EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVE
MADISON, WISCONSIN

Cleo Steinbring 2333 Allied Drive, #2 Madison, WI 53711 Complainant vs. Oakwood Lutheran Home 6209 Mineral Point Road Madison, WI 53711 Respondent	RECOMMENDED DECISION - REMEDY Case No. 2763

On February 11, 1982 the examiner issued the Recommended Findings of Fact, Conclusions of Law and Order in this matter. The Respondent filed a timely appeal to said Recommended Findings of Fact, Conclusions of Law and Order, but later withdrew its appeal on June 9, 1982. A remedy hearing was subsequently held to determine with specificity the amounts of money and other awards to which the Complainant is entitled.

Said Remedy Hearing was held on September 16, 1982 before the Examiner. Attorney William Haus of KELLY AND HAUS appeared on behalf of the Complainant who also appeared in person. The Respondent appeared by Attorney Gil Southwell of WHIPPLE LAW OFFICES. Based upon the record of the Remedy Hearing and after consideration of any written post-hearing arguments submitted by the parties, the Examiner proposes the following Recommended Decision-Remedy:

RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW - REMEDY

R1. Had the Complainant not been unlawfully discriminated against by the Respondent in violation of Sec. 3.23, Madison General Ordinances, she would have been hired as a Nursing Assistant (Nurse's Aide) on January 23, 1981. The Complainant would have been hired to work twenty-four hours per week beginning at a wage of $4.00 per hour.

R2. Beginning on March 8, 1981, the Complainant would have received an eight percent increase in her hourly wage and would have been paid $4.32 per hour.

R3. Beginning on January 24, 1982, the Complainant would have received a three percent merit increase and her hourly wage would have been increased to $4.45 per hour.

R4. Beginning on March 7, 1982, the Complainant would have received a four percent wage increase and her hourly wage would have been raised to $4.63 per hour.

R5. From January 23, 1981 through March 31, 1981, the Complainant would have earned $931.47 had she been employed by the Respondent. Even had she used reasonable diligence in seeking other employment, the Complainant would not have earned any other income during this period.

R6. From April 1, 1981 through June 8, 1982, the Complainant would have earned $6,054.69 had she been employed by the Respondent. Had the Complainant used reasonable diligence in seeking other employment in this period, the Complainant could have earned $5,814.99 from other sources. The Complainant failed to use reasonable diligence in seeking other employment during the period of April 1, 1981 through June 8, 1982.

R7. From June 9, 1982 through August 23, 1982, the Complainant would have earned $1,190.67 had she been hired by the Respondent on January 23, 1981.

R8. On June 9, 1982, the Respondent withdrew its appeal to the Examiner's Recommended Findings of Fact, Conclusions of Law and Order, issued on February 11, 1982 in this matter. The Respondent was, as of June 9, 1982 (subsequent to the withdrawal of its appeal), among other requirements, under an obligation to instate the Complainant to the next available position as a Nursing Assistant to work three days per week, six to eight hours per day. While Nursing Assistant positions were available with the Respondent between June 9 and August 24, 1982, the Respondent failed to comply with the (February 11, 1982) Order and did not instate Complainant until August 24, 1982 at $4.00 per hour.

R9. Had the Complainant been employed on January 23, 1981 by the Respondent, she would have received the following fringe benefits through August 23, 1982:

a. Eighty hours of paid vacation time;
b. Forty-eight hours of paid holiday time;
c. Twenty-five hours of paid sick time.

RECOMMENDED ORDER - REMEDY

R1. The Respondent shall pay to the Complainant the sum of $2,361.84 (the sum of $931.47 and $239.70 and $1,190.67) plus the difference between the amount she would have earned from August 24, 1982 to the time this Order is fully complied with had she been paid $4.63 per hour beginning on August 24, 1982 and the amount which she has actually been paid since that date.

R2. The Complainant's wage as of August 24, 1982 shall be adjusted to $4.63 per hour and she shall receive any increases to which she has been and is entitled during her employment with the Respondent based on that amount, including both backpay and frontpay.

R3. For the purposes of seniority and for any other reason affecting her current employment with the Respondent, the Complainant shall be considered to have again started working for the Respondent on January 23, 1981. The Complainant shall be entitled to all rights, privileges, benefits and perquisites of employment as if she had been employed by the Respondent from January 23, 1981 continuously.

R4. The Complainant shall be credited with twenty-five hours of sick time plus any additional sick time she would have earned from August 24, 1982 through the time this order becomes final and is fully complied with on the basis that she was employed continuously from January 23, 1981. The Complainant shall further be credited with forty-eight hours of additional holiday time and eighty hours of additional vacation time. The Complainant may combine all 128 hours of holiday time and vacation time and take them as paid time at her present wage rate, or alternatively the Complainant may request immediate compensation at her present wage rate for said 128 hours which the Respondent shall remit to her forthwith.

R5. The Complainant shall be entitled to 7% annual interest on all amounts she is entitled to receive pursuant to any and all provisions of this Order from the time said amount(s) became or become due until the Respondent remits said amounts to her.

R6. The Respondent shall comply with each and every provision of this order within ten days of the date this order becomes final. Respondent shall submit to the Hearing Examiner written documentation of compliance, including copies, of all checks remitted to the Complainant, by the end of that ten day period. Further the Respondent shall include written evidence of the current hourly wage of the Complainant and shall submit the said documentation to the Examiner as well.

R7. The Respondent shall post on each and every floor of the Oakwood Lutheran Home a copy of the Madison Equal Opportunities Ordinance in a conspicuous location, and a representative from the Madison Equal. Opportunities Commission shall be permitted to inspect Respondent's business from time to time to determine that the Respondent in fact is complying with this provision of the order. Said copies of the ordinance shall be posted for a period of no less than two years from the date this Order becomes final.

R8. The provisions of this Order and the entirety of this Recommended Decision - Remedy are supplemental to, and are not in any way intended to affect or diminish the finality of the Recommended Findings of Fact, Conclusions of Law and Order dated February 11, 1982 which became a Final Order pursuant to Rule 10.2 and Rule 15.513 of the Madison Equal Opportunities Commission (MEOC) promulgated pursuant to Section 3.23(9)(b)6., Madison General Ordinances.

MEMORANDUM OPINION

Before discussing the total amounts that the Complainant would be entitled to, I wish to resolve any disputes regarding the hourly rate of pay that the Complainant would be entitled to. While there is no dispute that she would have originally been hired for a twenty-four hour-a-week job, there is no dispute as to the rate of pay she would have received from January 24, 1982 on:

a. The parties agree that the Complainant would have received $4.00 per hour from January 23, 1981 through March 7, 1981;
b. The parties agree that the Complainant would have received $4.32 per hour (an eight percent increase) from March 8, 1981 through January 23, 1982;
c. The Complainant argues that she would have received a three percent (3%) merit increase effective January 24, 1982 and consequently would have been paid $4.45 per hour from January 24, 1982 through March 7, 1982. The Complainant furthers contends that she would have received a four percent wage increase effective March 8, 1982 and would have been paid $4.63 per hour from that time on (until any further increase would be made). Respondent contends that the Complainant would continue to have been paid $4.32 per hour through March 7, 1982 (i.e., that she would not have received the three percent merit increase) and that effective March 8, 1982, she would have received the four percent wage increase to $4.49 per hour.

The following chart reflects the parties respective positions:

	COMPLAINANT	RESPONDENT
Initial Salary (January 23, 1981 through March 7, 1981)	$4.00 per hour	$4.00 per hour

Eight percent increase (March 8, 1981 through January 23, 1982)	$4.32 per hour	$4.32 per hour
Merit increase (January 24, 1982 through March 7, 1982)	$4.45 per hour (three percent merit increase)	$4.32 per hour (no merit increase)
Four percent increase (From March 8, 1982 onward)	$4.63 per hour	$4.49 per hour

I. Back Pay

INITIAL PERIOD: JANUARY 23, 1981 THROUGH MARCH 31, 1981

There is essentially no dispute that even had the Complainant used reasonable diligence to mitigate her losses, it is reasonable to expect she would not have found employment until April 1, 1981. The Respondent effectively concedes this proposition in its brief. There is no dispute regarding the number of hours per week the Complainant would have worked in this period: twenty-four hours per week. There is no dispute regarding the hourly salary she would have received in this period: $4.00 per hour through March 7, 1981 and $4.32 per hour from March 8, 1981 through March 31, 1981. Following is the total amount of wages the Complainant is entitled to receive for this period:

January 23, 1981 through March 7, 1981:
144 hours X $4.00 per hour = $576.00
(24 hours per week X 6 weeks)

March 8, 1981 through March 31, 1981
82.29 hours X $4.32 per hour = $355.47
(24 hours per week X 3.43 weeks)

	$576.00
	$355.47
TOTAL	$931.47

In total, the Complainant is entitled to receive $931.47 in back pay for the period January 23, 1981 through March 31, 1981.

SECOND PERIOD: THE PERIOD OF APRIL 1, 1981 THROUGH JUNE 8, 1982: MITIGATION

I find that the Respondent showed that the Complainant could have earned $5,814.99 had she used reasonable diligence in seeking employment during the second period. The Complainant would have earned $6,054.69 had she been employed by the Respondent during this same period. Consequently I find that the Complainant is entitled $239.70 in back wages for this period.[1] It is not necessary, to show reasonable diligence, that the Complainant apply for each and every job available, nor is it necessary to actually obtain another job. However, the evidence is clear that the Complainant made little, if any, effort to seek alternative employment during this period.[2]

THIRD PERIOD: JUNE 9, 1982 TO AUGUST 22,1982

On June 9, 1982 the Respondent withdrew its appeal to the initial Recommended Findings of Fact, Conclusions of Law and Order (dated February 11, 1982) in this matter. Said Recommended Order

(which became final after the Respondent withdrew its appeal) required in part that the Respondent shall instate the Complainant to the next available position as a Nursing Assistant to work three days per week, six to eight hours per day. The Respondent's duty to comply with at least this portion of the order once liability had been established with finality supercedes any responsibility on the part of the Complainant to mitigate her losses. The evidence on the record shows that the Respondent did have Nursing Assistant positions available prior to the time the Respondent actually did instate the Complainant on August 24, 1982. The Respondent failed to offer any credible reason for not complying with the Order until August 24, 1982. Consequently, the Respondent may not benefit from its own neglect or failure to comply with an order that it conceded was lawful by having withdrawn its appeal on June 9, 1982. In short, the Respondent's failure to comply with the terms of a lawful order after the withdrawal of its appeal relieved the Complainant of any duty to mitigate losses from the point on. Just as the Complainant may not sit on a back pay order without making some reasonably diligent attempt to seek employment, the Respondent may not be permitted to fail to comply with a lawful order in the hopes that it can prove the Complainant failed to mitigate her losses or may be hired by some other employer. Essentially, had the Respondent complied with the order as it should have, the Complainant would not have been put in the position of having to seek other employment from June 9, 1982 onward.

To permit the Respondent to delay its compliance with a lawful order would in effect benefit the Respondent and permit the Respondent to punish the Complainant unnecessarily, where it is the Respondent who has violated the ordinance and has committed the wrongdoing. The Complainant is entitled to $1,190.67 for this period (see Finding of Fact and Conclusion of Law R7).

FOURTH PERIOD: AUGUST 24, 1982 UNTIL THE TIME THE ORDER IS FULLY COMPLIED WITH

The Complainant is entitled to the difference between $4.63 per hour and the wage she has received from August 24, 1982 until the time this order is complied with for all time she has worked since that date. Further the Complainant is entitled to even a greater amount should she have been entitled to any increases over that time period, and all increases shall be based on the premise that she should have been earning $4.63 per hour as of August 24, 1982.

II. SUMMER OFFSET

The Respondent spends a great deal of time in its brief attempting to persuade the Examiner that even had the Complainant been hired in January 23, 1981 she would not have worked during the either the summer of 1981 or the summer of 1982. I briefly dispose of this argument and the related arguments for reduction of the Complainant's benefits on the basis that the Respondent is estopped from making such arguments. The reason for such estoppel is that during the case-in-chief, the Respondent contended that it would not have permitted the Complainant to have taken the 1981 and 1982 summers off.

The Complainant had a release from her own physician indicating that she was able to work without restrictions. While the Respondent had granted summer leaves of absence to the Complainant in previous years, the Respondent has failed to prove[3] that the Complainant would have been required to have the summers off and by its own testimony indicated that it would not have permitted the Complainant to have the summers off. The Respondent may not now twist its argument to say that the Complainant would have been permitted to have the summers off, and that therefore should reduce her back pay and benefits.

III. ABSENTEEISM RECORD

The Respondent also spends a great amount of time in its brief attempting to persuade the Examiner that the Complainant's backpay somehow must be calculated in light of her past absenteeism; i.e., that the amount of time she would have worked should be projected on the basis of her past absenteeism record. In addition to finding absolutely no persuasive precedent in the law for this assertion, the Examiner finds this argument obnoxious to what the handicap law is designed to protect. The point is that the Complainant had a full release from her doctor to work without restriction. Even the Respondent's own doctor was willing to permit her to work on at least a three-month probationary condition. It must, therefore, be presumed that the Complainant would have worked the amount of hours that she was hired to work notwithstanding her past record.

The Respondent has failed to overcome this presumption by either a preponderance of the evidence or clear and convincing evidence, whichever applies.

IV. VACATION DAYS, SICK DAYS AND SENIORITY DATE

While the Ordinance applies to an offset of earnings for amounts that the Complainant may have earned with reasonable diligence, the Complainant is nevertheless entitled to fringe benefits as if she would have been hired on January 23, 1981. My Order reflects this proposition.

IV. CONCLUSIONS

Based on the preceeding analysis I have entered an appropriate order to remedy the Respondent's unlawful actions.

Signed and dated this 30th day of November, 1982.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
Hearing Examiner

cc: Attorney William Haus
Attorney Carlyle Whipple

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[1]The amounts were calculated as follows using the Respondent's figures for wages the Complainant would have received (see page 36 of Respondent's brief) but basing the calculations on a 24-hour week (and not a 24.07 hour week as asserted by the Respondent). There is no basis for averaging the hours of jobs available where other 24-hour per week jobs were available. It must be presumed that the Complainant would have found one with similar terms as the one the Respondent rejected her for - the Complainant failed to prove that she would have worked less than 24 hours, even had she found a job; the Respondent failed to prove she would have worked more than 24 hours:

OTHER JOB EARNINGS (If had been obtained)

$3.51/hr.	x	24 hrs.	x	13.14 wks.	=	$1,107.15 (04/01/81 - 05/31/81)
$3.64/hr.	x	24 hrs.	x	26 wks.	=	2,271.36 (06/01/81 - 12/31/81)
$3.76/hr.	x	24 hrs.	x	27 wks.	=	2,436.48 (01/01/82 - 06/08/82)
TOTAL (Period 04/01/81 - 06/09/82):						$5,814.99

OAKWOOD JOB EARNINGS

$4.32/hr. x 24 hrs. x 42.16 wks.	=	$4,413.81	(04/01/81 - 01/23/82)
$4.45/hr. x 24 hrs. x 6 wks.	=	640.80	(01/24/82 - 03/07/82)
.$4.63/hr. x 24 hrs. x 9 wks.	=	1,000.08	(03/08/82 - 06/08/82)
TOTAL (Period 04/01/81 - 06/09/82):		$6,054.69	

$6,054.69 - $5,814.99 = $239.70 (Amount Complainant would have earned at Oakwood less amount earnable with reasonable diligence.)

[2]The Complainant states in her "Answers to Interrogatories" (dated July 8, 1982) that since January of 1981, other than her attempt to seek employment with the Respondent, she sought work as follows:

A. She ". . . consistently and continuously followed the want ads of the Madison Newspapers looking for employment as a nurses aide." She states also that while she did not record the specific dates on which she examined the want ads, "I examined them frequently and regularly."
B. She filed an application with the Attic Angels Nursing Home in the Spring of 1981.
C. She filed an application with the Sunny Knoll Nursing Home (which at hearing was clarified to be the Sunnyhill Nursing Home) in the Spring of 1981.
D. She looked in the Yellow Pages and called the Arbor View, Americana, Colonial Manor, Rest Haven and Four Winds Manor Nursing Homes. She did not remember dates she had called, but said that she was told by each of these nursing homes that they were not taking applications.

