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

Earl Wopat 450 Primrose Lane Madison, Wisconsin 53713 Complainant vs. St. Vincent De Paul Society 1309 Williamson Street Madison, Wisconsin 53703 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 2551

A complaint in this matter was filed with the Madison Equal Opportunities Commission on January 11, 1980 alleging discrimination on the basis of age and handicap in employment. The case was investigated by Renee Caldwell and an Initial Determination of Probable Cause was issued on March 7, 1980.

Conciliation was waived or unsuccessful, and the case was certified to public hearing on May 4, 1980.

A hearing was held on September 12, 1980, and based on the record of the hearing, the following Recommended Findings of Fact, Conclusions of Law and Order are proposed:

RECOMMENDED FINDINGS OF FACT

1. Earl Wopat is a 62-year old adult male.
2. St. Vincent de Paul Society is a charitable organization that operates in the City of Madison and employs individuals at a store within the City of Madison.
3. St. Vincent de Paul Society is run by a Board of Directors consisting of four persons.
4. As of March 1, 1979, Complainant had worked for Respondent approximately 12 years.
5. Complainant's primary job was foreman of the trucking crew. Complainant also dispatched, worked in the back shop with furniture, helped clean up in the yard and performed other odd jobs when needed.
6. On March 1, 1979, Complainant took a medical leave of absence.
7. Complainant came into the store on a Friday in late March and gave new store manager, Dan Strizek, a slip from his doctor indicating Complainant could return to work. Strizek had started as store manager on March 15, 1979.
8. Complainant also told Strizek that he (Wopat) could not do any heavy lifting and would be better off doing light work.
9. Complainant's doctor had not placed any restrictions on Complainant's work.
10. On the following Monday, around March 30, 1979, Complainant was told by Strizek that a meeting had been held and it had been determined that Complainant was no longer needed as an employee of the store. Complainant was 61 years old at the time.
11. About the time of Complainant's termination, eleven paid employees shared the trucking duties, including Complainant.
12. While it was not always Complainant's duty to drive a truck, Complainant would drive when an insufficient number of licensed drivers were available.
13. Complainant had done almost no driving in 1978, but had driven almost every day in 1979 up to the time of his medical leave.
14. Truck driving involves pickup and delivery of boxes of clothes and other items, some of which were rather "heavy" like refrigerators and sofas. The "heavy" items required two persons to lift them.
15. Since the time of Complainant's termination, the trucking fleet has been pared from four trucks to two and the number of truckers has been pared from eleven to four: two drivers and two assistants.
16. There were 36 employees at the store at the time of Complainant's termination. The number of employees fluctuated between 32 and 37 between March and the end of August 1979, and has been reduced to 30 or fewer since September of 1979. The September 10, 1980 payroll had 20 employees.
17. Complainant, prior to his termination, would often drive with three persons to a truck: himself and two others to do lifting.
18. Around the time of Complainant's termination, Respondent was limiting runs to two persons to a truck.

19. Complainant had been working 45 to 52 hours per week prior to his termination and was expecting to return from his medical leave on a "full-time" 40-hour per week basis. Complainant had the most seniority of all persons in the trucking operation.
20. There were only approximately 8 hours per week of clothes pickup work which would be light lifting. The remainder of the work inevitably included some heavy lifting requiring two persons either for pickup or delivery.
21. Complainant's truck foreman duties other than driving were taken over by one Joe Kocvara, then an employee who also managed the furniture department. Mr. Kocvara was able to consolidate the truck foreman's job with his own job without having to work any additional hours.
22. A Marcia Brown combined the dispatching and routing job with other clerical and filing duties she had.
23. The non-trucking duties that Complainant occasionally performed such as helping in the furniture department or cleaning up the yard were also consolidated into other persons' jobs or performed by volunteers.
24. Twenty-two employees, mainly in their 20's and 30's and all under 50 have been hired since Complainant's termination. Approximately eleven of these worked on the trucking operation.
25. Of the four present truckers, three were hired after Complainant's termination.
26. In 1978, the store had been paying $5,600 per year in insurance payments on four trucks. Presently, the store's insurance payments are $560 on two trucks.
27. Complainant was not directly responsible for the insurance problems with the trucks in 1978 as he did not have authority to hire or fire the truckers, and was not required to train them as part of his foreman duties.
28. Complainant was not able to perform the duties required of a trucker or as a foreman of the trucking operation as he would be required to ride along on the trucks but would not do any "heavy" lifting.

RECOMMENDED CONCLUSIONS OF LAW

1. Complainant was not handicapped within the meaning of Section 3.23 of the Madison General Ordinances.
2. Complainant is a member of a protected class, age, within the meaning of Section 3.23 of the Madison General Ordinances.
3. Respondent is an employer within the meaning of Section 3.23 of the Madison General Ordinances.
4. Respondent did not discriminate against Complainant on the basis of handicap in violation of Section 3.23 of the Madison General Ordinances, as the Complainant was not handicapped.
5. Respondent did not discriminate against Complainant on the basis of age, as Complainant was unable to perform the duties of the job.

