STATE OF WISCONSIN
CIRCUIT COURT
BRANCH 10
DANE COUNTY

QUENTIN MCFAYDEN, Plaintiff, vs. EQUAL OPPORTUNITIES COMMISSION OF THE CITY OF MADISON, Defendant	MEMORANDUM DECISION Case No. 81 CV 3744

Plaintiff seeks review by writ of certiorari of an Order of the Madison Equal Opportunities Commission ("EOC") dated June 29, 1981, which order affirmed the proposed findings of fact, conclusions of law, and order of an EOC hearing examiner. The EOC Order dismissed plaintiff's claim that by discharging him from his warehouse job, the University Book Store ("UBS") had violated sec. 3.23 of the Madison General Ordinances with regard to discrimination on the basis of Handicap. The EOC found no ordinance violation. For the reasons following, the EOC's Order, is affirmed.

FACTUAL RECORD

A reading of the transcript of the testimony given in the proceedings before the EOC hearing examiner convinces the Court that the following facts found by the EOC have ample evidentiary support:

From April 2, 1974 to November 30, 1979, plaintiff worked as a shipping receiving clerk in the warehouse of UBS. His job duties included lifting and moving cartons of merchandise.

On January 11, 1979, plaintiff suffered a massive heart attack. After an absence from work of approximately two months, plaintiff returned to the UBS warehouse. Upon his return, plaintiff was under a doctor's limitation not to lift or carry more than 30 pounds or make frequent use of more than one flight of stairs. According to his doctor, plaintiff was able to perform activity requiring him to be on his feet, but he could only carry light loads.

A "significant" part of plaintiff's job at the UBS involved lifting and carrying items weighing 30 pounds or more. Hearing examiner's decision at p. 14. Such lifting and carrying were "essential job duties" for the position plaintiff held in the warehouse. Id. at 16.

After his heart attack, plaintiff was in fact unable to lift or carry weights over 30 pounds, and did not do so, requiring UBS to use a supervisor at least one day per week more than usual at its warehouse to accommodate plaintiff's post heart attack limitations. This accommodation on UBS's part required the store to incur significant additional salary expenses.

Upon ascertaining the extent of plaintiff's physical limitations and finding accommodation of those limitations an undue hardship, UBS terminated plaintiff and plaintiff filed his complaint with the EOC, seeking reinstatement.

After a hearing, the EOC reached the following conclusions under sec. 3.23 of the Madison General ordinances: that plaintiff a member of a protected class (specifically, persons with handicaps) ; that UBS is an employer; that plaintiff discharged because he was unable to perform his duties; that plaintiff's handicap was reasonably related to his ability, with reasonable accommodation, to adequately undertake the job-related responsibilities of his employment; and that UBS did not discriminate against plaintiff on the basis of handicap by discharging him from his position as a receiving clerk in November, 1979.

ISSUES

(1) Does the record evidence[1] support the EOC's conclusion herein that plaintiff was unable adequately to undertake the job- related responsibilities of his warehouse employment?

(2) Should a duty on the part of employers to reasonably accommodate the handicaps of employees be read into sec. 3.23 (7)(h)(2) of the Madison General Ordinances?

(3) If such a duty should be implied, did UBS in this case make reasonable accommodation for plaintiff's handicap prior to his discharge, so that plaintiff's termination did not violate sec. 3.23(7)(a)?

ORDINANCE INVOLVED

Section 3.23(7) of the Madison General Ordinances states:

> "It shall be an unfair discrimination practice and unlawful and hereby prohibited:
>
> (a) For any person or employer individually or in concert with others to fail or refuse to hire or to discharge any individual . . . because of such individual's . . . handicap . . .
>
> * * *
>
> "'(h)(2) Discrimination because of handicap is not prohibited if the employer . . . can show that the handicap is reasonably related to the individual's ability to adequately undertake the job related responsibilities of that individual's employment."

DECISION

On a review by certiorari, a court is confined to the evidentiary record of tile proceedings below, and its scope of review is further limited to examining the raised issues in light of the following questions:

> "(1) Whether the [administrative agency] kept within its jurisdiction; (2) whether it proceeded on correct theory of the law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question." State ex rel. Ball v. McPhee, 6 Wis. 2d 190, 199 (1959), cited in, e.g., State ex rel. DeLuca v. Common Council, 72 Wis. 2d 672, 676 (1976).

On the instant review, plaintiff is proceeding pro se, and in considering the foregoing questions in this matter, the Court has therefore construed plaintiff's position liberally, to the extent it has been possible to do so without unfairly distorting the applicable law. Nonetheless, after a careful consideration of the record in this case, I can find no error in the actions of the EOC herein.

With respect, first, to whether the evidence before the EOC showed that plaintiff was unable adequately to undertake the employment duties of his warehouse position as a receiving clerk, I conclude that the evidence must be viewed as allowing the EOC reasonably to reach the determination that plaintiff was unable to undertake those duties.

UBS's president, John Epple, testified that all of the warehouse employees were expected to lift and carry packages of all weights. He further testified that to keep up with the unloading and other work that had to be done at the warehouse, it was physically necessary that all warehouse employees work together on the lifting and carrying duties. In addition, he testified that a significant morale problem resulted among plaintiff's co workers from not having plaintiff lift and carry heavy items.

Moreover, substantial testimony was presented that the loading and unloading work at the warehouse involved heavy physical labor; that certain items needing to be lifted and carried weighed 40-100 pounds; and that lifting and carrying such weight was a significant part of the responsibilities of plaintiff's position.

After his heart attack, plaintiff was unable to lift more than 30 pounds. Plaintiff's supervisor, Robert Blossom, and one of plaintiff's co- workers, LaVerne Landmark, testified that after the heart attack plaintiff was unable to "carry his weight" at the warehouse and "was limited in what he could do."

Although plaintiff strenuously denies that he performed his job inadequately after his heart attack, the substantial evidence to the contrary presented to the EOC allowed that tribunal fairly and reasonably to reach the determination that it did in this respect. The EOC's finding regarding plaintiff's job performance must therefore be affirmed. See, e.g., State ex rel. De Luca, supra.

The question is next raised, however, whether employers under sec. 3.23 of the Madison General Ordinances should be considered as having an implied duty to snake reasonable accommodations for the handicaps of employees. I conclude that the EOC's conclusion of law that such an implied duty exists is a proper one. Because the pertinent language of the ordinance is substantially similar to sec. 111.32(5)(f), Stats., and the apparent purpose and intent of the ordinance is the same as that underlying the statute, it is reasonable to construe the relevant provisions of the statute and the ordinance consistently.

Section 111.32(5)(f), Stats., has been construed by other circuit court judges to impose a duty of reasonable accommodation on employers of handicapped employees. See Teggatz v. LIRC, Dane County Circuit Court Case No. 159-497 (Hon. Michael B. Torphy, October 3, 1977), and Fischer v. DILHR, Dane County Circuit Court Case No. 154-381 (Hon. P. Charles Jones, February 14, 1977). For similar reasons, I too find the EOC's recognition of an implied duty of accommodation under sec. 3.23 of the Madison General Ordinances proper.[2]

I turn now to consider whether in the instant case UBS made reasonable accommodation for plaintiff's handicap prior to discharging him. This question presents two elements: (1) Did UBS reasonably accommodate plaintiff in the performance of his assigned duties in the warehouse, for which he was originally hired? (2) In order to reasonably accommodate plaintiff, was UBS required to supply him with a non- warehouse job?

UBS's president made the decision to discharge plaintiff in October, 1979, with the effective date of the termination being November 30, 1979. From tile time plaintiff returned to work after his heart attack, and up until November 30, 1979, plaintiff was unable to lift or carry packages weighing more than 30 pounds, which duty the EOC properly found to be a significant part of his warehouse responsibilities, as already discussed. UBS was required to employ a supervisor at the warehouse for an increased number of hours each week after plaintiff's return in order to make up for the limitations in plaintiff's job performance. The added salary expense for UBS as a result was significant, and was found by the examiner to be unreasonably costly. This finding is amply supported by the record. Therefore, it can properly be concluded that UBS did not have a duty to continue paying another employee to assist plaintiff in the discharge of his necessary job responsibilities in order to reasonably accommodate plaintiff's handicap.

Even more significant, however, is the conclusion reached by the hearing examiner and adopted by the EOC that no amount of accommodation, reasonable or otherwise, could make it possible, for plaintiff to perform his job adequately. After his heart attack, plaintiff was not able -- at all -- to lift packages weighing more than 30 pounds. As already noted, the EOC found this to be a duty that all warehouse employees had to be able to perform to do an adequate job, and specifically found it to be an essential part of plaintiff's duties in the warehouse.

The hearing examiner concluded that in attempting to accommodate plaintiff, UBS "had to re-define job duties and utilize individuals not only to assist but to actually perform a job duty in place of the handicapped individual." Hearing Examiner's Decision at p. 16 (emphasis supplied). The examiner therefore concluded that an important factor in this case was that "the accommodation did not permit McFadyen to perform the essential function [of his job], but required someone else to do so." Id. at p. 17.

The examiner correctly emphasized that this consideration distinguishes plaintiff's case from the typical case in which an employer is required to make reasonable accommodation for an employee. In the typical case, the accommodation enables the assisted employee to minimally or better perform his or her essential job functions. In such a case, the employer's accommodation serves a purpose. By contrast, UBS's accommodation could not alter the basic fact that plaintiff was still unable to carry out an essential aspect of his job, and UBS's discharge of plaintiff therefore cannot be viewed as violating a duty as an employer under sec. 3.23 of the Madison General Ordinances to accommodate plaintiff's handicap with respect to plaintiff's performance of his job duties in the warehouse.

On the second accommodation sub-issue, whether UBS had an implied duty under the ordinance to reasonably accommodate plaintiff by transferring him to a completely new position within its operations, I conclude that EOC properly determined that the employer's duty of reasonable accommodation did not extend that far.

The EOC adopted the examiner's reasoning that with respect to a discharged handicapped employee, an employer must show that "the employee cannot with reasonable accommodation adequately undertake the job related responsibilities of that individual's employment" -- but that "[t]he key phrase . . . is 'of that individual's employment.'" Id. at p. 12. The examiner concluded, and the EOC agreed, that this key phrase means that the employer's duty of reasonable accommodation applies only to the job in which the handicapped employee is actually employed. Id.

I find this analysis of the language of the ordinance fair and reasonable. Further, I can find no reason in the relevant case law for disturbing it. As the examiner observed, the typical accommodation case involves assistance designed to enable an employee to carry out the duties of his or her particular position. The cases do not contemplate an employer

developing a new position for the employee. The EOC's conclusions that no such duty exists under the ordinance and that UBS did not discriminate against plaintiff by failing to transfer him to a new job are therefore affirmed.[3]

CONCLUSION AND ORDER

For the reasons stated above and bared on the entire record herein, I conclude that the EOC's determination that defendant University Book Store violated no duty owed to plaintiff Quentin McFadyen under sec. 3.23 of the Madison General Ordinances is well supported by the record evidence and is based on no error in law or procedure. Accordingly, the EOC's Order of June 29, 1981, in this matter is hereby affirmed.

Dated this 15th day of November, 1982.

BY THE COURT:

Angela B. Bartell, Judge
Circuit Court Branch 10
Dane County, Wisconsin

FOOTNOTES

[1]In the course of presenting his legal arguments, plaintiff has set forth factual allegations in his briefs and petition. On this review, the court may base its decision on only those facts that have been introduced into the record. See, e.g., State ex rel. DeLuca v. Common Council, 72 Wis. 2d 672.

[2]I also note, however, that,, even if the EOC's conclusion that an employer must accommodate a handicapped employee constituted an error of law and was improper, the error is immaterial to the outcome of this case. Whether the duty is recognized and viewed as discharged by UBS (for reasons that will be stated in the decision), or whether the duty is not recognized and plaintiff's discharge is based simply on an inability to perform his essential job functions, plaintiff's claim of discrimination must be dismissed.

[3]A related issue is raised by plaintiff's denied request for a transfer to a non-warehouse position within UBS's enterprise. To the extent this is also viewed as a "fail[ure] or refus[al] to hire" under sec. 3.23(7)(a) of the Madison General Ordinances as opposed to a failure to accommodate an already hired employee by transferring him to another job I conclude that the amply supported findings set out in paragraphs 15 and 32 and on page 13 of the examiner's decision establish that UBS could reasonably consider plaintiff unqualified for the positions he applied for, and that plaintiff's rejection for another position at UBS was not discriminatory.

STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION

Quentin McFadyen 609 East Gorham Street Madison, Wisconsin 53703 Complainant vs. University Book Store 711 State Street Madison, Wisconsin 53703 Respondent	ORDER ERD Case No. 7950575 EEOC TMK No. 055808172 EOC Case No. 2539

The Examiner of the Department of Industry, Labor and Human Relations issued a decision in the above-captioned matter on May 15, 1981. Complainant filed a timely petition for review of the Examiner's decision.

Based upon a review of the record in its entirety, the Labor and Industry Review Commission issues the following:

ORDER

That the attached Decision of the Examiner is affirmed in its entirety and shall stand as the FINAL ORDER herein.

Dated and mailed at Madison, Wisconsin, this 23rd day of July, 1981.

Virginia B. Hart, Chairman
John R. Haydon, Commissioner
Pamela I. Anderson, Commissioner

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN

Quentin McFadyen 609 East Gorham Street Madison, Wisconsin 53703 Complainant vs. University Book Store 711 State Street Madison, Wisconsin 53703 Respondent	NOTICE OF RIGHT TO APPEAL Case No. 2539

This is a notice that the attached FINAL ORDER is appealable to the courts as provided by law.

Signed and dated this 29th day of June, 1981.

Gridley Hall, Vcing EOC President
James C. Wright, EOC Executive Director

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN

Quentin McFadyen 609 East Gorham Street Madison, Wisconsin 53703 Complainant vs. University Book Store 711 State Street Madison, Wisconsin 53703 Respondent	FINAL ORDER CASE NO. 2539

The Hearing Examiner of the Madison Equal Opportunities Commission (MEOC) issued the Recommended Findings of Fact, Conclusions of Law and Order dated February 3, 1981, Timely exceptions were filed, written arguments were

submitted, and oral arguments were heard by the Commission, Based upon a review of the record in its entirety, the MEOC issues the following,

ORDER

1. Respondent's Motion to Dismiss Appeal dated February 26, 1981 is hereby DENIED in all its respects, Complainant's Motion to "Dismiss Respondent's Motion to Dismiss" is thereby mooted.

2. Respondent's Motion for More Definite Statement dated May 6, 1981 is hereby DENIED.

3. Respondent's Motion to Strike dated May 6, 1981 is hereby resolved as follows:

    a. That portion of said Motion to Strike moving to strike page 5, page 8, paragraph 3 on page 9, paragraph 5 on page 11, page 14, paragraph 6 on page 16, and paragraph 1 on page 17 of the Complainant's Notice of Appeal is hereby GRANTED;
    b. That portion of the Motion to Strike that requests the striking of all references to the Respondent's duty to accommodate the Complainant's disability is taken under advisement. This portion of the Motion to Strike is not a proper motion but is a legal argument, and the issue is not reached in this decision as the Commission concurs with the Examiner's decision that if such a duty does exist, the Respondent could not have reasonably accommodated the Complainant without "undue hardship" (at his warehouse job).

4. That the attached Recommended Findings of Fact, Conclusions of Law and Order is affirmed in its entirety and shall stand as the FINAL ORDER herein, and this case is hereby DISMISSED.

The eight Commissioners present at the June 25, 1981 hearing of the appeal voted as follows: Commissioners Abramson, Amato, Baerwolf, Fineman, McShan, Mendez, Perkins and Ware all join in the rulings on the motions and in affirming the Examiner's decision in its entirety as recited in the ORDER, above. No Commissioners dissented.

OPINION

Although it is the Commission's belief that the Respondent could have found some alternative employment for the Complainant within its enterprise, the Commission finds that the Respondent did not violate sec. 3.23, Madison General Ordinances, regarding handicap discrimination by discharging him from his warehouse job.

Signed and dated this 29th day of June, 1981

Gridley Hall, Acting EOC President
James C. Wright, Executive Director

STATE OF WISCONSIN
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS
EQUAL RIGHTS DIVISION

Quentin McFadyen 609 East Gorham Street Madison, Wisconsin 53703 Complainant vs. University Book Store 711 State Street Madison, Wisconsin 53703 Respondent	DECISION ERD Case No. 7950575 EEOC TMK No. 055808172 EOC Case No. 2539

Complainant herein, Quentin McFayden, filed a complaint with the Equal Rights Division of the Department of Industry,

Labor and Human Relations alleging he was discriminated against by Respondent because of age and handicap in regard to discharge, in violation of the Wisconsin Fair Employment Act, Sections 111.31 - 111.37, Wis. Stats (hereafter, "Act").

Following an investigation, an agent of the Equal Rights Division issued an Initial Determination finding no probable cause to believe that Respondent discriminated against the Complainant because of age, and probable cause to believe the Respondent discriminated against Complainant because of handicap. No request was made to review the finding of no probable cause relating to age. The only issue involved in this matter is whether Respondent discriminated against Complainant because of handicap.

Conciliation in the matter was either waived or unsuccessful and, pursuant to notice, a hearing was scheduled for March 12, 1981 before John J. Doll, a duly authorized hearing examiner for the Department.

Prior to the hearing, Richard Glesner, attorney for Respondent, filed a motion to dismiss based on the fact that a full and complete hearing on the identical matters filed with the Equal Rights Division had been held by the Madison Equal Opportunity Commission on September 15 and September 16, 1980 and that the doctrine of collateral estoppel/res judicata would apply. As a result of the motion to dismiss, the hearing scheduled for March 12, 1981, before the Equal Rights Division, was cancelled and both parties were afforded the opportunity to file briefs in support of, and in opposition to, the motion to dismiss. Attorney Andrea Mote Stelling, 302 East Washington Avenue, Madison, Wisconsin, represented the Complainant and filed a brief in opposition to the motion to dismiss and argued that collateral estoppel/res judicata should not be applied in this matter. Attorneys Richard Glesner and Kathryn E. Norton, 1 South Pinckney Street, Madison, Wisconsin, represented the Respondent and argued that collateral estoppel/res judicata would apply to this case and that the matter should therefore be dismissed.

Based upon the briefs filed by the attorneys, the examiner makes the following:

FINDINGS OF FACTS

1. Complainant filed identical charges with the Equal Rights Division and the Madison Equal Opportunity Commission, i.e., 1) that Respondent discriminated against him because of handicap and 2) that Respondent failed to reasonably accommodate Complainant because of his handicap. Both agencies made a finding of probable cause that Respondent did discriminate against Complainant because of handicap.

2. That on September 15 and September 16, 1980, a full and complete hearing was held before a hearing examiner of the Madison Equal Opportunity Commission. Both parties were represented by counsel, testimony presented, witnesses called, and both parties had the right of cross-examination. Prehearing briefs, as well as post hearing briefs, were submitted to the Madison Equal Opportunity Commission Hearing Examiner. The hearing examiner found that the Complainant was handicapped, but that the Respondent attempted to accommodate the Complainant's handicap and that no discrimination had occurred, and the complaint was dismissed.

3. Section 111.36, Wis Stats., provides that the Department shall receive and investigate complaints charging discrimination, provided they are filed within 300 days of the alleged discrimination, and make findings regarding the complaints. If a probable cause finding is made, the department may endeavor to eliminate the practice by conference, conciliation, or persuasion. If this fails, a notice of hearing is sent to both parties setting a hearing date and testimony is taken from both parties. The hearing examiner then issues a decision and if a finding is made that Respondent violated the Statute, the examiner may order Respondent to take such action that would effectuate the purpose of the Statute with or without back pay, with back pay not to accrue more than two years prior to the filing of the complaint with the Department. Either party may appeal the findings of the examiner.

4. Madison General Ordinances, Section 3.23, provides that the Commission shall receive and investigate complaints filed not more than 300 days after the alleged act of discrimination. If a finding of probable cause is made, the Commission shall attempt to eliminate any violation by means of conciliation, persuasion, or any other means to make Complainant whole. If this fails, a notice of hearing is issued to both parties setting a hearing date, and testimony is taken at the hearing. The hearing examiner issues a decision and if a finding is made that Respondent violated the Ordinance, the examiner may order such action by the Respondent as will redress the injury done to Complainant with back pay not to accrue not more than two years prior to the filing of the complaint with the Commission. Either party has a right to appeal that decision.

5. Sections 111.32(5)(f)(1), Wis. Stats., prohibits discrimination because of handicap. . ."unless such handicap is reasonably related to the individual's ability adequately to undertake the job related responsibilities of that individual's employment. . ."

6. Madison General Ordinances, Sections 3.23, prohibits discrimination because of handicap unless. . ."the handicap is reasonably related to the individual's ability to adequately undertake the job-related responsibilities of that individual's employment. . ."

7. A review of the Fair Employment Act, Sections 111.31 - 111.37, Wis. Stats., and Sections 3.23, Madison General Ordinances reveal that the procedures of both agencies are substantially similar, from the acceptance of a complaint through the hearing process, as well as the rights of appeal after the hearing. Both agencies accept complaints alleging discrimination, both investigate and issue findings of either probable or no probable cause. If probable cause exists, both agencies attempt to eliminate the discrimination by conference, conciliation, or persuasion. If that is unsuccessful, both agencies send both parties a notice of hearing setting a date for hearing. Both agencies provide for a hearing examiner to preside at the hearing. The hearing is a controverted hearing, rather than a fact finding hearing. Testimony is taken from witnesses on both sides, and witnesses are subjected to cross-examination. The remedy provided for in the Wisconsin Fair Employment Act and Madison General Ordinances, is the same, and the rights of the parties involved are protected by a right to appeal the decision of the examiner. The intent and purpose of the Fair Employment Act and the Madison General Ordinances is the same, to prohibit discrimination in employment.

8. In this case, Complainant filed his complaint with both the Equal Rights Division and Madison Equal Opportunity Commission. A finding of probable cause was made by both agencies that Respondent discriminated against Complainant because of his handicap. Conciliation was unsuccessful, and the matter was noticed for hearing with the Madison Equal Opportunity Commission. The law sought to be enforced by the hearing with the Madison Equal Opportunity Commission is the same as that of the Equal Rights Division, and both laws offered the same remedies if a violation occurred.

9. On September 15 and 16, 1980, the hearing was held. Both parties appeared and were represented by competent counsel. Complainant testified and had the opportunity to present evidence and cross examine witnesses. The examiner faced and decided the issue of whether Complainant was handicapped and whether the Respondent attempted to accommodate his handicap. Complainant was given a full and fair hearing and is not entitled to another chance to litigate the same issue and the same facts. There is no allegation made that any new evidence exists that had not been previously presented. The matter had been acted upon and adjudged and a decision issued by the examiner. The decision was on merits and would be conclusive as to the rights of the parties. The matter sued for and the cause of action is the same and the persons and parties to the action are identical. The decision of the hearing examiner of the Madison Equal Opportunity Commission is final and the Complainant is not entitled to another hearing before the Equal Rights Division.

Based upon the briefs submitted and the findings of fact, the hearing examiner makes the following:

CONCLUSIONS OF LAW

The decision of the Madison Equal Opportunity Commission is final as to any further proceedings on the same subject matter before the Equal Rights Division. The decision of the Madison Equal Opportunity Commission is res judicata and the Complainant cannot pursue his claim further in another forum that has the same jurisdiction and the same authority.

Based upon the briefs of the attorneys, the Findings of Fact, and the Conclusions of Law, the examiner issues the following:

ORDER

That the motion to dismiss is granted and that the complaint filed herein is dismissed.

Dated at Milwaukee, Wisconsin May 15, 1981

John J. Doll
Hearing Examiner

OPINION

The briefs submitted by the attorneys in this matter were quite extensive and were well documented with decisions supporting their positions. Both briefs agree that the law in Wisconsin relating to the doctrine of collateral estoppel/res judicata concerning administrative agencies is quite sparse.

The examiner agrees with Complainant in its argument that the doctrine of collateral estoppel/res judicata would not apply to proceedings and litigation under the Civil Rights Act of 1964, Sec. 701 and et seq 42 U.S.C. sec. 2000e et seq (Title VII). However, in those cases, the remedies afforded the Complainant were not similar in nature, and a distinction can be made. In this case, no distinction could be made in either the Wisconsin Statute or the Madison Ordinance. Both were virtually identical in the wording, and in the prohibition against discrimination because of handicap. The remedies available to the Complainant are identical. Complainant had an adversary hearing in front of an examiner who issued a decision on the same issues which would be tried in front of an Equal Rights Examiner. The possibility that a different decision could be reached by a different examiner hearing the same facts certainly exists, but that is not reason to give the Complainant another hearing.

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN

Quentin McFadyen 609 East Gorham Street Madison, Wisconsin 53703 Complainant vs. University Book Store 711 State Street Madison, Wisconsin 53703 Respondent	NOTICE OF RIGHT TO APPEAL CASE NO. 2539

Attached are the Recommended Findings of Fact, Conclusions of Law, and Order of the Equal Opportunities Commission's Hearing Examiner. The Rules of the EOC provide for appeal of this decision in the following terms:

> 10.1 Either party may appeal the recommended findings of fact, conclusions of law and order of the Commission's designee within ten (10) days after receiving them by filing written exceptions to such findings, conclusions, or order.
>
> 10.2 If neither party appeals the recommended findings of fact, conclusions of law, or order within ten (10) days, they become final findings, conclusions and order of the Commission.

This Notice, Findings, Conclusions of Law and Order have been sent to both parties. Any appeal from these Findings, Conclusions and Order must be postmarked or delivered at the offices of the EOC within ten (10) days of the date of receipt.

Dated at Madison, Wisconsin this 3rd day of February, 1981.

Allen T. Lawent
Hearing Examiner

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN

Quentin McFadyen 609 East Gorham Street Madison, Wisconsin 53703 Complainant	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CASE NO. 2539

vs. University Book Store 711 State Street Madison, Wisconsin 53703 Respondent	

On November 28, 1979, a complaint of discrimination was filed with the Madison Equal Opportunities Commission (MEOC) alleging that the Respondent had discriminated against Complainant on the basis of handicap in regard to employment. Said complaint was investigated by MEOC Investigations Supervisor Yvonne Thomas.

An Initial Determination of Probable Cause dated February 13, 1980 was issued and sent to the parties. Conciliation was waived or unsuccessful, and the matter was certified to public hearing on March 28, 1980.

A hearing was held on September 15, 1980 and continued through September 16, 1980. Complainant appeared by Atty. Andrea Mote Stelling and in person; Respondent appeared by Atty. Richard C. Glesner of Ross and Stevens, S.C. and Respondent's employee representative was Bookstore President John Epple.

The Hearing Examiner proposes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Quentin McFadyen, is an adult male residing in the State of Wisconsin.
2. The Respondent, University Bookstore (hereinafter "UB"), is a Massachusetts Common Law Trust with principal offices and a warehouse located in the City of Madison.
3. Complainant was employed as a "receiving clerk/driver" by the Respondent's warehouse from April 2, 1974 to November 30, 1979.
4. Complainant's job duties included receiving and pricing merchandise in accordance with UB procedures, filling stock orders as requested by the main store, and performing other periodic and occasional duties as assigned by his supervisor.
5. On January 11, 1979, Complainant suffered a massive heart attack.
6. Complainant did not report to work from the time of his heart attack until March 12, 1979, when he returned to the UB warehouse.
7. Upon returning to work, Complainant was under a doctor's limitation not to lift or carry more than 30 pounds and to avoid the frequent use of more than one flight of stairs. The precise extent of Complainant's limitations was not available to the Respondent until June, 1979.
8. UB customarily employed three persons who worked exclusively at the warehouse. All three of these persons were required to load and unload shipments to and from the warehouse. In additions the warehouse supervisor customarily assisted at the warehouse two days per wreek.
9. In addition to the three persons who worked exclusively and full time at the warehouse, UB also employed temporary workers as needed. The temporary workers were hired from Qualitemps employment service.
10. Subsequent to McFadyen's heart attack and following his return to work, the UB warehouse supervisor averaged three days per week of assisting at the warehouse. This average was maintained through the time of Complainant's termination. Also, from June of 1979 until the time of Complainant's termination November 30, 1979, the UB employed a fourth regular employee at the warehouse for all but four of those twenty-six weeks.
11. Freight shipments by suppliers to the warehouse consisted of mixed small and large boxes of merchandise and supplies, varying in weight. Some shipments were stacked on pallets in the delivery truck, and such pallets frequently weighed as much as 2,000 pounds after the stacking was completed. These pallets had to be removed from the truck by a fork lift which had to be manually pulled from the delivery truck onto the warehouse delivery dock and then moved down a 45 degree ramp to various storage areas within the warehouse.
12. There were 2,000 separate shipments annually to the warehouse, excluding UPS and Parcel Post shipments.

13. There was a non mechanized conveyor system to facilitate the movement of merchandise within the warehouse. Merchandise had to be first manually unloaded from delivery trucks. At various places along the sides of the conveyor system within the warehouse, it was necessary to manually lift and stack merchandise. Stacks frequently exceeded heights of six to eight feet, and required overhead lifting and the climbing of a ladder. Similar lifting and climbing of a ladder simultaneously was required to stack merchandise on shelves and on the top of shelving which was seven feet high.

14. In addition to his primary duties as a shipping/receiving clerk, Complainant had driven a truck from time to time in the early days of his employment with the Respondent. The truck driving was for the purpose of transferring merchandise from the warehouse to the bookstore. Complainant had not driven a truck since October 15, 1976 following an incident not an accident involving police. The person who was UB President at the time relieved Complainant of his truckdriving duties.

15. McFadyen had difficulty taking orders by phone from the main store because he became impatient when he could not understand an order immediately or when he felt someone was talking too fast. As a result, he rarely was required to take such orders during the course of his employment at the UB.

16. Upon Complainant's return to work on March 12, 1979, the Respondent did not possess any professionally substantiated written information concerning Complainant's physical limitations or his long-term prognosis. March is a "slow" month in the Bookstore's business cycle. McFadyen was told to "take it easy and do not overdo anything" by authorization of Epple.

17. Complainant was permitted to work with the understanding that he would not immediately be able to fully perform all the normal lifting and carrying duties required of his warehouse job that he had been able to perform prior to his heart attack.

18. Sixty percent of the UB's business in terms of sales occurred in a six week period: three weeks around the beginning of the Fall University of Wisconsin semester in late August and early September and three weeks around the beginning of the Spring semester in January. This was an annual cycle.

19. The heaviest receiving period at the warehouse was the period between May and August May, June, and July of each year. The volume of business overall for UB traditionally increased in May of a given year and peaked in late August and September of the year.

20. In May of 1979, when the busy season was beginning, the UB had still not received any professionally substantiated written information regarding the extent or duration of McFadyen's specific physical limitations. UB President Epple had requested such information from McFadyen upon his return to work in March, and the UB had made efforts to obtain the information from a Dr. Farnham who was a specialist in internal medicine and cardiology at the Jackson Clinic and who had been one of Complainant's treating physicians at Methodist Hospital.

21. On June 13, 1979, after the Complainant had authorized the release of information to the UB, the UB received a copy of a letter from Dr. Farnham that was addressed to the Complainant and stated in part:

    I feel you should not lift or carry more than 30 pounds, should avoid frequent uses of more than one flight of stairs, but should be able to perform job activity requiring you to be on your feet and to carry light loads.

    If your employers have any more specific requests, your case is well known to our Vocational Rehabilitation counselor here at Methodist Hospital and I would urge them to contact us if they feel they need more information.

22. Epple was not satisfied with Farnham's letter, as he desired to know the duration of Complainant's disability, and Epple continued to request such information with no response from the persons at Methodist Hospital.

23. Epple then requested the UB's corporate counsel (who represented the UB at this hearing) to contact Methodist Hospital regarding the duration of Complainant's physical limitations. Between July 10 and July 17 of 1979, a Mr. Patton, who had headed the Methodist Hospital Vocational Rehabilitation Department at the time of McFadyen's heart attack, discussed over the telephone information regarding the duration and extent of Complainant's physical limitations with Respondent's corporate counsel. The corporate counsel summarized the discussion in a letter to Epple, but no direct written correspondence was ever received from Patton.

24. After receiving the letter from the UB corporate counsel, Epple discussed with various people, including McFadyen's supervisor and the UB assistant manager, what other positions, if any, McFadyen was capable of performing, considering his experience and qualifications.

25. Epple determined, after consultations with the supervisor and assistant manager and others, that a transfer or reassignment of McFadyen was not possible. Although the decision was finally made in October, discussions had occurred in late July and early August and resumed again in the latter part of September following the conclusion of the semester book rush.

26. McFadyen was informed of his termination on October 24, 1979 and the reasons therefor by Epple. Complainant was told further that he would be terminated on November 30, 1979.

27. On October 30, 1979, the UB Board voted to retire McFadyen as "permanently disabled" in order that McFadyen could receive 100% of his share of the pension fund at the UB. Without such action by the UB, McFadyen would have been entitled to receive only 30% of the amounts contributed to his pension fund, as well as two weeks of termination pay.

28. McFadyen received disability payments totaling at least $1,996 spread over several months following his termination. After several months, however, the insurance carrier refused to pay the benefits because McFadyen's doctor has refused to certify his disability to the company.

29. McFadyen needed more assistance with "heavy" lifting subsequent to his heart attack than he had received prior to his heart attack.

30. The Respondent made diligent efforts to ascertain the duration and extent of Complainant's physical limitations but never received any written documentation from a medical expert regarding the duration of McFadyen's disability.

31. McFadyen's work experience prior to coming to the UB as a permanent employee was as follows:

    (a) eleven years as an employee of Qualitemps, Inc. (and its predecessor business) where he was hired out primarily on a part time basis to primarily one of the following three employers:

    - Berg Company where he did miscellaneous duties
    - Marschal Dairy Labs where he racked rennets
    - University Bookstore where he worked as a "spiral Man" stacking office supplies and where he worked in the warehouse

32. McFadyen was easily confused by numbers and by variances in tasks.

33. Prior to his heart attack on January 11, 1979, McFadyen was adequately performing all of the essential duties of his job at the UB warehouse.

34. Subsequent to his return to work on March 12, 1979 and up to the time of his termination on November 30, 1979, McFadyen was unable to lift or carry more than 30 pounds and was unable to frequently use more than one flight of stairs. These were his only known medical limitations over said period.

35. The warehouse salary expense for the period May through July was as follows for the years 1978, 1979 and 1980:

		1980	1979	1978
MAY	Bookstore Employees	$ 2993	2446	1983
	Qualitemps (temporary employees)	975	467	471
		3968	2913	2454
JUNE	Bookstore Employees	2307	2606	2175
	Qualitemps	594	641	600
		2901	3247	2775
JULY	Bookstore Employees	2880	2824	2282
	Qualitemps	386	335	155
		3266	3159	2437
	TOTAL	**10,135**	**9,319**	**7,660**

36. May through July are customarily the Respondent's busiest receiving months each year at the warehouse.

37. Thomas McCoy, another full time employee at the UB warehouse terminated on May 8, 1980.

38. In 1979, LaVerne Landmark worked 65.41 hours of overtime in 12 months, Quentin McFadyen worked 44.97 hours of overtime in 9 months, and Thomas McCoy worked 1.05 hours of overtime in 12 months.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of a protected class, handicap, within the meaning of sec. 3.23, Madison General Ordinances.

2. The Respondent is an employer within the meaning of sec. 3.23, Madison General Ordinances.

3. The Complainant's handicap was reasonably related to the Complainant's ability with reasonable accommodation to adequately undertake the job-related responsibilities of the Complainant's employment within the meaning of sec. 3.23, Madison General Ordinances.

4. The Respondent did not discriminate against the Complainant on the basis of handicap in violation of sec. 3.23, Madison General Ordinances by discharging the Complainant from his job as a receiving clerk/driver in November, 1979.

RECOMMENDED ORDER

That this case be and hereby is dismissed.

MEMORANDUM OPINION

The primary issues presented in this case are as follows:

1. Does sec. 3.23(7)(a) of the Madison General Ordinances pertaining to discrimination on the basis of handicap impose a duty of reasonable accommodation on an employer?

2. If so, what is the scope of that duty of reasonable accommodation?

3. If (1) is answered in the affirmative, and in light of the scope determined in the answer to (2), did the Respondent fail to make reasonable accommodation for the Complainant's handicap prior to his discharge such that Complainant's termination constituted a violation of sec. 3.23(7)(a), Madison General Ordinances?

I. PRIMA FACIE CASE OF DISCRIMINATION AND RESPONDENT'S MOTION AT NEARING TO DISMISS

Before discussing whether sec. 3.23(7)(a) imposes a duty of reasonable accommodation on an employer, it is first necessary to determine whether a prima facie case of discrimination was established by the Complainant. Respondent attempted to characterize the Complainant as a marginal or even substandard employee. What is clear from the evidence, however, is that the Complainant's level of performance was acceptable and adequate for the Respondent prior to Complainant's heart attack on January 11, 1979. Complainant had commenced full-time employment with the Respondent on April 2, 1974. Prior to his heart attack, Complainant had worked at Respondent's warehouse for nearly five years. Complainant had ceased secondary trucking duties in mid October of 1976 at Respondent's mandate. Complainant had some difficulty in taking phone orders from the main store, but this difficulty had existed well before his heart attack. Despite not performing the truckdriving and phone order duties for several years, there was no effort by Respondent to terminate the Complainant prior to his heart attack. It is concluded, therefore, that truckdriving and phone order receiving were not essential duties of the job.

Upon return to work on March 12, 1979, Complainant was told by Bookstore President John Epple to "take it easy and do not overdo anything." Complainant continued to work for Respondent in the warehouse until November 30, 1979 when he was terminated. Complainant had been informed of the impending termination on October 24, 1979 by Epple. On October 30, 1979, the Bookstore Board of Directors voted to retire McFadyen as "permanently disabled" in order that he could receive 100% vesting of his pension plan contribution share as opposed to the 30% vesting he would otherwise have received. Between the time McFadyen returned to work after his heart attack and the time of his termination, Respondent used diligent effort to ascertain the extent and duration of Complainant's physical limitations, if any. One letter which the Respondent received via the Complainant was from a Dr. Farnham, one of the Complainant's treating physicians. Farnham's letter, dated June 13, 1979, indicated that the Complainant was not to lift or carry more than 30 pounds and should avoid frequent uses of more than one flight of stairs, but should be able to perform job activity requiring him to be on his feet and lift light loads. Farnham also suggested that the Respondent contact the Vocational Rehabilitation Counselor at Methodist Hospital for further information.

Respondent also had a letter dated July 17, 1979 from its corporate counsel, Ross & Stevens, S.C. by Attorney Richard C. Glesner (who represented Respondent at this hearing), which related a phone conversation with a Mr. Patton who was allegedly in charge of the Division of Vocational Rehabilitation for the State of Wisconsin. Glesner's letter states that Patton had previously headed Vocational Rehabilitation at Methodist Hospital and that Patton indicated the limitations stated in the earlier Farnham letter would likely continue to prevail for Complainant's lifetime. Further, Patton supposedly indicated that the Complainant:

(1) is not to lift weights in excess of thirty pounds
(2) is to avoid all overhead lifting
(3) is to avoid any quick or sudden movements; and
(4) is to avoid all ladder climbing.

Respondent next attempted to determine whether Complainant could be reassigned or transferred from his job. The Respondent considered this matter from mid July (after July 17, 1979) after the phone conversation with Patton had allegedly occurred until early August and again in late September and through much of October. The issue of transfer and reassignment was put on the "backburner" throughout the latter part of August and early September. After consulting with the Store Assistant Manager and with McFadyen's supervisor, Epple determined that transfer or reassignment was not possible. Epple then informed Complainant of his termination on October 24, 1980 which was followed by the Board of Director's vote regarding Complainant's disability status for purposes of pension vesting.

The Examiner, therefore, finds that Complainant presented a prima facie case of discrimination[1] as follows:

> (a) Complainant was handicapped within the meaning of sec. 3.23, Madison General Ordinances.[2]
>
> (b) Complainant was working in the warehouse for approximately 8-1/2 months subsequent to returning to work from his heart attack, and worked during the Store's "busiest" time in this span as well as working during "slow" periods.
>
> (c) Respondent believed Complainant to have permanent physical limitations and discharged him primarily because of his handicap.

Consequently, Respondent's motion at hearing to dismiss this matter for failure of the Complainant to establish a prima facie case was denied.

I. DOES SEC. 3.23(7)(a) OF THE MADISON GENERAL ORDINANCES PERTAINING TO DISCRIMINATION ON THE BASIS OF HANDICAP IMPOSE A DUTY OF REASONABLE ACCOMMODATION ON AN EMPLOYER?

Sec. 3.23(7) stated as follows:

> It shall be an unfair discrimination practice and unlawful and hereby prohibited:
>
> > (a) For any person or employer individually or in concert with others to . . . discharge any individual . . . because of such individual's . . . handicap . . ..

Sec. 3.23(7)(h)2. states in relevant part as follows:

> Discrimination because of handicap is not prohibited if the employer . . . can show that the handicap is reasonably related to the individual's ability to adequately undertake the job related responsibilities of that individual's employment.

The employer's defense as stated in sec. 3.23(7)(h)2. is virtually identical in language to that of the Wisconsin Fair Employment Act (WFEA), Sec. 111.31 et. seq., Wis. Stats., specifically Sec. 111.32(5)(f), Wis. Stats. Said language in the WFEA resulted from a 1975 statutory amendment. Prior to 1975, the employer had to show that a handicapped employee was, because of handicap, physically or otherwise unable to efficiently perform, at the standards set by the employer, the duties required of that job.

It is the Examiner's holding that the portions of the present Madison Ordinance discussed above have sufficient identity with the present WFEA language to indicate that the Ordinance handicap provisions were passed with similar intent and purpose to the present WFEA language, and that the portions of the State and local Ordinance may be consistently construed.

In two Circuit Court cases, the WFEA has been construed to impose a duty of reasonable accommodation on the employer.[3] The Examiner holds that the Madison Ordinance imposes a similar duty on the employer.

II. SCOPE OF THE DUTY OF REASONABLE ACCOMMODATION

The question to be decided here is whether the duty of reasonable accommodation pertains only to the job for which the handicapped individual is employed (or has applied for), or whether the duty includes the consideration of a handicapped employee for reassignment or transfer to other jobs (or consideration of an applicant for other jobs).

The Examiner holds that the duty of reasonable accommodation applies only to the job in which the handicapped employee is employed or has applied for. Based on the standard prescribed in 3.23(7)(h)2., MGO, it is a defense for an employer in a handicap discharge case such as this to show that the handicap is reasonably related to the individual's ability to adequately undertake the job related responsibilities of that individual's employment. The duty of reasonable accommodation that has been read into the WFEA by two courts and is now read into the Madison General Ordinances by the Examiner, modifies the employer's burden as follows:

> Discrimination because of handicap is not prohibited if the employer . . . can show that the handicap is reasonably related to the individual's ability with reasonable accommodation to adequately undertake the job related responsibilities of that individual's employment.

In other words, the burden on the employer is to not only show that the employee cannot adequately undertake the job related responsibilities of that individual's employment, but the burden is to show that the employee cannot with reasonable accommodation adequately undertake the job related responsibilities of that individual's employment. The key phrase, however, is "of that individual's employment." The employer does not have to prove that the handicapped employee could not perform any available job, but to show only that the employee could not perform his/her particular job. While the duty of reasonable accommodation adds an additional facet to the burden, the Examiner does not find that either Teggatz or Fischer reads into the State Act an additional burden of considering whether the employee could perform any or all other available job openings within the Respondent's control. Similarly, in construing the Madison Ordinance, such a broad construction would amount to judicial lawmaking and clearly exceed the intent of the ordinance-makers.

In this particular case, the Respondent did, however, take its own initiative in considering the Complainant for transfer or reassignment. And the Complainant personally inquired about at least one open position. The first issue regarding these other positions is, taking each position individually, whether handicap was a factor in Respondent's failure to employ the Complainant. The Respondent argued that the Complainant was either unable to perform any of the jobs available around the time of his discharge or that such rejection was not related to his handicap. Those jobs which were not beyond the capacity of Complainant's lifting and carrying limitations and which appeared suitable required secondary cashiering duties on a daily basis. Respondent established a factual basis for its belief that Complainant had difficulty under pressure and in dealing with the public which would likely prevent him from being able to adequately cashier. Therefore, the Complainant's rejection for these jobs was not discriminatory.

III. DID THE RESPONDENT FAIL TO REASONABLY ACCOMMODATE THE COMPLAINANT IN VIOLATION OF SEC. 3.23., MADISON GENERAL ORDINANCES?

The final issue, then, is whether the Respondent in fact could have made reasonable accommodations that would have permitted the Complainant to adequately undertake the job-related responsibilities of his warehouse job. The evidence presented establishes that Complainant had a lifting and carrying limitation of 30 pounds and that he was to avoid the frequent use of more than one flight of stairs, but that he was able to perform, activity requiring him to be on his feet and to carry light loads.

The additional restrictions referred to by Mr. Patton pursuant to a phone conversation are not accepted as fact because they are blatant hearsay and not adequately established on the record as a medical or otherwise expert opinion. Even if they were so established, such testimony would have been within the discretion of the Examiner to reject, although I make no judgment at this time as to whether I would have accepted or rejected such testimony in supplement of Farnham's letter.

Farnham's letter is also a form of hearsay, but is accepted for the truth of the matters asserted because it is not disputed that this was the letter sent by Farnham to the Complainant which Complainant then turned over to Respondent.

The issue then is whether an individual with a 30-pound lifting and carrying limitation who was to avoid the frequent use of more than one flight of stairs could perform, with or without reasonable accommodation, the essential functions of the job of a Receiving Clerk/Driver at the University Bookstore warehouse.

The truckdriving duties and phone answering duties were not essential functions of the job, and the Complainant's inability or other failure to perform these is irrelevant to the issue. It is clear, however, that lifting more than 30 pounds and climbing ladders were more than incidental functions of the job, although not as great a proportion as Respondent has tried to establish.

In regards to ladder climbing, it does not appear that Farnham's limitations precluded the Complainant from ladder climbing. However, neither his own witness nor Respondent's witnesses had any recollection of seeing him doing ladder climbing since the return from his heart attack.

In regards to the 30-pound lifting, Respondent has tried to show that such lifting comprises 80% of the job. Complainant has tried to show that such lifting is occasional. The Examiner believes that is a significant part of the job, although far less than the 80% urged by Respondent.

There are two pieces of telling evidence in this regard. One is the unrefuted testimony that Bob Blossom, the warehouse supervisor, was spending three days per week at the warehouse after Complainant's heart attack, instead of his customary two days. Further, Respondent argues that between the months of May and July inclusive, the salary expense of non-supervisory warehouse employees in 1979 jumped 21.55% over that of 1978 while only rising 8.76% in 1980.

To attribute the entire 21.55% rise to McFadyen's alleged lack of ability, however, is impossible. Such rise was in part due to wage raises. Further, in examining overtime hours, one sees the following overtime hours for 1979:

	Worked in 1979	1979 Overtime
Landmark	12 Months	65.41 Hours
McFadyen	9 Months (approximate)	44.97 Hours
McCoy	12 Months	1.08 Hours

It is difficult to understand why the supposedly inefficient McFadyen was permitted to work an amount of overtime almost proportionally equivalent to the amount that Landmark worked, while McCoy worked almost none. The Respondent, therefore, has not effectively established that the large salary expense increase was solely due to McFadyen's disability. Also, McCoy was terminated in May, 1980, and a decreased salary expense could have been likely due to McCoy's as McFadyen's termination.

At the same time, McFadyen's own witness, Landmark, raises some serious doubts regarding McFadyen's ability. While Landmark denied ever complaining to management regarding McFadyen's work, the implication of Landmark's testimony was that McFadyen was unable to do some of the primary job functions, particularly lifting, since his return from his heart attack.

And Blossom's additional day per week at the warehouse must be attributed to McFadyen's limitations, as Blossom had to spend only two days at the warehouse prior to McFadyen's heart attack and while McCoy was employed.

In examining the duty of reasonable accommodation, we will consider the Hardison,[4] Teggatz and Fischer cases. Hardison is the federal religious discrimination case which is the cornerstone of interpretations relating to reasonable accommodation as it applies to Title VII religion cases. Hardison establishes the "de minimis" rule which has subsequently been interpreted to make unreasonable any accommodation that creates an undue hardship on the employer.[5] This rule is far more strict than the handicap "de minimis" rule established in Teggatz and Fischer, although both rules require that reasonable accommodations shall not impose an "undue hardship" on employers.[6]

Teggatz is not directly on point with the case at hand. In Teggatz, a blind individual worked for the State of Wisconsin at one institution and received a promotional transfer to a second institution. However, rather than being provided with a paid reader who worked regular hours as he had been, Teggatz was instead provided with a student volunteer at the second institution. As a consequence, Teggatz's work suffered. By requiring the State of Wisconsin to provide Teggatz with the type of assistance it had previously provided, the court was imposing a financial burden on the State that it had already borne and was capable of bearing without undue hardship.

Fischer is much more akin to the fact situation at hand, as the Fischer court required a school district to provide a blind teacher with a teacher's aide in order to assist him in keeping classroom control. The cost of such an aide was

determined to be between $500 and $700 for 10 hours per week for 37 weeks. Such cost was not considered as "undue hardship" on the school district.

The Examiner in this case, however, distinguishes the Fischer-Teggatz de minimis rule of reasonable accommodation from the fact situation at hand, and establishes a new rule for the MEOC forum. In the Fischer and Teggatz cases, the Complainants were able to perform their essential job functions. Their assistants enabled them to minimally or better to perform their essential job functions. And the Examiner is in agreement that where an individual can perform the essential job functions of his or her employment, the broad Fischer-Teggatz de minimis rule applies. Such a rule could perhaps justify expenditures of some magnitude such as building a ramp, raising or lowering a workbench, hiring an assistant, buying a machine, and so on.

But, as in this case, where the employer had to redefine job duties and utilize individuals not only to assist but to actually perform a job duty in place of the handicapped individual, and where that job duty is essential and not merely incidental, the strict Hardison de minimis rule must be applied. In this case, the lifting and carrying of 30 pounds were essential job duties which the Complainant clearly could not perform and was under a medical restriction not to perform. In order to accommodate the Complainant, the Respondent had to utilize a supervisor at least one day per week more at the warehouse than usual, and likely incurred some additional salary expense. Under the Hardison rule, such an accommodation cannot be considered a reasonable accommodation as it is too costly. Further, as the accommodation did not permit McFadyen to perform the essential function, but required someone else to do so, the broader Fischer-Teggatz rule does not apply.

In conclusion, the Respondent permitted the Complainant to return to work prior to receiving a medical statement regarding his fitness to do so. Respondent permitted the Complainant to perform lighter duties than normally required while Respondent attempted to ascertain the duration and extent of Complainant's physical limitations. Having some success learning the extent of Complainant's limitation - 30 pound lifting and carrying limitation - but no success learning the duration in a direct written statement, the Respondent considered and rejected Complainant for transfer or reassignment for non-discriminatory reasons. Finally, finding that the Complainant was unable to perform essential duties of the job and finding accommodations an undue hardship, the Respondent terminated the Complainant, although later voting to retire him as "permanently disabled" so he would be entitled to 100% rather than 30% pension vesting. In short, the Respondent attempted to accommodate the Complainant, found the accommodation unworkable and unreasonable, and terminated the Complainant with full financial advantage under the circumstances. The Examiner agrees that the accommodation was an undue hardship and the discharge was non-discriminatory.

Signed and dated the 3rd day of February, 1981.

Allen T. Lawent
Hearing Examiner

[1]McDonnel Douglas v. Green, 411U.S.792, 5 FEP 965 (1973); see Footnote 13 which states that the facts necessarily will vary in Title VII cases, and the specification above of prima facie proof required from the Complainant in this case is not necessarily applicable to differing fact situations. While the case at hand is not a Title VII matter, the Examiner holds that differing factual situations require variations in what elements the Complainant is required to establish a prima facie case of discrimination under Section 3.23, Madison General Ordinances.

[2]Chunat v. Olin Corp. (Wisconsin Labor and Industry Review Commission, November 4, 1977, Lienhardt v. Pacon Corp. (Wisconsin Department of Industry, Labor and Human Relations, January 21, 1976.)

[3]Teggatz v. LIRC, No. 159 497 (Dane County Circuit Court, Hon. Michael B. Torpy, October 3, 1977); Fischer v. DILHR, No. 154-381 (Dane County Circuit Court, Hon. P. Charles Jones, February 14, 1977)

[4]TransWorld Airlines, Inc. v. Hardison, 432 U.S. 63, 14 FEP Cases 1697

[5]See Brown v. General Motors Corp., 601 F.22U956 (9th Cir. 1979), Wren v. T.I.M.E.D.C., Inc., 595 F24 441 (9th Cir. 1979), Redmond v. GAF Corp., 574 F.2d897 (7th Cir. 1978)

[6]Although the Act (Wisconsin Fair Employment Act) does not expressly require accommodation of a handicapped employee's special needs, such requirement may be implied absent a showing by the employer that the accommodation will be an undue hardship on its business

Teggatz v. LIRC, No. 159-497 (Dane County Circuit Court, Hon. Michael B. Torphy, October 3, 1977)

. . . and, although the Act cannot be construed to dictate which reasonable accommodation an employer must make if there are alternative accommodations which could be made, an accommodation which enabled the handicapped employee to perform in a mere passable manner might be unreasonable if there existed alternative reasonable accommodations which posed no undue burden on the employer and which enabled the handicapped person to perform on a par with non handicapped employees. Teggatz v. LIRC, supra; see Fischer v. DILHR, No. 154-381 (Dane County Circuit Court, Hon. P. Charles Jones, February 19, 1979)