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

Willie Johnson 1402 Iowa Dr Madison WI 53704 Complainant vs. Webcrafters 2211 Fordem Ave Madison WI 53704 Respondent	COMMISSION'S DECISION AND FINAL ORDER Case No. 20042097

BACKGROUND

On May 27, 2004, the Complainant, Willie Johnson filed a complaint with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, Webcrafters, Inc., terminated his employment because of his arrest record, conviction record and retaliation in violation of the Madison Equal Opportunities Ordinance, MGO sec. 3.23 et seq. The Respondent denied the allegations stating that it terminated the Complainant's employment because of a material misstatement on his application.

Subsequent to an investigation, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that discrimination had occurred with respect to the complaint's claims of discrimination on the bases of arrest record and conviction record. However, it determined that there was no probable cause with regard to the claim of retaliation. Efforts at conciliation failed and the complaint was certified to hearing before the Hearing Examiner.

At the time of the Pre-Hearing Conference, the Complainant indicated that he wished to amend his complaint to add a claim of discrimination in his termination on the basis of his race. The Hearing Examiner remanded the complaint to permit the amendment and additional findings.

Subsequent to the amendment, the Investigator/Conciliator conducted a further investigation and issued an amended Initial Determination. The amended Initial Determination concluded that in addition to there being probable cause to believe that the Respondent had discriminated against the Complainant on the bases of his arrest record and his conviction record, there was also probable cause to believe that the Respondent had discriminated against the Complainant on the basis of his race. Again, conciliation was unsuccessful in resolving the complaint.

The complaint was transferred to the Hearing Examiner again for hearing. On August 16, 2005, a public hearing was held in room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd. in Madison.

Subsequent to hearing, on March 30, 2006, the Hearing Examiner issued a Recommended Findings of Fact, Conclusions of Law and Order concluding that the Respondent had not violated the ordinance when it terminated the Complainant, and that there was a legitimate, nondiscriminatory explanation for the Complainant's termination that he was unable to rebut.

The Complainant filed an appeal of the Hearing Examiner's decision on April 14, 2006. Along with his Notice of Appeal, the Complainant filed extensive exceptions to the Hearing Examiner's Recommended Findings of Fact,

Conclusions of Law and Order. On April 24, 2006, the Respondent filed a cross-appeal seeking amendment of the Findings of Fact.

On April 19, 2006, the Commission's Director, on behalf of the Commission, issued a Notice of Appeal to the Commission and Briefing Schedule. On May 11, 2006, the Director issued an additional Notice of Cross-Appeal to the Commission and Briefing Schedule accounting for the Respondent's Cross-Appeal.

The Complainant did not file a brief and additional exceptions as specified in the Notice of Appeal and Briefing Schedule. On June 6, 2006, the Respondent filed a motion to dismiss the appeal for the Complainant's failure to file the specified brief. The Complainant demurred contending that he was not obligated to file such a document and that his original Notice of Appeal and Exceptions should be adequate in lieu of a brief.

On August 10, 2006, the Commission met to consider the Respondent's motion to dismiss. Taking part in these discussions were Commissioners Brandon, Enemuoh-Trammell, Howe, McDonell, Ross, Selkowe and Zipperer. Commissioner Morrison recused himself from this matter and took no part in the discussion or Commission action.

DECISION

The Commission first looked at the Rules of the Equal Opportunities Commission for guidance on how to resolve this issue. The Rules are silent with respect to this matter.

Next the Commission looked at the Notice of Appeal and Briefing Schedule. The language used in this document speaks in terms of a requirement rather than a permissive action. "The Complainant shall file a brief... ." Given the clear statement of this requirement, the Commission concludes that the Complainant's failure to file a brief requires dismissal of the appeal.

The Commission notes that the Complainant is represented by able and experienced counsel who is or should be well aware of the effect of the mandatory language of the Commission's order. Had the Complainant not been represented, the Commission might feel that it has more latitude in crafting a response to the motion to dismiss. However, that is not the circumstance facing the Commission in this matter.

The Commission understands that it may seem harsh to dismiss the appeal under these conditions. The mandatory language of the Briefing Schedule gives the Commission little room for any other result.

Briefs and written argument are essential to affording opposing parties the opportunity to understand the basis of the appeal and the arguments relied upon by the appealing party. Briefs and written argument also help to inform the Commission of the issues and arguments and assist in providing the framework of its considerations. A failure to supply the opposing party and the Commission with this material creates a vacuum in which the Commission may be tempted to speculate about the basis of the appeal and such speculation is fatal to Commission action.