RECOMMENDED ORDER

This case be and hereby is dismissed.

MEMORANDUM OPINION

The scenario in this matter is as follows:

A 61-year old individual, Earl Wopat, who had worked for approximately 12 years as a trucker in the employ of the St. Vincent de Paul Society took a medical leave of absence on March 1, 1979. On March 15, 1979, St. Vincent de Paul hired a new store manager, one Dan Strizek. When Wopat returned to the store in late March on a Friday, he told Strizek, someone he had never seen before, that he was only able to lift light loads. The following Monday, Strizek told Wopat that a meeting had been held and it was decided that the store could no longer use him.

I. HANDICAP DISCRIMINATION

What is conspicuously lacking in this case is any medical evidence to show that Complainant was handicapped. No medical evidence was introduced to show that Complainant suffered from a medical ailment or that a doctor had advised him not to lift items that exceeded a certain weight.

Handicap was first defined by the Wisconsin Supreme Court as "a disadvantage that makes achievement unusually difficult; especially a physical disability that limits capacity to work." See Chicago, Milwaukee, St. Paul and Pacific Railroad v. DILHR (Goodwin), 62 Wis. 2d 392, 215 N.W. 2d 443 (1974).

The court further stated in St. Paul that "Although the Act (Wisconsin Fair Employment Act) does not define what legally constitutes a handicap, it does not mean that a person must be incapacitated from normal remunerative occupations or be an economic detriment to a normal employer and require rehabilitative training since it was the legislative policy to encourage employment of all properly qualified persons."

Later, in Connecticut General Life Insurance v. DILHR (Bachand), 86 Wis. 2d 393 (1979), the State Supreme court said that

> In determining whether a condition is a handicap, weight is given to the fact that it is medically diagnosable . . .

Finally, in Dairy Equipment v. DILHR (Wolf), No. 77-504 (Wis. Sup. Ct., filed April 1, 1980), the high court affirmed Judge Sachtjen's Circuit Court analysis that

> A handicap may be a condition which creates a perceived sensitivity in the mind of the employer to injury in the future . . .

An analysis of the three cited cases indicates that a handicap is a "disadvantage" such as a "physical disability"[1] or a "condition," actual or perceived. While Mr. Wopat showed that he believed he was limited in his capacity to work in that he could not lift "heavy loads," he did not show that such inability was due to a "disadvantage" or a "condition." While medical evidence may not be absolutely necessary to establish that a "condition" is a handicap, Connecticut General teaches that great weight is given to the fact that it is medically diagnosable.

It can be imputed that once Wopat informed the employer of his inability to lift the "heavy loads," the employer could not turn away, but instead had a duty to inquire as to the nature of the inability to determine whether or not it was handicap related. However, in this instance, Wopat stated that he did not have any medical restrictions, so a Respondent's inquiry would have been fruitless.

It is the Examiner's belief that the handicap discrimination laws in the Madison General Ordinances were passed with similar intent to the state law as construed in St. Paul, Connecticut General, and Dairy Equipment, that intent being not to protect individuals because they have less skill or ability, but to protect individuals who suffer or are believed to suffer from a "disadvantage" or "condition," actual or perceived, that is ordinarily medically diagnosable.

Once that "disadvantage" or "condition" is established, along with the other elements of a prima facie case, only then does the burden shift to the Respondent to prove that individual could not adequately undertake the job-related duties. The fact than an individual returned from a short-term medical leave of absence and said he was unable to lift "heavy loads" did not establish per se that the individual was in fact handicapped or perceived to be handicapped.

II. AGE ISSUE

Even had Mr. Wopat proven he was handicapped, this Examiner believes that findings adequately reflect that Mr. Wopat could not perform the required job duties of the position he sought to return to,[2] and for this reason his age claim is rejected as well. Also, there were no other job openings in areas other than trucking which Mr. Wopat had previously performed for the employer, nor was there any showing that newly-hired younger employees performed any job duties in those other areas.

III. MISCELLANEOUS

While the Examiner does not doubt that St. Vincent de Paul performs various commendable charitable functions in the community, the Examiner does not feel that St. Vincent de Paul's treatment of Mr. Wopat, though not discriminatory, was consistent with the Society's generally humanitarian orientation, and the rather sloppy employment practices of the Society should be given immediate attention to avoid future mistreatment of aged, long-term employees, whether discriminatory or merely unfair.

Signed and dated at Madison, Wisconsin this 7th day of October, 1980.

Allen T. Lawent
Hearing Examiner

---

[1]Case law in the lower courts has consistently found mental disabilities to be handicaps as well.

[2]However, if Mr. Wopat were found to be handicapped, one would have to deal with the issue of reasonable accommodation. That does not have to be addressed here, however, because he has not been found to be handicapped, and reasonable accommodation is not an issue of age discrimination.