the policies and procedures. The Complainant also did not believe that the Respondent was satisfying her licensing requirements. Shobe asked whether the Complainant met the educational requirements of the Director position. Nichols affirmed that Respondent paid for Complainant to complete the education required for the position.

The Commissioners discussed the catalyst for the argument between the Complainant and Respondent. Nichols replied that it revolved around Complainant's availability.

Hearing no further discussion, Chairperson Shobe asked for the roll call. Voting "aye" was: Shobe, Baron, Kennedy-King, Oldfield, Thompson, Reece, Rehm and Ways. Motion carried.

PRE-DETERMINATION AGREEMENTS:

LCHR #15-0813-016-H

A motion was made by Reece and seconded by Ways to recommend an approval of the pre-determination settlement.

Hearing no discussion, Chairperson Shobe asked for the roll call. Voting "aye" was: Shobe, Baron, Kennedy-King, Oldfield, Thompson, Reece, Rehm and Ways. Motion carried.

ADMINISTRATIVE CLOSURES:

LCHR NO.: 15-0706-019-E-R

A motion was made by Kennedy-King and seconded by Ways to recommend an approval of administrative closure due to lack of jurisdiction.

Rehm asked for the reason for the closure. Littrell explained that it was due to the investigator's inability to establish the Complainant's identity. Taylor-Riley said the evidence indicated that the Respondent was issuing the payroll under a name that did not match the name Complainant signed on his complaint.

Hearing no further discussion, Shobe asked for the roll call. Voting "aye" was: Shobe, Baron, Kennedy-King, Oldfield, Thompson, Reece and Ways. Abstaining was Rehm. Motion carried.

LCHR NO.: 15-0722-021-E-R

A motion was made by Reece and seconded by Shobe to recommend an approval of administrative withdrawal with settlement.

Hearing no discussion, Shobe asked for the roll call. Voting "aye" was: Shobe, Baron, Kennedy-King, Oldfield, Thompson, Reece, Rehm and Ways. Motion carried.

OLD BUSINESS:

Outreach Activities

Roberts reported on the Streets Alive event and thanked Commissioner Thompson for his participation. The Bed Bug Prevention event was well attended by 70 people and some individuals were turned away because there was not enough space, so another session will be planned in the future.

Future events: September 29- Project Homeless Connect at Pinnacle Bank Arena; OLLI (UNL life-long learning group) presentation at UNL about the LCHR and Spanish culture; October 6 – Lincoln Libraries, Hispanic Heritage Celebration; October 9 - Hispanic Celebration at the Capital; October 13 – Loren will present at the Multi-cultural Awareness Commission (MAC) to update them on LHCR activities.

NEW BUSINESS:

2016 Civil Rights Conference

Roberts reported that the planning continues for the 2016 Civil Rights Conference. The bids had gone out and there were no replies so the Purchasing Department will contact some venues to solicit competitive bids. Baron proposed SCC as a venue. Taylor-Riley was concerned it may be too small. Baron gave Roberts a name to contact for more information.

Training

Nichols attended Fair Housing training at the John Marshall School of Law. Taylor-Riley will attend the IOHRA conference in Alabama which will include sessions on voter's rights and police issues. Littrell attended the National HUD policy conference.

Nichols advised that the new HUD contract is the largest in LCHR history since the receipt of the initial HUD Capacity Building Fund from 2001-2003. The contract provides for case processing, administrative funds, and training.

Taylor-Riley updated Commissioners on outreach activities including: October 7th – she will present at the State Bar Association on Domestic Violence; and she will also present at the American Association of University Women in October concerning Women’s Civil Rights issues.

PUBLIC COMMENT:

No Public Comment

The meeting was adjourned at 5:50 p.m.

Next Meeting:

Thursday, October 29, 2015, at 4:00 p.m.
555 S. 10th Street, 1st floor, City Council Chambers.