Under the circumstances, the Commission finds that it is required to dismiss the Complainant's appeal.

ORDER

It is hereby ordered that the Complainant's appeal is dismissed with prejudice. The Respondent's Cross-Appeal is also dismissed as having no underlying appeal to sustain it.

Joining in the Commission's action are Commissioners Brandon, Howe, Ross and Selkowe. Opposing the Commission's action are Commissioners Enemuoh-Trammell, McDonell and Zipperer. Commissioner Morrison recused himself and took no part in this matter.

Signed and dated this 25th day of August, 2006.

EQUAL OPPORTUNITIES COMMISSION

Bert G. Zipperer
President

cc: William Haus
Thomas R Crone

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

Willie Johnson 2219 Woodview Ct., Apt. 4 Madison WI 53704 Complainant vs. Webcrafters 2211 Fordem Ave Madison WI 53704 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 20042097

This matter came before Madison Equal Opportunities Commission Hearing Examiner Clifford E. Blackwell, III on August 16, 2005. The Complainant, Willie Johnson, appeared in person and by Attorney William Haus of Haus Roman and Banks LLP. The Respondent, Webcrafters, appeared by Judy Peirick, vice president of human resources and by Attorney Thomas R. Crone of Melli Walker Pease and Ruhly. Based upon the evidence presented, the Hearing Examiner now makes his Recommended Findings of Fact, Conclusions of Law and Order as follows:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Willie Johnson, is an adult resident of the State of Wisconsin.
2. The Respondent, Webcrafters, is a Madison business and employer located at 2211 Fordem Avenue, Madison Wisconsin 53704.
3. Complainant is an African-American.
4. Complainant has a record of arrests and criminal convictions.
5. Complainant worked for Respondent from March 28, 2000 until Respondent terminated his employment with a letter dated May 28, 2004.
6. Judy Peirick, Respondent's Vice President of Human Resources was the principal decision maker regarding Complainant's termination. Either HR consultant Rob Oja and/or Employee Relations Manager John Sanders was responsible for decisions made regarding Complainant's hire and the related records.
7. Respondent suspended Complainant from work on May 13, 2004 following reports from other employees that Complainant had indicated a desire to beat another employee with a bat or 2x4. Respondent sent Complainant to Dr. Darald Hanusa, who provides assessments of risks posed by violent behavior. Respondent also ran a criminal background check on Complainant in the aftermath of the violent threat suspension. Respondent used the Wisconsin Consolidated Court Automation Program (CCAP) to run the criminal check.
8. Respondent has a practice of suspending employees involved in violence or threats of violence in the workplace.
9. Respondent has sent at least eleven employees, other than Complainant, to Dr. Hanusa for violence assessments. Six of those sent to Dr. Hanusa are classified by Respondent as Caucasian; one is classified as African-American. The remaining four were classified in other races or ethnicities. Six of the

eleven sent to Dr. Hanusa for violence assessments had prior conviction records. Five did not have conviction records.

10. Respondent terminated Complainant's employment prior to the completion of Dr. Hanusa's violence assessment of Complainant.
11. Dave Austin, the white employee who was reportedly threatened with a beating, was not suspended or subjected to the same scrutiny as Complainant, nor were other employees who witnessed the threats.
12. Respondent hired Robert Parr and Chris Riddle (both white) around the same time as Complainant for the same or roughly equivalent work. Both Parr and Riddle had extensive conviction records, which included violent crimes, of similar severity to that of Complainant.
13. In the course of investigating Complainant's alleged threats against a co-worker, Peirick reviewed Complainant's application and employee records. Peirick spoke with former Employee Relations Manager John Sanders, who was involved in reviewing applications at the time Complainant was hired. Peirick also spoke with Rob Oja, who was a consultant working for Respondent at the time of Complainant's hire. Oja's duties included application review and interviews. Oja and Sanders reported to Peirick.
14. Peirick did not consult South Plant Receptionist Margarett McIntyre in reviewing Complainant's records. McIntyre worked in close proximity to Sanders and Oja.
15. Respondent terminated Complainant on May 28, 2004. The termination letter cited a failure to properly disclose Complainant's criminal record as the reason for termination. The letter stated that Respondent makes no exception to the practice of terminating employees for falsification or omission of relevant, requested employment information. Respondent informed Complainant on May 26, 2004 that he would be terminated.
16. Respondent employs a racially diverse workforce, and employs many workers with serious criminal conviction records, including persons convicted of violent crimes.
17. At the time of Complainant's hire, Respondent was interviewing and hiring more employees than usual.
18. Neither Oja nor Sanders remember interviewing Complainant. Writing that appears to be that of Oja is present on the application in the spot where the interviewer would make notes.
19. Respondent is one of at least 42 employees terminated for falsifying or omitting relevant information on their application or other work-related documents. Of those, eleven involved conviction records.
20. Respondent does not enforce any requirement that new hires fully disclose the full nature of their conviction records in their written applications.
21. Complainant did appropriately disclose his conviction record during the application process. However, at the time Peirick decided to terminate Complainant's employment, Peirick did not believe that Complainant had made a complete disclosure.

RECOMMENDED CONCLUSIONS OF LAW

1. Complainant is a member of the protected class race (African-American).
2. Complainant is a member of the protected class arrest record.
3. Complainant is a member of the protected class conviction record.
4. Respondent is an employer within the meaning of the ordinance.
5. Respondent did not violate the ordinance in that Respondent did not terminate Complainant on the basis of arrest record, conviction record, or race when Respondent terminated Complainant's employment. Therefore, Respondent did not violate the ordinance.

RECOMMENDED ORDER

It is hereby ordered:

1. The Complaint is hereby dismissed.
2. The parties shall bear their own costs.

MEMORANDUM DECISION

The Hearing Examiner addresses the question of whether the Respondent discriminated against the Complainant on the basis of race and arrest and conviction record when it terminated his employment. Complainant Willie Johnson, an African-American male, worked for Respondent, a Madison printing business from March 24, 2000 until his termination on May 28, 2004. Complainant was hired despite a significant conviction record that includes convictions for disorderly conduct, battery, resisting arrest, felony reckless

physical abuse of a child, and felony second-degree sexual assault. Webcrafters interviewed and frequently hired employees from several races and ethnicities with serious criminal records.

On May 13, 2004, Respondent suspended Complainant from work because Respondent had received reports that Complainant had told other workers that he wanted to beat Dave Austin, a co-worker, with either a bat or a 2x4. Judy Peirick, VP of Human Resources for Respondent then investigated the reports by speaking with the two employees who had overheard the indirect threats, as well as Complainant, who admitted making the comments. Peirick compelled Complainant to have an appointment with Dr. Darald Hanusa, Ph.D., who specializes in assessing the risks of violent behavior. Peirick also ran a criminal background check of Complainant by utilizing the CCAP website. The background check showed a significant criminal background. Peirick was concerned because Complainant's file did not contain the substantial conviction information that she obtained from her CCAP search. Peirick called John Sanders and Rob Oja, the two employees other than her who were involved in reviewing applications and interviewing applicants at the time of Complainants hire. Sanders and Oja had left Webcrafters well before the time of Complainant's termination. Peirick reviewed Complainant's written application and file, and learned that Oja and Sanders could not remember interviewing Complainant, much less an interview that involved a discussion that disclosed Complainant's criminal convictions. On the basis of a lack of documentation in the file related to the Complainant's criminal record, as well as Sander's and Oja's belief that if Complainant had disclosed, further steps would have been taken to investigate, Peirick concluded that Complainant had not disclosed his criminal record. Subsequent to her investigation, Peirick terminated Complainant's employment, notifying him in a May 26, 2004 meeting and by letter on May 28, 2004. The stated reason for termination was withholding material information regarding the Complainant's criminal record at the time of hire, an offense that Respondent states has always triggered a termination of employment.

In a complaint filed on May 27, 2004 Complainant alleged that Respondent violated the ordinance in that Respondent discriminated against him on the basis of retaliation and arrest and conviction record when it terminated him. The Complainant amended his complaint to add a claim of race discrimination in employment on September 23, 2004. The investigator found probable cause for the race and arrest and conviction claims. The investigator found no probable cause on the retaliation claim, which will not be discussed further.

The Complainant has chosen to fight this battle on the field of pretext. In doing so, he seems to have lost sight of the fact that the ultimate burden of proof to demonstrate discrimination rests with the Complainant. McDonnell Douglas v. Green, 411 U.S. 792 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248. This failure is manifested in two related ways. First, the Complainant does not address his burden to set forth a prima facie case of discrimination in order to shift the burden to the Respondent to put forth a legitimate, nondiscriminatory explanation for the Complainant's termination. Second, the Complainant, while arguing that the proffered reason for the Complainant's termination is a pretext, fails to go the additional step to demonstrate that the pretext is to cover an otherwise discriminatory motive.

When utilizing the McDonnell Douglas/Burdine paradigm, id., the Complainant must first establish a prima facie claim of discrimination. In the present case, the elements of such a prima facie claim are membership in a protected class, an adverse employment action and some reason to believe that there is a causal connection between the first elements. There is no dispute that the Complainant meets the first two elements of the prima facie case. However, it is not at all clear that the Complainant meets the requirement to demonstrate a causal link between those elements. It seems that the Complainant is satisfied to rest his claim on the fact of his membership in the protected class and that he was terminated. Generally, this approach is insufficient to establish the necessary link of causation. The Complainant obliquely argues that the Respondent's racial animus can be seen in Judy Peirick's failure to seek out the input of Margarett McIntyre when there was a question about which of two possible interviewers had spoken with the Complainant at the time of his employment interview. From this, the Complainant seeks to argue that this demonstrates that the Respondent chooses to believe two white former employees over two African-Americans with differing recollections.

As to Peirick's failure to contact McIntyre when initially looking into the circumstance of the Complainant's hire, there is nothing in the record to indicate that this would have been part of the usual process. Though a trained investigator might well have wanted to speak with McIntyre to determine what light she might be able to shed, Peirick's failure, whether accidental or intentional, cannot be found to have occurred because of racial animus on this record.

Similarly, the fact that significantly after the fact, the Respondent accepted the statements of Oja and Sanders instead of McIntyre and the Complainant does not, without more, reflect any intent to discriminate.

Also working against the Complainant with respect to demonstrating this causal link between his termination and his race is the fact that the Respondent did hire Complainant knowing of his race. It has terminated other individuals not of the Complainant's race for similar albeit not identical reasons. It is difficult to see that the Complainant has met his burden to establish the elements of a prima facie claim on race so as to shift the burden to the Respondent.

The same problem faces the Complainant with respect to his claim of discrimination on the basis of his arrest/conviction record. The heart of the Complainant's argument is that even though the Respondent hired the Complainant, it did so at a time when it desperately needed employees. Given the Respondent's contract pressures, it was willing to accept employees that it might not normally have hired. When market conditions contracted, the Respondent was looking for reasons to terminate the less desirable employees it had hired earlier. While this is an interesting theory, there is no evidence in the record to support it. There was no testimony that other employees who were hired at about the same time as the Complainant were being terminated or that employees with arrest/conviction records were being more frequently terminated around the time of the Complainant's termination. The Respondent clearly knew that the Complainant had a substantial conviction record simply based upon his written application. It took no action to terminate his employment or otherwise disadvantage him until the incident involving the questionable threat to another employee. Given the totality of the record, the Hearing Examiner is hard pressed to determine that the Complainant has carried his burden to establish each element of the prima facie claim.

Accepting for the moment that the Complainant has met his initial burden, the Respondent must present a legitimate, nondiscriminatory reason for its termination of the Complainant. This is a burden of production and not one of proof. As noted above, this is the battleground on which the parties present their cases.

Complainant's first pretext argument is that he did in fact disclose his conviction record in his application and interview process, chiefly in the interview with John Sanders. A complete written disclosure would indeed show that the proffered justification is pretextual. Complainant checked "yes" in response to whether he had any convictions. Complainant left blank the space where the application requested an explanation for a "yes". He checked "no" to the question of any pending criminal charges. Complainant's application clearly indicated that he left a job at Gardner Bakery due to incarceration. So it is evident that the interviewer knew that Complainant had some type of criminal record that led to incarceration. However, Complainant did not clearly indicate the nature of his record in writing, nor did he indicate in writing, in accordance with common advice from parole officers to convicts looking for work, that he would talk about it in the interview, as Robert Parr and Chris Riddle had clearly done on their applications. The Hearing Examiner believes that the content of Complainant's written application alone is not by itself a reasonably complete disclosure of Complainant's conviction record. As such, the written application alone is not sufficient to show that Respondent could not genuinely believe that Complainant has failed to disclosed his conviction record. Similarly, Parr's and Riddle's written applications cannot stand alone as complete disclosures of their respective criminal records, even with the "will explain" statements written in by the applicants.

Of course, the written application is only the beginning of the hiring process. Indeed, in some cases it may not be practical for an applicant to disclose and explain everything on the written application alone. Complainant testified that he disclosed the nature of his record in his interview with Sanders. Respondent does not create a record for the contents of the verbal interview, although it's method of obtaining information seems to rely primarily on a verbal disclosure by applicants, a practice that fits with the common parole officer advice to convicts that they indicate in written applications that they will explain a conviction record. Complainant's recollection, bolstered by the recollection of Margarett McIntyre, is that Sanders, and not Oja, conducted the interview. Complainant claims that in his interview with Sanders, he fully disclosed his record. McIntyre recalls not only that Sanders interviewed Complainant, but that the conversation involved Complainants incarceration for a sexual assault conviction. Respondent believes that Oja probably conducted the interview, and handwriting that appears to be his is on Complainant's application. Sanders was an experienced interviewer for Respondent and he had familiarity with the employers listed on Complainant's application. Sanders knew that Badger Industries and Winnebago Resource Center were employers associated with incarcerated persons. If Sanders indeed conducted the interview, it bolsters the inference that the interviewer had sufficient cues to open a discussion about the criminal record of Complainant.

The recollections of the Complainant and McIntyre, which have Sanders as the interviewer, seem credible and yet are difficult to reconcile with the presence of Oja's handwriting on the application, something that is most likely to happen if he was the interviewer. Oja testified that his practice was to direct a candidate who had disclosed a serious conviction record to Sanders or Peirick, who would review the matter and make the hiring decision. Sanders testified that he would review the decision regarding applicants with significant criminal backgrounds to Peirick.

Peirick reviewed the criminal records of Parr and Riddle, two white applicants with criminal records approximately as serious as that of Complainant. Oja interviewed Riddle and made a notation regarding Riddle's need for a particular bus route. Peirick and Sanders reviewed Riddle's record, including a CCAP report, and each spoke with Riddle's parole officer before he was hired. In Parr's case, it is not entirely clear whether Oja or Sanders interviewed him, since the handwriting that appears on the application is apparently not Oja's but it is clear that Peirick made a similar review of Parr's record before he was hired.

The hiring of Parr and Riddle at the same time Complainant was hired indicates that Respondent was willing to hire applicants who had disclosed serious conviction records. In fact, there were many employees working for Respondent with conviction records, and many were African American. The hiring of Parr and Riddle indicates a procedure by which Respondent reviews the conviction records of applicants. That procedure was not followed in the case of Complainant. It is possible that the staff, through incompetence or error, did not subject Complainant to the same level of scrutiny as it the similarly situated white applicants Parr and Riddle. Another possibility is that Respondent did in fact closely scrutinize Complainant's record but failed to document that fact, perhaps since the Respondent was unusually busy at the time of Complainant's hire. McIntyre testified that Sanders was occasionally somewhat forgetful. It would be consistent with McIntyre's testimony for Sanders to have failed to document the result of his investigation. Respondent runs a large operation, reviewing large numbers of applications. Still, Respondents record keeping of the interview process is somewhat lacking. A box to indicate the identity of the interviewer would be helpful, as would a checklist of tasks completed by the interviewer and decision maker.

In addition to somewhat poor record keeping, Peirick's termination letter is a less than completely straightforward explanation of the basis for her belief that Complainant had misrepresented material facts on his application. Peirick emphasizes Complainant's failure to properly disclose the nature of his criminal record on the written application. Of course, neither Parr's nor Riddle's written applications alone are reasonably sufficient disclosures of their records. Peirick next stresses the fact that no one involved in the interview or processing of the application recalls any disclosure of the nature of the Complainant's criminal record. This leads the reader to believe that the interviewers have at least some memory of the interview. Incidentally, it is also factually untrue that no one involved in the hiring process had any memory of a disclosure, at least to the extent that McIntyre was involved in the processing of Complainant's application and does have a recollection of a discussion that disclosed the Complainant's record.

This central question then becomes, did Respondent genuinely hold a belief that Complainant had failed to disclose material and requested information regarding his criminal record, and was this in turn the reason for the termination of Complainant's employment. The Hearing Examiner will gauge the genuineness of Peirick's belief by examining Respondents conduct in the termination of Complainant and in similar situations. First, it is clear that Respondent has a procedure by which it will hire employees with serious and violent criminal records. The hiring of Parr and Riddle demonstrate that, at least with regards to white applicants with serious criminal records, Respondent is willing to hire after completing a process that includes a discussion of the applicant's criminal record, a CCAP report, and a conversation with a parole officer, all of which will be documented to some extent in the applicant file. Complainant was hired and, despite a significant criminal record, was apparently not subject to scrutiny similar to Parr and Riddle. Respondent's hiring policies, as evidenced by the treatment of Parr and Riddle, as well as the presence of numerous employees of several races, and employees with significant conviction records, are indicative of evenly applied non-discriminatory criteria.

Next, Respondent's suspension of Complainant on May 13, 2004 was reasonable and non-discriminatory. Complainant asserts that the fact that no white employees who were involved with the complaint were suspended is evidence of a racial bias. The Hearing Examiner cannot imagine a reason to suspend the victim of the indirect threats, Dave Austin, nor anyone who heard or reported the threats. Respondent provided evidence that employees of several races have been suspended for violence or the threat of violence. Similarly, although not central to this claim, the practices of sending employees who have committed or

threatened violence in the workplace to Dr. Hanusa for a violence assessment, and running a CCAP report, have been consistently applied and are not necessarily unreasonable as an employer's response to the threat of violence in the workplace. The decision to terminate appears to have been made before and without regard to the conclusions of Dr. Hanusa's report. There is no real evidence that the suspension and evaluation policies are applied with discriminatory intent or effect.

The most suspect portion of Respondent's termination of Complainant's employment is the investigation of Complainant's application and hiring process, specifically Peirick's inquiry as to whether or not Complainant had disclosed his record. In the course of investigating Complainant's file during his suspension Peirick ran a CCAP check, finding a significant criminal conviction record. Then, seeking to find out why the file had not previously shown this information, Peirick conducted her investigation. Peirick states that in this process of investigation and records evaluation she came to believe Complainant had not disclosed a material fact during his application and hiring process. Peirick reviewed Complainant's file and concluded that he had not disclosed fully in writing on his application. She spoke with the two men who could have interviewed him, Sanders and Oja, and concluded, on the basis of their lack of any specific recollections about Complainant or his disclosures, along with no evidence that any further background check occurred similar to the check that was applied to Parr and Riddle, that Complainant had not disclosed in the interview. Peirick did not seek out McIntyre, who is involved in the processing of applications and happens to have a specific recollection about Complainant's application and disclosure.

Although the investigation would have been more thorough if Peirick had spoken with McIntyre, Peirick did not have good reason to think that McIntyre would have been present in the interview portion of the hiring process. The failure to consult the African - American receptionist, McIntyre, in Peirick's investigation is attributable to the fact that in the normal course of things, McIntyre would not have had occasion or opportunity to be present during any significant portion of the interview. Even if McIntyre's and Complainant's remembrances of the identity of the interviewer, Sanders in their opinion, are correct, this does not convert the written portion of the application into a reasonable and full disclosure. Given his knowledge and experience, Sanders would have been well positioned to inquire about Complainant's record based on Complainant's places of employment. However, Oja would also have been fairly well positioned to make similar inquiries. The procedures followed in the hire of Parr and Riddle, as well as the stated policy of Respondent, show that given written cues on the application, the interviewer acquires the additional information regarding convictions and then determines whether to investigate further. It is difficult to imagine an employer with a racially discriminatory motive subjecting Parr and Riddle, the white applicants, to more scrutiny than Complainant, an African-American applicant. Peirick claims that she concluded that Complainant had not disclosed based upon the fact that application file contains no record of such disclosure and that neither Oja nor Sanders remember such a disclosure. Respondent's record keeping is not perfect, it may have been lax in picking up the cues to question Complainant about his conviction record at the interview stage, but the Hearing Examiner also believes that Respondent uses a fairly well regimented hiring and interviewing process, which has a procedure on how to investigate and document applicants with significant records. Furthermore, this process likely subjected Parr and Riddle to more scrutiny than it did to Complainant. The process followed by Parr and Riddle created a record of the procedures the interviewers had followed, including a criminal background check.

Peirick's termination letter to Complainant could have been more straightforward and forthcoming about how she arrived at the termination decision. Peirick could have specifically noted that Sanders and Oja lack any recollections of the hire of Complainant. Peirick did not even know with certainty the identity of the interviewer. Peirick could have revealed in the letter that Respondent's hiring procedures, which do not employ stringent documentation at every step of the process, also could contribute to uncertainty regarding the reconstruction of past events. In addition, Respondent could have conducted a more thorough investigation of Complainant's disclosure by interviewing McIntyre, who was involved in the initial processing with applications.

Complainant asserts that the aforementioned weaknesses in Peirick's decision making and justification show a lack of good faith, which in turn is important in making the pretext determination regarding Respondent's proffered non-discriminatory justification for terminating Complainant's employment.

The Complainant has presented a significant and credible argument that Peirick did not act in "good faith" when she wrote the letter that is exhibit T in this record. She knew that neither Oja nor Sanders remembered the Complainant or the interview leading to the Complainant's hire. Despite this knowledge, she presents the facts in the light of certain knowledge as if the interview was remembered and nothing was presented by the Complainant to explain his arrest/conviction record. The Hearing Examiner can accept that Peirick may well

have had an alternative agenda for writing ex. T in a less than truthful manner. The question is, was that an illegally discriminatory agenda or not? The Complainant, much as with demonstrating the elements of a prima facie case, fails to show that the Respondent was motivated by a discriminatory animus.

Since the St. Mary's Honor Center case, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993), it has been insufficient to demonstrate the fact of pretext alone. There must be some evidence tending to demonstrate that the pretext concealed an illegally discriminatory motive. See Fisher v. Vassar College, 114 F.3rd 1332,(1998), McCullough v. Real Foods, 140 f. 3rd 1123 (8th Cir, 1998).

Nothing in this record leads the Hearing Examiner to the conclusion that the Complainant's race was the true motive for his termination nor was his arrest/conviction record. The Respondent employs many individuals of the Complainant's race and individuals with arrest/conviction records substantially similar to that of the Complainant. There is no evidence in the record to demonstrate, as the Complainant suggests, that the Respondent was removing employees that it might not have hired had it not needed to meet its contractual obligations around the time of the Complainant's original hire.

Similarly, there is no indication that the Respondent was terminating African American employees in greater than usual numbers under any pretext around the time of the Complainant's termination.

It seems likely to the Hearing Examiner that Peirick's letter was stated as it was out of an arrogance cemented in her belief that the Respondent's system was infallible and that if the record appeared incomplete, it had to be because the Complainant was lying not because the system failed in any respect. While this belief was callous and made a victim of the Complainant, it does not violate the ordinance. Clearly the Complainant was treated harshly and even unfairly by the Respondent, however the record does not demonstrate that the treatment resulted from animus based upon his race or was because of the fact of his arrest/conviction record or its nature.

To the extent that the Complainant attempts to meet his ultimate burden with the same arguments forwarded to meet his burden to demonstrate a prima facie claim, they fail for the same reasons. When viewing the record as a whole, the Hearing Examiner must conclude that the Respondent terminated based upon an erroneous belief that the Complainant failed to fully disclose his arrest/conviction record at the time of his hire. While the Respondent's actions disclose an arrogant and insular view of its hiring process that is unwarranted, that does not necessarily translate into liability under this ordinance.

On balance, the Hearing Examiner believes that Respondent's conduct, from the suspension of Complainant, to the review of the Complainant's file and records, which included Peirick's attempt to determine why there had been no background check, as well as the termination and termination letter, survives a McDonnell Douglas/Burdine pretext analysis. McDonnell Douglas Id., Burdine, Id. Respondent has submitted a record of 11 employees who were suspended and sent to Dr. Hanusa for violence assessments. Five are Caucasian males. One is an African-American male. Similarly, 42 employees have been terminated for omitting or falsifying information in applications or in work documents and the overwhelming majority are Hispanic. Of the 12 terminated for reasons that include misrepresenting or falsifying conviction records, five are white and seven are African-American.

Respondent's overall employment practices have produced the bottom line results of a workforce that appears to be diverse. Of course, this does not dispose of Complainant's case, since it is possible that despite acceptable bottom line results, Respondent discriminated against this particular Complainant. However, Respondent's practices with regard to the Complainant, particularly when viewed in the context of Parr and Riddle, two similarly situated white employees hired at about the same time as Complainant, do not evince discriminatory intent. The inferences likely to be drawn from the Respondent's practices as a whole and from Parr and Riddle's treatment are damaging to Complainant's case. The specific weaknesses in Respondent's conduct with respect to Complainant, such as Peirick's process of determining that Complainant had falsified his conviction record and Respondent's less than forthcoming letter of termination are simply not significant enough to create a reasonable belief that Peirick's proferred justification was pretextual.

In any claim of discrimination, it is important to have an understanding of how the Hearing Examiner or other Finder of Fact views the credibility of the major witnesses. Credibility determinations play a somewhat less important role in the current matter. However to the extent that credibility is important, the Hearing Examiner offers the following observations.

First, the Hearing Examiner found the testimony of the Complainant entirely credible. His testimony was given without signs of evasion, makes sense given the Hearing Examiner's experience of the world and is, in key areas, corroborated by that of other witnesses especially McIntyre. While the Complainant certainly has a vested interest in the outcome of the complaint, he seemed mostly to want the opportunity to tell his story as he saw it.

Margarett McIntyre was also credible. She had no apparent axe to grind with respect to the Respondent. She worked there and displayed no particular feelings of loyalty or disloyalty to the Respondent. Though McIntyre and the Complainant came to know each other through work, there was no indication of any relationship outside of work that might influence her testimony. Her testimony was delivered in a straightforward manner without evasion or equivocation.

Rob Oja, though no longer an employee of the Respondent, seemed to try to favor the Respondent when the opportunity presented itself. In general, he was believable though he couldn't add much to the testimony due to a lack of recollection.

The Hearing Examiner initially viewed the testimony of John Sanders with some mistrust. Though Sanders was no longer employed by the Respondent at the time of hearing, it can be expected that someone with the years of a work connection demonstrated by Sanders might have a natural loyalty to an old employer. Also, the complaint in this might directly relate to one of his decisions and his actions and could therefore cast him in a good or poor light. Sanders seemed not to provide any useful information for either side though. He could simply remember nothing about the Complainant or any interview. He could neither confirm nor dispute anything about an interaction between him and the Complainant.

Judy Peirick left the Hearing Examiner with the feeling that she would not be a very nice person to work with, but found little in her testimony to create an overwhelming belief in her lack of credibility. She did impress the Hearing Examiner as someone who is arrogant and overly confident in her own abilities and opinion. Despite these negative impressions, the Hearing Examiner found no reason to openly doubt that she was telling the truth as she saw it and from her limited perspective.

There can be no doubt that the Respondent failed to treat the Complainant fairly. The Complainant suffered as a result of the Respondent's complacency and its unwarranted belief in the infallibility of its system for hiring those with substantial conviction records. The Hearing Examiner is convinced that the Complainant disclosed, as fully as requested, his arrest/conviction record to the Respondent. Through no fault of the Complainant's, the information provided the Respondent was not properly transmitted, memorialized or followed up on. That Peirick could not believe that one of her supervisees could have made such a mistake, on one hand, speaks well of her loyalty to those who work for her, but, on the other hand, shows her to be unimaginative and self absorbed to a fault. Despite these shortcomings, the record fails to demonstrate that Peirick acted with any illegal motive in terminating the employment of the Complainant. Had she shown more imagination, perhaps, this complaint would never have risen and the Respondent would have one more long-term employee.

Signed and dated this 30th day of March, 2006.

DEPARTMENT OF CIVIL RIGHTS
EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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

	NOTICE OF RIGHT TO APPEAL

Willie Johnson 219 N Frances St No 5B Madison WI 53704 Complainant vs. Webcrafters 2211 Fordem Ave Madison WI 53704 Respondent	Case No. 20042097

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 Commission's designee 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, except that where the tenth day falls on a federal holiday or on a non-business day, the appeal will be accepted on the first business day thereafter.
>
> 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. If an appeal is made to the Commission, it shall consider only the record of the hearing, written exceptions to the recommended findings, conclusions and order, any brief properly submitted before it, and oral arguments presented by the parties at a review hearing scheduled by the Commission. To be properly submitted, briefs by any party must be served upon opposing parties or their counsel and received by the Commission at least ten (10) days prior to any scheduled oral arguments or by another date determined by the Commission. Cross appeals are allowed in accordance with Rule 15.521. Any party requesting a written transcript of the hearing that was held by the Hearing Examiner shall pay the actual cost of preparing the transcript, including copying costs. The Commission shall affirm, reverse or modify the recommended findings, conclusions and order. Any modification or reversal shall be accompanied by a statement of the facts and ultimate conclusions relied on in rejecting the recommendations of the Commission's designee. Such decision of the Commission shall be the final findings of fact, conclusions of law and order of the Commission.

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 15.521. 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 30th day of March, 2006.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner