EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Theodis Rogers 209 Swanton Rd 7 Madison WI 53714 Complainant vs. New Horizons 1255 Deming Way Madison WI 53717 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION Case No. 19982232

BACKGROUND

On November 24, 1998, the Complainant, Theodis Rogers, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). Rogers charged that the Respondent, New Horizons, discriminated against him on the basis of his conviction record when it did not hire him for a Receptionist position. The Respondent denies having discriminated against the Complainant on any basis and contends alternatively that it did not know of the Complainant's conviction record and that the Complainant's conviction record is for a crime the circumstances of which are substantially related to the position for which the Complainant applied.

After investigation, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant as alleged. Efforts at conciliation of the complaint proved unsuccessful and the complaint was transferred to the Hearing Examiner for a public hearing on the merits of the complaint.

Subsequent to a Pre-Hearing Conference, the Hearing Examiner, on June 2, 1999, issued a Notice of Hearing and Scheduling Order. Pursuant to the provisions of the Scheduling Order, the Respondent filed its Motion to Dismiss the complaint on July 2, 1999. The Complainant responded to the motion and the Respondent replied to the response.

DECISION

The Respondent essentially argues that the Hearing Examiner should, as a matter of law, find that the Complainant's conviction is substantially related to the circumstances of the position for which the Complainant applied. The Hearing Examiner declines to do so.

Section 3.23(8)(i) MGO sets forth the provisions of the ordinance specifically dealing with arrest and conviction records in the context of employment. At question here are the specific provisions found in Section (8)(i)3.b. That provision indicates that an employer may take a prospective employee's conviction record into account if it is no older than three years from the date of employment and the circumstances of the conviction are substantially related to the employment in question. There is no question at this stage that the Complainant's conviction for 2nd degree homicide by reckless conduct falls within the ordinance's 3 year provision. It is not simply the date of conviction that triggers the time period, but placement on probation or the date of parole.

The Complainant objects to the Respondent's motion asserting that it is really a Motion for Summary Judgment. The typical Motion for Summary Judgment is not recognized by the Commission. Rhone v. Marquip, MEOC Case No. 20967 (Ex. Dec. 04/05/89), Petzold v. Princeton Club, MEOC Case No. 3252 (Ex. Dec. 15/94, Ex. Dec. 05/10/94). If, however, the motion is one challenging the subject matter jurisdiction of the Commission

or some other aspect of the Commission's jurisdiction, the Commission will entertain such a motion, Potter v. Madison Gospel Tabernacle, MEOC Case No. 21269 (Ex. Dec. 02/14/94).

The Hearing Examiner concludes that the Respondent's motion does not seek to dismiss the complaint because of some jurisdictional defect, but instead on the grounds that given the facts, no reasonable Finder of Fact could come to the conclusion that discrimination under the ordinance has occurred. It seems to be the Respondent's position that the Complainant's conviction is for so serious a matter that any contact with other individuals may cause a repetition. Given the likelihood of a reoccurrence of criminal activity, the Respondent alleges that the Hearing Examiner has no alternative but to find the Complainant's conviction substantially related to the Complainant's potential employment.

The approach urged by the Respondent is inconsistent with the protections of the ordinance. The ordinance makes no specific crimes substantially related to employment as a matter of law. The ordinance requires an analysis of the circumstances leading to a conviction and an analysis of the circumstances of the specific employment. Such an exercise strikes the Hearing Examiner as highly fact intensive. Even if the Hearing Examiner could consider such a motion, it appears to be inappropriate for decision because of the conflict between the parties about the nature of both the crime and the employment.

The Hearing Examiner concedes that some convictions might be so obviously related to potential employment that such a motion could be appropriate. For example, repeated convictions for child molestation could automatically exempt someone from employment as a teacher at a pre-school. Such a conviction, on the other hand, might not keep one from employment as a night duty janitor at the same pre-school, if there would not be any contact with children. However, given the incomplete record regarding the circumstances of the Complainant's crime and how the precise requirements of the Receptionist position for which the Complainant applied might create an environment in which a similar offense might be encouraged, the Hearing Examiner cannot dismiss this complaint without a hearing.

ORDER

The Respondent's motion is denied. The Complainant's request for costs and attorney's fees is denied.

Signed and dated this 10th day of August, 1999.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

EQUAL OPPORTUNITIES COMMISSION
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MADISON, WISCONSIN

Theodis Rogers 209 Swanton Rd 7 Madison WI 53714 Complainant vs. New Horizons 1255 Deming Way Madison WI 53717 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 19982232

BACKGROUND

A public hearing on the merits of the above-captioned complaint was held before Hearing Examiner Clifford E. Blackwell, III, on September 9, 1999 in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd., Madison, Wisconsin. The Complainant, Theodis Rogers, appeared in person and by his attorney, Mark Michael P. Murphy of the Kasieta Legal Group. The Respondent, New Horizons, appeared by its owner and President Scott Dell and by its attorney Emily R. Gnam of the law firm of Foley and Lardner. Based upon the record of proceedings in this matter, the Hearing Examiner now enters the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant is a person with an extensive record of convictions for violent crimes.
2. The Respondent is a corporation that provides training on computer software packages. It employs a number of individuals within the City of Madison.
3. On October 29, 1998, the Complainant saw an advertisement in the newspaper for the position of Receptionist with the Respondent. He contacted Katie Slinde, the Respondent's Office Manager, and arranged for an interview over his lunch hour on the same day.
4. The Complainant arrived approximately 30 to 45 minutes late for the interview because he had mistakenly gone to the Respondent's previous location. Slinde did not comment on the Complainant's tardiness. The Complainant agreed to send Slinde his résumé by facsimile transmission later that day. He did so.
5. The Complainant was one of seven persons initially interviewed for the Receptionist position. He was the only candidate who was given a second interview. The Complainant's second interview took place on November 5, 1998. Slinde liked the Complainant and believed he would work well in the Respondent's office. On November 6, 1998, Slinde told the Complainant that she was very interested in him for the Receptionist position.
6. On November 6, 1998, the Complainant called Slinde to tell her that he had been convicted of second degree homicide. The Complainant told Slinde that he had killed a man who had raped the Complainant's girlfriend. The Complainant had not disclosed this conviction on the application form where it requested information about arrests and convictions occurring in the previous seven years.
7. The Complainant lied to Slinde about the nature and the extent of his conviction record. The Complainant had been convicted of killing his girlfriend and then stealing her property and selling it to obtain drugs. These crimes had occurred while the Complainant was on probation for other theft related crimes. The Complainant had been placed on probation in 1996 for the homicide and related crimes.
8. At the time the Complainant was seeking employment with the Respondent, he was employed at Meriter Hospital in the Human Resources Department. He had disclosed his conviction to that employer, but had similarly lied about the nature of the crimes for which he had been convicted.
9. After disclosing some form of conviction to Slinde on November 6, 1998, it was agreed that the Complainant would fax the name of his Probation Officer and his doctor to Slinde, along with his references.
10. The Complainant called Slinde on November 10, 1998 to check on his application. Slinde told the Complainant that she had not received the materials that he had agreed to send her. He said he would send them again.
11. On November 11, 1998, the Complainant's wife, Vickie Rogers, faxed the material to the Respondent from her place of work. Her fax machine generated a report indicating that the Respondent had received the fax.
12. On November 16, 1998, Vickie Rogers called the Respondent to see if the Receptionist position was still available. She did not identify herself. She was told that the position had been filled.
13. Subsequent to the Complainant's disclosure to Slinde of his conviction record, but prior to the Complainant's November 10, 1998 conversation with Slinde, Slinde spoke with Scott Dell and Belkis Dell about the Complainant's application. Belkis Dell had participated in the Complainant's second interview with Slinde. Scott Dell was not customarily involved in discussions about applications unless there were problems connected with the application. The discussion supposedly identified three problems with the Complainant's application. First, the Complainant appeared 30 to 45 minutes late for his initial interview with Slinde. Second, the Complainant had failed to forward documents requested by Slinde relating to his conviction. Third, the Complainant had applied for a position with the Respondent a year before and had been rejected at that time.

14. The Respondent did not offer the position of Receptionist to the Complainant because of his conviction record. The position was offered to and taken by Albert Boyd on or about November 11, 1998. Boyd was one of the original candidates who had not been given a second interview. Slinde did not tell the Complainant of the Respondent's decision to offer the Receptionist position to Boyd when she spoke with the Complainant on November 10, 1998.
15. The Respondent's stated reasons for not hiring the Complainant, while factually true, were not the actual reasons for the Respondent's decision.
16. The crimes for which the Complainant was convicted demonstrate a lack of concern for property and life under certain circumstances. Those crimes were committed while the Complainant was actively using controlled substances. The Complainant is under treatment and counseling and it seems likely that those conditions will not be repeated under the circumstances of employment as a Receptionist for the Respondent. The Complainant's employment at the time of his application with the Respondent had stresses and conditions that were similar to those which he might experience as a Receptionist for the Respondent. The Complainant was able to perform the similar duties at Meriter Hospital without a problem.
17. The Respondent performed no analysis of any relationship between the Complainant's reported conviction and the circumstances and conditions of employment as a Receptionist. The Respondent made its decision not to hire the Complainant simply on the knowledge of his reported conviction.
18. At the time of his application for the Receptionist position, the Complainant was making more money as a temporary employee at Meriter Hospital. Though he might have eventually made more in employment with the Respondent, the record does not demonstrate when that would occur. It is not clear that the Receptionist position offered the Complainant any greater benefits of employment than his employment with Meriter Hospital other than permanent status.
19. The Complainant was clearly upset and emotionally distressed by the Respondent's failure or refusal to hire him. However, the Complainant clearly and intentionally misled the Respondent about the nature and extent of his conviction record.
20. The Complainant has had reasonable costs and expenses related to the bringing of this action including attorney's fees.

CONCLUSIONS of LAW

21. The Complainant is a person with a conviction record and is subject to the protection of the Madison Equal Opportunities Ordinance (ordinance).
22. The Respondent is an employer within the meaning of the ordinance and is subject to its regulation.
23. The Respondent violated the ordinance by refusing to hire the Complainant for the position of Receptionist in November of 1998 because of his conviction record.
24. The Respondent failed to establish that the Complainant's conviction record was substantially related to the circumstances of the position of Receptionist.
25. The Complainant suffered no economic loss or lost wages as a result of the Respondent's violation of the ordinance.
26. The Complainant suffered emotional distress and injury as a result of the Respondent's violation of the ordinance, but is stopped from claiming any damages by his clear and intentional misstatements to the Respondent about the nature and extent of his conviction record.
27. The Complainant is entitled to his reasonable costs and fees including a reasonable attorney's fee for bringing this complaint.

ORDER

28. The Respondent shall cease and desist from discriminating against the Complainant on the basis of his conviction record. This does not require the Respondent to offer the Complainant the next available position as a Receptionist.
29. The Respondent shall not retaliate against the Complainant in any manner protected by the ordinance for his bringing of this complaint.
30. The Complainant shall submit a petition for his reasonable costs and fees including a reasonable attorney's fee incurred in connection with this complaint. The petition shall be filed with the Commission within 15 days of this order's becoming final. The Respondent shall have 15 days from receipt of the petition to respond and the Complainant shall have 10 days to reply.

MEMORANDUM DECISION

This complaint presents several extremely difficult issues of interpretation and application. The underlying question of whether the Respondent's decision not to offer the Receptionist position to the Complainant was motivated in some significant part by the Complainant's conviction record is relatively easy. It is the questions surrounding interpretation and application of the ordinance's provision regarding consideration of a conviction record that pose the challenge.

On this record, the Respondent clearly was motivated by its fear of the Complainant's conviction record when it did not offer the Complainant the position of Receptionist in November of 1998. Prior to the Complainant's disclosure of some form of conviction to Slinde on November 6, 1998, Slinde was prepared to hire him. The Complainant was the only applicant of seven who was offered a second interview. Slinde clearly thought that the Complainant would fit in well with the office culture. He had been performing duties with similar requirements at Meriter Hospital in the Human Resources department.

The explanations presented by the Respondent for its decision not to hire the Complainant are not credible and are likely a pretext for a discriminatory motive. The Respondent stated that there were three reasons why it did not choose to hire the Complainant. First, the Complainant was 30 to 45 minutes late for his initial interview. Allegedly, Scott Dell, the Respondent's President is a stickler for punctuality. Second, the Complainant had applied for a position with the Respondent a year earlier and had not been hired at that time. The Respondent contends that the earlier application and rejection made the Complainant unsuitable for the Receptionist position. Third, the Respondent states that the Complainant's failure to provide the Respondent with requested information about his Parole Officer and therapist disqualified the Complainant. After the Complainant notified Slinde of his conviction, Slinde requested that the Complainant provide her with the name of the Complainant's Parole Officer and therapist. Whether the Complainant provided this information is a matter of dispute on this record.

The fact that the Complainant was late to his initial interview went without comment by Slinde at the initial interview. Despite his tardiness, which was explained to Slinde, the Complainant was the only applicant offered a second interview. Even assuming that Slinde was aware of Dell's apparent fixation on timeliness, the Complainant's initial late appearance was not sufficient for the Complainant's application to be immediately rejected. For the Respondent to attempt to use this fact as a paramount reason for not offering the Complainant the Receptionist position is simply not credible. It would be more believable if the Respondent had not offered the Complainant a second interview or been prepared to offer him employment until the disclosure of a conviction record.

The argument that the Complainant's unsuccessful application to the Respondent of a year prior somehow disqualifying him from consideration for the Receptionist position is almost laughable. There is nothing in this record to suggest that the Respondent had some sort of one application per person policy. The mere suggestion that a company might apply such a policy in today's tight labor market is not credible.

The final ground proffered by the Respondent for its decision not to hire the Complainant under other circumstances would have greater merit. Once the Complainant informed Slinde of a conviction record, Slinde properly asked him to provide information about his Parole Officer and his therapist. Slinde's request was proper since the protection for conviction records is limited by the language of the ordinance. The Respondent had the right to seek information to help it make a reasoned determination of substantial relatedness to the Receptionist position.

The Respondent contends that the Complainant did not send the information. The Complainant testified that he had sent the information on November 6, 1998 by facsimile transmission. The Complainant testified that he then left a voice mail message for Slinde indicating that he had sent the requested references. Slinde did not return the Complainant's call and did not contact the Complainant when she did not allegedly receive the material she requested. When Slinde had not contacted him by November 10, 1998, the Complainant called Slinde. Slinde stated that she had not received the material. The Complainant's wife, Vickie Rogers, then "faxed" the requested material to the Respondent on November 11, 1998. Vickie Rogers produced a confirmation sheet indicating that the facsimile transmission had been received by the Respondent.

The Respondent asserts that its fax machine had been not working properly during this period of time and that it was entirely replaced at the end of November, 1998 or the beginning of December, 1998. Slinde testified that she never received the information that she had requested from the Complainant.

The Respondent contends that the Complainant had good reason not to send the requested material. Had he sent the name of his Parole Officer, that person, Melanie Mohrman, would have been able to immediately expose the Complainant's lie about the extent and nature of his conviction record. The Respondent contends that the fax confirmation sheet is insufficient to demonstrate that the Complainant had faxed the requested material. It could show only that a fax was received, not the content of the fax. Since neither Rogers nor his wife contacted or actually spoke to anyone at the Respondent's immediately after transmittal to confirm the receipt, the question of comes down to credibility.

It is clear that either the Complainant and his wife are lying or Slinde and Dell are lying. On this record and given the testimony at hearing, the Hearing Examiner finds that Vickie Rogers' testimony is more credible than that of anyone else. Vickie Rogers' testimony lacked any unusual nervousness and was internally consistent. The Complainant's testimony lacks credibility because of his obvious and frequent lies about the extent and nature of his conviction, his periods of probation violation and his testimony about his enrollment at Upper Iowa University. While Vickie Rogers seems willing to acquiesce in a misleading appearance on the Complainant's list of references, her testimony impressed the Hearing Examiner as credible and is somewhat corroborated by the fax transmittal confirmation sheet. The Respondent's speculation that Rogers may have only faxed two blank sheets is sheer speculation and receives no credit from the Hearing Examiner.

It appears from the record that when Slinde was telling the Complainant to send the materials again on November 10, 1998, that there had already been a decision to not hire the Complainant and to hire Albert Boyd instead. Boyd was one of the original applicants who was not asked for a second interview. The excuse that the Respondent's fax machine was "on the blink" seems entirely too convenient under the circumstances particularly in light of Boyd's contemporaneous hiring. When the Hearing Examiner considers the likelihood of this being true, the clearly pretextual nature of the Respondent's other explanations undercuts any credibility that the Hearing Examiner might otherwise be willing to find. Scott Dell had very little credibility as a witness. His answers lacked conviction other than in his own importance. Slinde was somewhat more credible but her testimony appeared to be given with an eye to her employment rather than to the truth. The Hearing Examiner is in the unenviable position of having to decide whether to believe an admitted liar or a probable liar. Fortunately for the Hearing Examiner, the Complainant's wife helps to resolve this issue. The record as a whole renders the Respondent's explanation unworthy of credence even though under other circumstances, it would present a legitimate, nondiscriminatory explanation for not hiring the Complainant.

Having determined that the Respondent was motivated by its perception of the Complainant's conviction record, the Hearing Examiner must determine whether the Respondent's action is protected by the operation of Section 3.23(7)(i) of the ordinance. That provision indicates that where a person has been convicted of a crime, paroled or placed on probation for a conviction within the last three years, an employer may consider that information to refuse to hire an applicant if the conviction is substantially related to the circumstances of the employment. Since the Complainant was placed on probation within the three year period preceding his application to the Respondent, the question becomes was his conviction record substantially related to the circumstances of his employment and how does one apply this standard.

The question is particularly complicated in this situation. The Complainant's blatant lie concerning the nature and extent of his conviction record deprived the Respondent of the opportunity to make a reasoned analysis as contemplated by the ordinance. However, the Respondent appears to have performed no analysis of how or whether the crimes for which the Complainant was convicted were related to the duties and responsibilities of a Receptionist for the Respondent. Instead, the Respondent acted viscerally to the information given Slinde. Without really considering whether the Complainant's crimes were related to the Receptionist duties, the Respondent automatically determined not to hire the Complainant.

The Respondent now, after the fact, seeks to demonstrate that the Complainant's crimes would have been substantially related to his duties as a Receptionist. The Respondent contends that this belated application of the substantially related doctrine is sanctioned by the Fair Employment Act (FEA) and decisions of courts and agencies under that law. The Respondent then argues that the Commission is required to apply this approach in order to avoid preemption by the FEA. The Hearing Examiner disagrees. McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W.2d 830 (Ct. App. 1988).

The primary reason for permitting an employer to use information obtained about a prospective employee's conviction record after a refusal to hire is that the remedy of reinstatement or damages should discrimination be demonstrated could be inappropriate. For example, if a later investigation reveals a conviction that is

substantially related to the terms of employment, it would be paradoxical to award the aggrieved party employment that would then be properly withdrawn. While this is indeed paradoxical, the Hearing Examiner believes this should more properly be addressed in the damage phase of a hearing instead of the liability phase. This situation is similar to that of "after acquired evidence" and the Hearing Examiner takes his lead from that line of cases. McKennon v. Nashville Banner Publishing, Co., 513 U.S. 352 (1995).

To find that liability does not follow creates an incentive for an employer to creatively analyze a conviction record and to rewrite history. Even if there is no reinstatement remedy for the aggrieved employee, there is benefit to the finding of discrimination and the award of costs and attorney's fees where appropriate. Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984). This latter function would not be served if an employer is permitted to entirely escape the consequences of a discriminatory decision.

The Respondent may contend that one consequence of not permitting the employer to analyze an applicant's conviction record for relatedness once a claim has been filed is that the employee, as in the present case, may have an incentive to make only a partial or a completely erroneous disclosure in an attempt to "trap" the employer. Once an individual reveals a conviction record, there is nothing that prevents an employer from making a reasonable investigation of the conviction and the underlying activity. In fact, it is that sort of reasoned analysis that the ordinance and presumably the FEA are intended to encourage. These laws are intended to protect individuals from irrational fears about convicts while protecting an employers legitimate interest in protecting itself, its employees and its customers from renewed criminal activity. In the present case, once the Complainant disclosed his conviction record, the Respondent could have and should have followed up with confirmation of the record and analysis of the relationship between the crimes for which the Complainant was convicted and the duties of the Receptionist position. While the Respondent contends that this is what it did, as noted above, the Hearing Examiner concludes that its protestations ring falsely. Why the Respondent did not inform the Complainant in writing of the need for the requested information is beyond the Hearing Examiner.

The Respondent asserts that the Commission may not apply a rule that is more stringent than that used to interpret the FEA. Fox v. City of Racine, 225 Wis 542, 545; 275 N.W. 513, 514 (1937). The Respondent asserts that an effort by the Commission to impose a more stringent analysis runs counter to the intention of the legislature in adoption of the FEA and must therefore be preempted by the FEA. Fox supra. The Respondent recognizes that courts have found that the Commission has the authority to enact more stringent provisions than that of the equivalent state law. Fed. Rural Elec. Ins. v. MEOC (Kessler), unpublished opinion No. 79-538 (Ct. App. April 27, 1981), affirmed per curiam 106 Wis. 2d 767 (1982). The Respondent contends, however, that this authority is limited to provisions that further the same protections of the FEA.

Where the legislature has been concerned about municipal regulation in an area where it has previously acted, it has clearly expressed its intent to preempt municipal action. Wis. Stats. 111.337(3) The legislature has not chosen to act in a similar manner with respect to the protections relating to conviction record.

Even if the Respondent's position were correct, the ordinance's three year limitation on which conviction records can be considered does not have a contrary effect on the FEA. The ordinance enhances the protection of the FEA by limiting the period of consideration. While it is arguable that the ordinance's provision adversely affects the actions of employers, the FEA is intended to establish protection for employees and applicants in various protected classes not employers.

Returning to the Respondent's defense of relatedness, the Hearing Examiner is not convinced that the Respondent's analysis really demonstrates that the Complainant's criminal activity would likely be repeated under the circumstances of his potential employment as a Receptionist. There is no question that the Complainant's crimes are among the most serious for society. Murder and theft cannot be overlooked easily. The Hearing Examiner in no way condones or minimizes the seriousness of the Complainant's convictions. However, the Respondent does not convince the Hearing Examiner that the likely circumstances of employment as a Receptionist are going to expose the Respondent, its employees, customers or property to any great threat of danger.

The Respondent expends great time attempting to demonstrate the great stress and financial temptations presented by its Receptionist position. This appears to be after the fact conjuring on the part of the Respondent. The Complainant's crimes appear to have been related to his use of illegal drugs more than to the stress of employment and dealing with people. This record generally indicates that the Complainant's drug use

is under control and any repeated occurrence is likely to be detected and addressed before it might lead to a repetition of the crimes for which the Complainant was convicted.

It is the Respondent's burden to establish the substantial relatedness of the Complainant's crimes and the circumstances and requirements of the position in question. It is not the burden of the Complainant to establish a lack of relatedness. On this record, the Respondent has established that the Complainant was convicted of extremely serious crimes, but fails to demonstrate that the conduct leading to those crimes is likely to be once again triggered by the circumstances of potential employment as a Receptionist for the Respondent.

Having found that the Respondent has failed to carry its burden on the defense of relatedness, the Hearing Examiner must turn to the difficult question of damages. There seems no question that the Complainant has suffered no cognizable wage loss with respect to the Receptionist position. It appears that the Complainant was making more money in his position with Meriter Hospital than he would have made for any foreseeable period with the Respondent. If there are other forms of economic damages, the Complainant fails to specify or demonstrate them.