The Respondent, however, submitted a sampling of newspaper advertisements for the period between April 1, 1981 through June 8, 1982 (those ads that appeared on the first day of a month) indicating that openings existed at the Upjohn, Carmenta Health Care Center, Americana, and Colonial Manor nursing homes, all places which the Complainant had not applied (though she stated in the answers to the interrogatories that she had called Americana and Colonial Manor). Further, Mark Schuster, the Supervisor of Human Resources at Americana, testified (for said period) that an average of 5 to 6 nurses aides positions were open per month, mostly on the p.m. and night shift (the Complainant testified she preferred the "p.m." or 3 p.m. to 11 p.m. shift), two-thirds of which were advertised in the Madison Newspapers. Consequently, during said 15-month period, approximately 75-90 positions were open at Americana, 50-60 of which were advertised in the newspapers which the Complainant read. Approximately one out of 3.5 applicants were hired by Americana.

There was further testimony that over 100 combined openings for Nursing Assistants were available at Colonial Manor, Sunnyhill and Arbor View Nursing Homes, quite a number of these on the p.m. shift and some of these with 18 to 24 hours of work per week. All of these nursing homes, as did Americana, testified that people who telephoned were generally encouraged to come in and fill out an application, regardless of whether a current job opening existed, and that they ran ads in the Madison Newspapers. The Complainant did apply at Sunnyhill on one occasion during the April 1, 1981 through June 8, 1982 period.

While it is not necessary for a Complainant to actually obtain employment to show reasonable diligence in seeking employment (indeed, her chances of obtaining employment were at best one in three based on the evidence presented), her failure to even apply at (among others) Americana, Colonial Manor and Arbor View Nursing Homes notwithstanding the number of Nurse's Aides job openings (including some on her preferred p.m. shift) and the frequency of advertisements in newspapers that the Complainant conceded she frequently read, in this case was sufficient to show a lack of reasonable diligence in attempting to seek other employment. The Complainant's statements that she was told by these homes that they were not taking applications were shown to be of doubtful credibility.

[3]Any statements made by the Complainant regarding her reasons for taking leaves of absence in past summers are negated by the fact that she had received a medical release to work without restrictions from her own doctor at the time she reapplied for employment in January of 1981. As the Respondent also had agreed to past leaves of absence in summer but said it would not have agreed to future ones, it must be concluded that the Complainant was able and would have been required to work those summers. Also, I note that the Respondent reinstated the Complainant on August 24, 1982, presumably when the weather can still be very warm and prior to expiration dates of her earlier summer leaves (October 1, 1979 and September 18, 1980).

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Cleo F. Steinbring 2333 Allied Drive, #2 Madison, WI 53711 Complainant vs. Oakwood Lutheran Homes Association, Inc. 6209 Mineral Point Road Madison, WI 53705 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 2763

On January 28, 1981, a complaint was filed with the Wisconsin Equal Rights Division of the Department of Industry, Labor and Human Relations (ERD/DILHR) alleging discrimination on the basis of age and handicap each in regard to discharge and/or hire. Said complaint was referred to the Madison Equal Opportunities Commission (MEOC) and was received by the MEOC on February 11, 1981. MEOC Human Relations Investigator Mary Pierce investigated said complaint and an Initial Determination dated June 4, 1981 was issued finding (1) no probable cause to believe that discrimination occurred on the basis of age in regard to any employment action, and (2) probable cause to believe that discrimination occurred on the basis of handicap in regard to hire (rehire). There was clearly no discriminatory discharge issue.

As no timely appeal was made of the issues upon which no probable cause was found, these issues were construed to be dismissed. Consequently, the only issue remaining pertained to handicap discrimination in regard to hire (specifically, the Respondent's failure or refusal to rehire the Complainant as a nursing assistant in January of 1981).

Conciliation failed or was waived, and the matter was certified to public hearing. A public hearing was held on September 24, 1981. The Complainant appeared in person and by Attorney William Haus of KELLY AND HAUS. The Respondent appeared by Attorney Carlyle H. Whipple of MC BURNEY, WHIPPLE AND BIEBER, S.C. and by employee representatives Carol Schnacky and Audrey Peterson. Based upon the record of the hearing and after consideration of the written posthearing arguments submitted by the parties, the Examiner proposes the following RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Cleo F. Steinbring is an adult female residing in the State of Wisconsin.
2. The Respondent, Oakwood Lutheran Homes Association, Inc., is a corporation that operates a nursing home and employs persons in the City of Madison.
3. The Complainant was first employed by the Respondent as a nursing assistant on October 16, 1978. She was scheduled to work 6 hours per day, three days a week.
4. The Complainant requested and was granted three leaves of absence by the Respondent:

a. From June 9, 1979 to October 1, 1979 due to problems she had working in the heat in those months;
b. From February 7, 1980 to April 24, 1980 primarily due to a thumb and wrist injury. This leave was originally granted through March 24, 1980, up to which time she received Worker's Compensation. A one month extension to April 24th was subsequently granted;
c. From June 9, 1980 to September 18, 1980 for the same heat problem described in a. above.

5. In addition to the leaves of absence referred to in Finding of Fact 4, the Complainant missed 20 days of work for various reasons between October 16, 1978 and October 24, 1980.
6. On October 24, 1980, the Complainant requested an indefinite leave of absence in order to take care of her husband who was to undergo heart surgery. Her request was denied by the Respondent and the Complainant subsequently resigned.
7. Prior to October 24, 1980, the Complainant had not received any verbal or written warnings regarding her absences, including the three leaves of absence.
8. In early January, 1981, the Complainant again applied for employment as a nursing assistant with the Respondent. The job opening was for an individual to work three days per week, eight hours per day.
9. The Respondent's customary procedure for hiring nursing assistants is as follows:

    a. The Respondent initially screened written applications;
    b. The Respondent sent applicants who had passed the initial written screening to their would-be supervisor for further consideration; and
    c. The Respondent sent those applicants who were still considered acceptable after Step b to employee health for a medical check-up.

10. During the processing of the Complainant's 1981 application, the Respondent referred the Complainant to employee health without having her see a would-be supervisor.
11. On January 15, 1981, the Complainant was interviewed by Dr. Norman M. Jensen, M.D., the Respondent's Medical Director. Jensen was concerned that she had missed 22 work days due to illness or injury during her past employment with the Respondent and he was concerned that she had two work related injuries during her past employment He told her that he doubted the safety of her returning to a nursing assistant job and would reconsider only if Dr. Liebl, her doctor, sent him a letter indicating that he approved and recommended this kind of work for her. (See Complainant's Exhibit 11.)
12. Dr. Liebl, the Complainant's personal physician who had treated her for her prior thumb and wrist injury, subsequently sent a note for Dr. Jensen indicating the Complainant could return to work as a nursing assistant without restrictions.
13. The Complainant was subsequently examined by the Respondent's employee health division, and Dr. Jensen could find nothing to absolutely disqualify her other than her record of excessive illness and injury (See Complainant's Exhibit 11).
14. Dr. Jensen approved a 3-month trial period for the Complainant. He indicated that the Complainant's health might become a problem and should be evaluated before 6 months.
15. The Complainant subsequently received a call from Sheryl Apdugh, the Respondent's Assistant Head Nurse, on January 21, 1981. Apdugh told the Complainant at that time that the Complainant could return to work on a three day per week, eight hour per day schedule for a three month trial period.

16. On January 23, 1981, subsequent to Apdugh's call, Audrey Peterson met with the Complainant. At this time, Peterson, the Respondent's Head of Nursing, told the Complainant she would not be rehired.
17. At sometime during the processing of the Complainant's January, 1981 application for a position as a nursing assistant, prior to the January 23rd refusal to hire, Respondent suggested that she consider other positions. The Complainant declined and indicated that she was interested only in a nursing assistant position.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class of handicap within the meaning of Section 3.23, Madison General Ordinances.
2. The Respondent is an employer within the meaning of Section 3.23, Madison General Ordinances.
3. The Respondent discriminated against the Complainant on the basis of handicap in regard to hire (rehire) in violation of Section 3.23, Madison General Ordinances; specifically, the Respondent discriminated against the Complainant on the basis of her handicap by failing to hire (rehire) her as a nursing assistant in January of 1981.

RECOMMENDED ORDER

1. The Respondent shall cease and desist from discriminating against the Complainant on the basis of her handicap.
2. The Respondent shall instate the Complainant to the next available position as a Nursing Assistant to work three days per week, six to eight hours per day. The Complainant shall be instated with all rights, privileges, benefits and perquisites of employment, including, but not limited to, seniority, to which she would be entitled had she been hired on January 23, 1981.
3. The Respondent shall pay to the Complainant the amount of backpay to which she would be entitled, less ordinance setoffs, had she been hired by the Respondent from January 23, 1981 to such time as she is instated. This provision is also intended to include front pay.

MEMORANDUM OPINION

An employee's past record of injury and illness and/or an employer's perception of an individual as handicapped is sufficient constitute a handicap within the meaning of Section 3.23, Madison General Ordinances.[1] Where an employer fails to hire (rehire) an employee on account of her past record of injury and illness because the Respondent believes that (1) she will constitute a safety risk to herself and/or others and (2) that she will be frequently absent, the burden of proof is on the Respondent to show to a reasonable degree of medical probability (or certainty) that the working conditions would be hazardous to the employee's health or safety or that of others.[2] It is insufficient for the employer to show a mere possibility of future injury.

In this case, there is no dispute that the Complainant had a past record of injury and illness known to the Respondent (in fact, compiled while she was previously employed by the Respondent), and the employer perceived her as a future risk as follows:

a. The Respondent perceived that she might not be able to lift patients safely and perform other duties efficiently because of her past wrist and thumb injury.

b. The Respondent perceived that she might be absent frequently because she had taken much time off in the past, primarily for a heat problem in the summers and for the wrist and thumb injury.

There can be no dispute that the Complainant was fit or presently able to perform her job at the time of her (re)application. Her doctor had authorized her to return to work with no reservations, and the Respondent's doctor had reluctantly, but on the basis of her attending doctor's recommendations, authorized a three month trial period. Based on these two recommendations, the Respondent's apprehensions about the future risk of employing the Complainant must be dismissed as mere speculation. There was no reason to believe that the Complainant was any more of a risk than any other employee.[3]

Finally, I find the issue of past absenteeism was a pretextual reason offered by the Respondent. The Respondent had never warned the Complainant that her past "absenteeism" was a problem, nor would have terminated her had she not resigned in October (Peterson's testimony). Also, if past absenteeism was a problem, the Respondent would not have offered her to be employed in positions other than nursing assistant. However, even if her past absenteeism was a factor in Respondent's failure to hire, the Respondent would not be shielded from liability because the Respondent's impermissible consideration of her (perceived) "handicap" was a determining factor in the Respondent's refusal to hire her.[4]

Signed and dated this 11th day of February, 1982

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
Hearing Examiner

FOOTNOTES

[1]Dairy Equipment Company v. DILHR, 290 N.W.2d 330, 22 EPD 30,809 (1980). In Dairy Equipment, the Wisconsin Supreme Court acknowledged the Federal definition of handicap (found in 29 U.S.C., Section 706(6), 1976 as appended to the Rehabilitation Act of 1973):

A handicapped individual is ". . . any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such impairment, or (C) is regarded as having such impairment.

The evidence in this case is clear that the Complainant had a record of injury and illness which the Respondent regarded as limiting her ability to perform her job (work is a major life activity on its face).

[2]Chicago, Milwaukee, St. Paul and Pacific Railroad v. DILHR, 62 Wis. 2d 392, 215 N. W. 2d 443 (1974); and Dairy Equipment Company v. DILHR, supra (1980).

[3]The Respondent takes a rather interesting position. It argues on the one hand that the Complainant was not handicapped at the time of the January application, and called the Complainant's doctor to testify regarding her ability to perform the nursing assistant job without restriction. At the same time, the Respondent dotes on the apprehension of some of Respondent's employees about the Complainant's ability to perform safely and without being absent as a reason for not employing her. Clearly, where the Respondent and Complainant's doctor both agreed she was fit to perform, the speculations by the Respondent's employees must be rejected.

Further, the Respondent could not presume the Complainant would ask for time off again in the summer because of heat. In the first place, the Respondent had agreed to her past summer leaves of absence, indicating that they were not a problem. Based on the doctor's recommendations that she was fit to perform her job, the Respondent will have to cross the bridge of any future requests for leaves of absence when it comes to it.

[4]See Wisconsin Department of Agriculture v. Wisconsin Labor and Industry Review Commission, 17 EPD 8607 (1978) for the proposition (as paraphrased from Muskeog-Norway C.S.J.S.D. WERB, 35 at p.562) that an employer's conduct is not insulated from a finding of illegality when one of the motivating factors is legally protected (e.g., race, age, handicap, union activities, etc.) no matter how many other valid reasons might exist for the action complained of.