

Commission on Human Rights and Opportunities ex rel.	: Connecticut Commission on Human Rights and Opportunities
	:
Betty Gabriel	: CHRO No. 0620141
	: EEOC No. 16aa600013
	:
Rose Ann Carlson	: CHRO No. 0620142
	: EEOC No. 16aa600014
v.	:
	:
Town of Fairfield	: July 10, 2009

Ruling re: the commission's motion for reconsideration of the ruling precluding the
commission from calling Josephine O'Halloran as a witness

I

In March 2005, Josephine O'Halloran, Betty Gabriel, Rose Ann Carlson and Matt Decker applied for the position of zoning inspector in the Town of Fairfield's (respondent) planning and zoning department. They were interviewed by Joseph Devonshuk, the sole decision-maker. Decker was the successful candidate. Thereafter, in September 2005, O'Halloran, Gabriel and Carlson separately filed affidavits of illegal discriminatory practice with the commission. Each alleged that the respondent had violated Title VII and General Statutes §§ 46a-58 (a) and 46a-60 (a) (1) when it refused to hire her for the position of zoning inspector because of her sex.

O'Halloran's affidavit, CHRO No. 0620146, was certified for public hearing on April 17, 2007. Her public hearing was held on diverse days between April 28, 2008

and August 25, 2008 and the final decision, dismissing her affidavit, was issued on May 20, 2009. The affidavits of Gabriel and Carlson were certified for public hearing on August 11, 2008, and their consolidated public hearing is scheduled to commence in September 2009.

On March 5, 2009, the commission filed its proposed witness lists. The commission listed O'Halloran as one of its potential witnesses in the public hearing for Gabriel and Carlson. The commission summarized O'Halloran's testimony as follows: "Female applicant for the position of Zoning Inspector. She will testify about her interview with Joseph Devonshuk; her job duties in the Zoning department; her application and qualifications for the position of Zoning Inspector; the actions of the Respondent during the interview process; her performance in her position; her background, experience and education; her knowledge reading zoning maps; her familiarity with the permitting process in the town; her understanding of the THEA union contract as it relates to promoting individuals within a department; the humiliation she felt during the interview process; the discrimination she suffered; the treatment of the other two female applicants and other related matters." (Emphasis added.) Commission's witness list for Carlson, 2. See also Commission's witness list for Gabriel, 1 – 2.

On March 19, 2009, the respondent filed its objections to the commission's proposed witnesses and exhibits, which included its objection to testimony by O'Halloran. On June 17, 2009, a prehearing conference was held at which the

undersigned sustained the respondent's objection. On June 29, 2009, the commission filed a motion for reconsideration (motion) of the ruling and, on July 2, 2009, the respondent filed its objection. For the reasons set forth, the commission's motion is denied.

II

A

In its motion, the commission raised three arguments. First, the commission contended that "Josephine O'Halloran's testimony is relevant and material to these consolidated cases. O'Halloran's experience of feeling discriminated against by Respondent's interviewing and selection process is directly relevant and material to Carlson and Gabriel's claims of discrimination by the same decision-maker during the same interviewing and selection process." Motion, 2.

"We are mindful that evidence is relevant if it has a tendency to establish the existence of a material fact. . . . Relevant evidence is evidence that has a logical tendency to aid the trier [of fact] in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, along or with other facts, renders the existence of the other either more certain or more probable." (Internal quotation marks omitted.) *United Technologies Corp. v. Commission on Human Rights & Opportunities*, 72 Conn. App. 212, 229, cert. denied, 262 Conn. 920 (2002).

In this case, O'Halloran's proposed testimony about her interview, her job duties, her qualifications for the position, her job performance, her background, her understanding of the union contract and her humiliation, as well as her subjective feelings of unproven discrimination, offers no obvious or logical connection to the issue of the respondent's alleged discriminatory conduct toward Gabriel and Carlson. In addition, given that O'Halloran was not qualified for the position of zoning inspector; *CHRO ex rel. Josephine O'Halloran v. Fairfield*, CHRO No. 0620146, Final decision, 29 – 34 (May 20, 2009); it is particularly evident that there is an absence of a logical connection between the respondent's decision not to hire O'Halloran and its alleged discrimination against Gabriel and Carlson.

B

The commission next argued that "O'Halloran is similarly situated as defined by the United States Supreme Court in *Spring/United Management Company v. Mendelshohn*, 128 S.Ct. 1140, 1144 (2008), with the two other female employees." Motion, 2. According to the commission, O'Halloran is similarly situated because "O'Halloran, Carlson and Gabriel's claim is that they were discriminated against by the same decision-maker." Motion, 3. The commission, though, misapplies the similarly situated standard.

“To meet the fourth prong of that prima facie showing, a female employee must establish that she was treated less favorably than comparable male employees in circumstances from which a gender-based motive could be inferred. . . . In other words, the female employee must show that in all material respects, she was similarly situated to a male employee, but was treated differently on the basis of her gender.” (Citations omitted; internal quotation marks omitted.) *United Technologies Corp. v. Commission on Human Rights & Opportunities*, supra, 72 Conn. App. 226. The purpose of the similarly situated standard, then, is to support an inference of discrimination by identifying non-basis employees treated different from a complainant for no apparent reason other than a protected basis.

O’Halloran, though, is not a male applicant treated different from Gabriel and Carlson. Rather, she is also, like Gabriel and Carlson, a female applicant who was not hired for the position of zoning inspector. O’Halloran does not meet the criteria of similarly situated to be called as a similarly situated witness.

C

The commission further argued that “Carlson and Gabriel each have the right to bring witnesses to corroborate their testimonies. O’Halloran’s testimony would corroborate the complainants’ testimonies.” Motion, 3. However, “[t]here is no constitutional or statutory requirement that every witness must testify in a . . . hearing .

. . . The erroneous admission [or omission] of evidence will not invalidate an administrative order unless substantial prejudice is affirmatively shown . . . The burden is on the plaintiff to prove that the evidentiary ruling of an administrative hearing officer is arbitrary, illegal or an abuse of discretion.” (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities v. University of Connecticut*, 1996 WL 737513, 3 (Conn. Super., Docket No. 95-57527s, December 16, 1996).

In its proposed witness list, the commission represented that, in addition to testifying in detail about herself, O’Halloran would testify about “the treatment of the other two female applicants”. The commission, though, provided no specific information in its proposed witness list or its pending motion as to the discriminatory treatment of Gabriel and Carlson that O’Halloran personally observed. There is no information that O’Halloran was present during the interviews of Gabriel or Carlson, nor is there any information that O’Halloran participated in the decision to hire Decker. The commission also provided no specific information as to what testimony O’Halloran could corroborate that would both need corroboration and also not be unduly repetitious.

III

For the foregoing reasons, the commission's motion to reconsider is denied.

Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Ms. Betty Gabriel
Ms. Rose Ann Carlson
Cheryl A. Sharp, Esq.
Eileen Kennelly, Esq.
Robin B. Kallor, Esq.