The primary form of damage sought by the Complainant appears to be that for emotional distress. This claim presents significant problems for the Hearing Examiner. As noted above, the Complainant blatantly lied to the Respondent about the nature and extent of his conviction record. While both the Complainant and his wife testified emotionally about the effect of the Respondent's denial of employment for the Complainant, the Hearing Examiner is reluctant to make any award that might reward the Complainant for his failure to truthfully disclose his conviction record. Even if the Hearing Examiner were willing to consider making some award for the Complainant's emotional distress, many of the factors that could support a large award are missing from this record. The Complainant maintained his employment with Meriter and did not suffer realistic concerns about being able to support his family. The record fails to demonstrate the type of loss of dignity in the eyes of others that might support a claim for substantial damages.

Under the circumstances as presented in this record, the Hearing Examiner cannot make any award for emotional damages. The Complainant's lie deprived the Respondent from any meaningful opportunity to consider whether his convictions might be substantially related to the circumstances of the Receptionist position. Because the Complainant failed to permit the scheme contemplated by the ordinance from running its course, the Hearing Examiner will not reward the Complainant's misconduct. To do so, would encourage others to be less than completely truthful in the future. If others are thusly encouraged, the protection of the ordinance would become corrupted and the subject of abuse. The Hearing Examiner will not encourage such abuse of the ordinance by making the requested award.

Under other circumstances, the Hearing Examiner might consider an order that the Respondent offer the Complainant the next available Receptionist position and front pay until an offer can be made. However, since there is no wage differential that needs to be spanned and because of the Complainant's misconduct, the Hearing Examiner does not find such an order to be appropriate. Under the circumstances presented in this record, it does not seem likely that the parties could establish the necessary level of trust to create a meaningful employment relationship.

The Hearing Examiner will order the Respondent to cease and desist from any discrimination against the Complainant. Additionally, the Hearing Examiner will order the Respondent to pay the Complainant's costs of bringing this complaint including a reasonable attorney's fee. There is a societal benefit to a finding of discrimination and attorneys and complainants should be encouraged to bring such actions to further the development and reach of the ordinance. Watkins, supra.

This complaint is most unusual in that both sides appear to have engaged in inappropriate conduct.

In reaching this decision, the Hearing Examiner has attempted to balance the conduct of the parties with the requirements of the ordinance, and further, the public policy underlying the ordinance. Given the circumstances of this case, it is unfortunate that the parties were not able to achieve a resolution prior to hearing. The hearing and decision in this matter really vindicates no one.

Signed and dated this 1st day of September, 2000.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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CITY OF MADISON
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MADISON, WISCONSIN

Theodis Rogers 209 Swanton Rd 7 Madison WI 53714 Complainant vs. New Horizons 1255 Deming Way Madison WI 53717 Respondent	NOTICE OF RIGHT TO APPEAL Case No. 19982232

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:

11.1 Either party may appeal the recommended findings of fact, conclusions of law and order of the Hearing Examiner by filing written exceptions to such findings, conclusions or order in the EOC offices no later than fifteen (15) days after receipt of said findings.

> 11.12 Any other party may file a cross appeal in writing with the Commission within fifteen (15) days of that party's receipt of the Commissions' notice of appeal.

11.2 If neither party appeals the recommended findings of fact, conclusions of law or order within fifteen (15) days, they become the final findings, conclusions and order of the Commission, without further action.

This Notice and the attached Recommended Findings of Fact, Conclusions of Law and Order have been sent to all parties by certified mail. Any appeal from these Recommended Findings of Fact, Conclusions of Law and Order must be delivered at the offices of the EOC within fifteen (15) days of the date of receipt. Cross appeals are allowed in accordance with EOC Rule 11.2. Unless timely appealed, the enclosed Recommended Findings of Fact, Conclusions of Law and Order will become final without further notice to the parties.

> Signed and dated this 1st day of September, 2000.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner