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

Julius Wilson 338 W Lakeside St Madison WI 53715 Complainant vs. Madison Concourse Hotel 1 W Dayton St Madison WI 53703 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER CASE NO. 20072249

On January 14, 2009, the Hearing Examiner held a public hearing on the merits of the above captioned complaint. The hearing was held in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd., Madison, Wisconsin. The Complainant, Julius Wilson, appeared in person and by his attorney, A. Steven Porter. The Respondent, the Concourse Hotel, appeared by its corporate representative, Carolyn Whittacker.

Based upon the record in this matter, including the testimony and evidence received at hearing, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS of FACT

1. The Complainant is an African American male with a substantial record of criminal conviction. This record extends back many years and includes both arrests and convictions of a variety of misdemeanors.

2. The Respondent operates a hotel in the City of Madison located at 1 West Dayton Street. It employs several hundred employees in a variety of capacities. It receives approximately 120 new applications for employment each month.

3. In late 2006 or early 2007, the Complainant was employed by a local temporary employment agency. One of the Complainant's temporary assignments involved busing tables at a restaurant in the Respondent's hotel. The Complainant was encouraged to seek permanent employment with the Respondent because of the benefits and amenities of employment that he observed.

4. The Complainant checked with the Respondent's employment office for positions for which he might be qualified. On or about April 19, 2007, the Complainant submitted an application for a position as a Dish Washer.

5. The Complainant felt that he would be able to fulfill the position of Dish Washer based upon his several years of prior experience working in restaurants and catering businesses in a variety of positions, including as a Dish Washer.

6. After submitting his application, the Complainant did not hear about the status of his application. He from time to time checked to see if the position remained posted. It was posted on several occasions when the Complainant checked. He did attempt to follow up on the status of his application. On one or more occasions, he spoke with, Kathryn Hunter, Human Resources Generalist, to inquire about the status of his application or to attempt to obtain the name of the manager in charge of hiring for the Dish Washer position. The Complainant never received the information he sought. Hunter would reiterate the Respondent's hiring process including the fact that if an interview were required, the Hiring Manager would contact him.

7. After several weeks of growing frustration, the Complainant resolved that he would not apply for further positions with the Respondent. He took the Respondent's lack of response as an indication that the Respondent would not hire him for any position.

8. During 2006 and 2007, the Respondent regularly sent Leslie Westerfelt, a job coach with the YWCA, emails listing available positions at the Concourse Hotel. When Kathryn Hunter, from the Respondent's Human Resources Department, first contacted Westerfelt about the idea of weekly emails sharing job information, Westerfelt made it clear to Hunter that Westerfelt's client population would likely include individuals with arrest and conviction records.

9. The Complainant has participated in a variety of job coaching and other employment assistance programs including those at Madison Urban Ministry, the YWCA and the Employment and Training Association. These programs help teach and coach those, with arrest and conviction records and other barriers to regular employment, the skills and techniques that might help them to find regular employment. Among the concepts these programs encourage or teach are preparedness, feedback, persistence and other skills involved in job seeking. The Complainant's attendance at such programs has been occasionally erratic, but his efforts are highly regarded by those with whom he has worked such as William Stahl, Jerome Dillard and Leslie Westerfelt.

10. In July of 2007, Leslie Westerfelt of the YWCA received a posting for a position in laundry for the Respondent. The Complainant had practical experience working in a laundry which he received while in prison. The Complainant did not wish to apply for the position given his past experience with the Respondent. However, Westerfelt prevailed upon the Complainant until he submitted an application.

11. The Complainant contacted Hunter on several occasions after submitting his application, but, again, did not receive the information he wanted and was not hired for the laundry position.

12. On or about December 7, 2007, the Complainant called the Respondent to inquire about any available positions or his pending applications. At that time, Bethany Retzlaff had replaced Hunter as the Human Resources Generalist. In reviewing the records of the

Respondent, she only identified the Complainant's July 2007 application for a position in laundry. She indicated that the Complainant had not been hired. In further conversation, Retzlaff indicated that there was a position for a Dish Washer and that she would forward the Complainant's application to the Hiring Manager.

13. Retzlaff did not forward the Complainant's application to the Hiring Manager because she was upset by the Complainant's persistence in seeking information about his application. Despite his persistence, the Complainant was polite and calm during the December 7, 2007 telephone conversation.

14. The Complainant once again called Retzlaff about a week after the December 7, 2007 conversation to inquire about his application. During this conversation, the Complainant and Retzlaff became frustrated with each other. Retzlaff transferred the Complainant to the Human Resources Manager, Bridget Hinton. Hinton ultimately terminated the call when, in her opinion, the Complainant became angry and abusive.

15. The Respondent, from 2006 to the first quarter of 2008, regularly hired individuals with what the Respondent understood to be arrest records and conviction records. This included hiring at least one individual with what the Respondent understood to be a conviction record for the position of Dish Washer in the Spring of 2007.

CONCLUSIONS OF LAW

1. The Complainant is an individual with arrest records and conviction records and as such is entitled to the protections of the Equal Opportunities Ordinance.

2. The Respondent is an employer with a business location within the City of Madison and as such is subject to the requirements of the Equal Opportunities Ordinance.

3. The Complainant failed to demonstrate a causal connection between his arrest record or conviction record and the fact that he was not hired by the Respondent in 2007.

4. The Respondent did not discriminate against the Complainant on the bases of either his arrest record or conviction record when it failed to hire him for the position of either Dish Washer or Laundry Worker in 2007.

ORDER

It is hereby ordered that the complaint in this matter is dismissed.

MEMORANDUM DECISION

The first question to be addressed by the Hearing Examiner is whether this is a case to be analyzed as one of direct or indirect evidence. In the case of a claim presented by direct evidence, the Hearing Examiner must review the facts, weigh the evidence and render a decision without relying upon inferences to be drawn from the evidence. Direct evidence is that which, if believed, demonstrates a fact without reliance upon inference or presumption. In the case of indirect proof, the Hearing Examiner will apply the McDonnell Douglas/Burdine burden shifting approach to determine whether discrimination has occurred. See McDonnell Douglas

Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). In a claim presented by indirect evidence, the Hearing Examiner may rely upon inferences and presumptions raised by the evidence to reach a conclusion as to whether discrimination has occurred.

The testimony and evidence presented in this case create a factual record that fits more closely with a determination of discrimination under the indirect method. This analysis is performed through application of the facts to the elements of a *prima facie* claim of discrimination. If a *prima facie* claim is made out, then the Hearing Examiner must determine whether the Respondent has presented a legitimate, non-discriminatory explanation for its conduct. Finally, if the Respondent meets its burden, the Hearing Examiner must conclude whether the Complainant can rebut the Respondent's proffered explanation.

The elements of the Complainant's *prima facie* claim require that the Complainant be a member of a protected class, that he experience an adverse action and that he demonstrate a nexus between the adverse action and his membership in his protected class. See Rhyne v. Kelley Williamson's Mobil, MEOC Case No. 20092086 (Ex. Dec. 11/30/11); Meyer v. Purlie's Café South, MEOC Case No. 3282 (Ex. Dec. 3/20/95).

The facts of this complaint are fairly straight forward and are not substantially in dispute. As is often the case, however, application of those facts to the requirements of the ordinance are not so clear.

The Complainant first moved to Madison in the late 1980s. From his early days in Madison until the early 2000s, the Complainant held a variety of positions in the food service industry. These included wait staff positions, kitchen positions and food preparation positions. The Complainant worked for restaurants and catering services. The Complainant's testimony indicated that he believed himself to have a wide range of skills and experience in virtually all phases of food service.

In 2001 or 2002, the Complainant had some difficulty with his employment at a catering business and his employment was terminated. From that point on, the Complainant's testimony is somewhat imprecise about timeframes and exact dates. However, the Complainant testified that his last regular employment ended with that catering position.

The next several years were apparently spent in and out of trouble with the law and in part-time positions or employment with temporary agencies. The Complainant was incarcerated for varying lengths of time during the period from approximately 2002 to 2007. While incarcerated, the Complainant worked in the correctional facility laundry and learned the operation of the equipment utilized in such a large scale laundry. Undoubtedly, these skills were transferable to a more commercial facility as well.

In late 2006 or early 2007, the Complainant was employed by a temporary agency. One assignment was to work as wait staff at a catered event at the Respondent's facility. The Complainant enjoyed his work there and determined that he would seek employment directly with the Respondent. From the record it is unclear if the Complainant was fully able to immediately apply for employment or if he needed to complete some period of incarceration. In any event, the Complainant, after seeing a posting for a Dish Washer position, submitted an application on or about April 21, 2007.

In April 2007, applications were reviewed by the Respondent's Human Resources Generalist, Kathryn Hunter. Hunter did not testify at the hearing despite her continued employment with the Respondent. Bethany Retzlaff, who replaced Hunter in the Human Resources Generalist position on December 3, 2007, stated to the best of her understanding that the Respondent's method for review of applications was the same throughout 2007 and remained in effect until January 2009. In January 2009, the Respondent outsourced its background check process.

Retzlaff explained that when a position became open, it would be posted on the Respondent's bulletin board and circulated to various agencies and newspapers. The Respondent then accepted applications for the position and occasionally culled its files for previous applications for the same or similar positions. It was the Respondent's practice to hold applications for one calendar year.

As part of the review of applications for a position, Hunter and eventually Retzlaff would check to see if an applicant had checked the item indicating that the applicant had an arrest or conviction record. If that item was not checked, the Respondent performed no independent investigation to verify the absence of an arrest record or conviction record. If the applicant self-identified himself or herself as having an arrest or conviction record, Hunter and Retzlaff would determine whether the identified arrest record or conviction record was substantially related to the position for which the application was submitted. This investigation might or might not involve reference to the Circuit Court Access Program (CCAP) file of the applicant.

If Hunter or Retzlaff believed that there was a substantial relationship between the applicant's arrest record or conviction record, the application would not be forwarded to the Hiring Manager. If Hunter or Retzlaff determined that there was not a substantial relationship between the arrest record or conviction record and the position, the application would be forwarded to the Hiring Manager.

Once the Hiring Manager had reviewed the applicants, he or she, would determine which if any applicants to interview and to hire. It was, at all times relevant here, the Respondent's policy not to disclose to an applicant the name of the Hiring Manager to avoid time consuming contacts with the manager. Once the manager made a decision it was transmitted to the Human Resources Generalist and the offer of employment made. It does not appear that unsuccessful applicants were automatically informed that they were not to be hired.

There is no question that the Complainant marked the box self-identifying that he had an arrest record and conviction record. In lieu of specifying the offenses, the Complainant indicated that he would discuss at the time of an interview. This approach is one that is commonly suggested by programs assisting convicts with reintegration. There is nothing in the record to indicate that the Complainant's application was forwarded to the Hiring Manager on or after April 2007. Equally, there is nothing in the record to indicate, if the application was not forwarded to the Hiring Manager, why it was not.

The Complainant submitted his application for the position of Dish Washer on or about April 21, 2007. The Complainant contacted Hunter on several occasions after submitting his application for the Dish Washer position to follow up. Apparently, Hunter informed and reiterated the Respondent's hiring process to the Complainant. When the Complainant became

dissatisfied with Hunter's answers, he asked to speak to the Hiring Manager. Hunter declined to give the Complainant the name of the Hiring Manager.

The Complainant requested the name of the Hiring Manager because the training that he had received from the various programs in which he had participated recommended this as a way to improve his opportunities for employment in the future. These programs indicate that an unsuccessful applicant, by following up and speaking with the hiring official can demonstrate his or her interest in employment and can find out in what ways an application might be deficient. It is intended to help both applicants and employers by demonstrating that the applicants are interested in employment with the employer and meet the employer's requirements for employment.

After several weeks of contacts with Hunter, the Complainant ceased further contacts in frustration. He believed that the Respondent would not hire him. The record does not indicate what the Complainant thought was the reason for the Respondent's decision not to hire him, i.e. lack of experience, his criminal record, his race or some other reason. The Complainant decided that he would not further apply for positions with the Respondent.

In the spring and summer of 2007, the Complainant worked with Leslie Westerfelt at a program for convicts at the YWCA. Hunter or the Respondent's Director of Human Resources, Bridget Hinton, had previously contacted the YWCA to establish a referral relationship in 2006 or earlier. The Respondent would send the YWCA notices of open positions to garner applicants from the YWCA's employment programs. It was clear that the Respondent understood that some applicants referred from the YWCA would have arrest records or conviction records. This referral relationship was viewed as being profitable to both the Respondent and to the clients of the YWCA employment programs.

In June or July of 2007, Westerfelt received a notice of an available position in the Respondent's laundry. Westerfelt believed that the Complainant might be an appropriate candidate for this position. She suggested that the Complainant submit an application. Initially, the Complainant refused because of his less than satisfactory experiences with the Respondent especially with respect to his application for the Dish Washer position earlier that year. However, after urging from Westerfelt, the Complainant did submit an application for the laundry position in July of 2007.

As with the Dish Washer position, the Complainant was not hired for the Laundry position and was not called for an interview. The record is somewhat unclear at this point. The Complainant testified that he did seek to follow up with Hunter after submission of the July application. Again, the Complainant's efforts to speak with the Hiring Manager were rebuffed. There is no record of why the Complainant's application was unsuccessful. However, Retzlaff testified that she first became aware of the Complainant on or about December 6 or 7, 2007, when the Complainant called to check on the status of his application(s).

Assuming for the moment that the Complainant did call shortly after the submission of his application, it appears that he was given essentially the same information about the hiring process as he was given after applying for the Dish Washer position. At any rate, the Complainant was never given the name of or an opportunity to speak to the Hiring Manager.

At hearing Retzlaff, testified that while speaking with the Complainant in December of 2007, she identified his application of July 2007 and that it was only afterwards that she discovered the April 2007 application.

Retzlaff indicated in her telephone conversation that there was another Dish Washer position available and that she would forward the Complainant's application to the Hiring Manager for consideration. This was, in fact, a lie. After initially denying the falsehood, Retzlaff admitted that she decided not to forward the Complainant's application to the Hiring Manager because she was upset with how persistent the Complainant had been in asking to be given the Hiring Manager's name. Retzlaff did this despite the indication that the Complainant had been polite throughout the conversation.

A week or so after Retzlaff's initial contact with the Complainant, the Complainant called back to inquire about the status of his application, as he had not been contacted. Retzlaff and the Complainant became frustrated with each other and the Complainant's call was forwarded to Hinton, the Respondent's Director of Human Resources. Hinton did not testify at the time of hearing. However, her submission to the Department of Civil Rights after receipt of the complaint indicates that ultimately she terminated the conversation with the Complainant when in her opinion, the Complainant became loud and abusive. It was after this conversation that the Complainant filed his complaint with the Department of Civil Rights.

Given this record, there is no question that the Complainant meets his burden to establish the first two elements of the *prima facie* case of discrimination. The Complainant has an extensive record of arrests and convictions as outlined in Exhibit 3. Retzlaff acknowledged that the Complainant had checked the appropriate box on the application form indicating that the Complainant had an arrest and/or conviction record. Further, there is no doubt that the Respondent failed or refused to hire the Complainant in 2007 or at any time thereafter. Being denied employment is most certainly an adverse employment action.

Further, there is little question that the Complainant was likely qualified for both the Dish Washer and laundry positions. Both were entry level positions requiring no specialized knowledge. The Complainant satisfactorily testified about his experience in both areas.

As is often the case, the ultimate question is whether the Complainant can meet the requirement of demonstrating the final element of the *prima facie* case which is that of a causal connection between the Complainant's membership in one or more protected classes and the adverse action. On this record, the Hearing Examiner finds that the Complainant does not meet this burden.

The Complainant contends that he demonstrated a causal connection by showing that he was qualified for the positions for which he applied and that individuals not of his protected classes were hired for the positions while he was not. The Complainant does recognize that one individual with an apparent conviction record was hired for the Dish Washer position sought by the Complainant. However, the Complainant argues that the offense may not have risen to the level of a criminal conviction and was so temporally removed from the hiring date as to not be properly considered by the Respondent.

The Respondent asserts that, though the individuals who were hired for the particular positions in question may not have had arrest records or conviction records, the Respondent

has hired individuals with arrest and conviction records both prior to and subsequent to the Complainant's applications. Respondent's Exhibit 5 indicates that 10 or 11 individuals who self-identified as having arrest records or conviction records were hired from some point in 2006 through the first quarter of 2008. This period included the period during which the Complainant sought employment with the Respondent.

While the Complainant's argument has a mechanical appeal to it, it places too great an emphasis on an inference that the Complainant's treatment resulted from his membership in the protected classes, arrest record and conviction record. It also fails to examine the record as a whole including inferences raised by the evidence presented by the Respondent.

The record in this matter is extremely sparse on both sides of the issue. Essentially, the Complainant asks the Hearing Examiner to find that there is a causal connection between his protected classes and the fact that he was not hired simply because he is a member of the protected classes. He presents no additional evidence to demonstrate an animus on the part of the Respondent. Without some additional evidence linking the decision not to hire the Complainant to his arrest and conviction records, the Complainant fails to make the required connection between his protected classes and the Respondent's action.

First, the Complainant's suggested approach asks the Hearing Examiner to create and follow an inference that is not logically present. The Complainant seeks to utilize an inference that the Respondent's failure to hire was premised upon his arrest record or conviction record. However, these are but two of many factors that could have caused the Respondent's action. Some of these factors are permissible while others may not be. Unfortunately, there is nothing in the record to help the Hearing Examiner choose from among the variety of possible factors.

In very limited circumstances, it might be sufficient to establish a *prima facie* claim by merely demonstrating membership in a protected class and an adverse action, however, it is the Hearing Examiner's experience that these cases tend to occur only early in the processing of a complaint such as at the issuance of an Initial Determination. At a minimum, the circumstances as a whole would have to create some reason to expect one's membership in a protected class to be a potential factor in an employer's decision. Given the record as a whole, there is simply nothing upon which the Hearing Examiner might base such a finding.

Second, the Complainant glosses over the fact that, with respect to the Dish Washer position, there is evidence that a member of his protected classes was hired. The Complainant also asks the Hearing Examiner to disregard Respondent's Exhibit 5 which indicates that the Respondent did hire individuals with arrest records and conviction records during the period when the Complainant was seeking employment with the Respondent.

In a proceeding before the Hearing Examiner, the evidentiary standards and rules are relaxed as in a Wis. Stats. Chapter 227 proceeding. While certain rules of common sense apply, the rules permit the Hearing Examiner to consider all evidence so long as it is generally relevant to the proceeding. In this regard, though the Respondent may have failed to strictly observe the rules of evidence in setting forth its defense, the testimony of Ms. Retzlaff and the documents produced at the time of hearing must be accepted and considered.

The Complainant, in closing, argued that because he had demonstrated a *prima facie* claim of discrimination, the burden shifted to the Respondent to produce a legitimate,

nondiscriminatory explanation for its action. The Complainant contends that the Respondent failed to produce any such explanation and accordingly the Complainant should prevail.

However, as indicated above, the Hearing Examiner finds that the Complainant failed to demonstrate a *prima facie* claim of discrimination and therefore the burden does not shift, under the McDonnell Douglas/Burdine approach, to the Respondent. Even if the Complainant had produced sufficient evidence to warrant shifting the burden to the Respondent, the Hearing Examiner must find that there is sufficient evidence in the record to find that the Respondent presented a legitimate, nondiscriminatory explanation for its action. The reason being the Complainant's uncompromising persistence in seeking an interview with the Hiring Manager. Admittedly, this explanation is the result of inference due to a lack of precision in the Respondent's presentation. However, Retzlaff's statements and Hinton's written response indicate a difficult relationship between the Complainant and the Respondent. When one couples that history with the evidence of hiring individuals with arrest records and conviction records throughout the period in question here, the Hearing Examiner would have to conclude that the Respondent could meet its burden of production.

One important factor in reaching any conclusion in a proceeding before the Hearing Examiner is the credibility of the witnesses. This matter presented particularly difficult determinations of credibility for the Hearing Examiner. On the side of the Complainant, he called three witnesses, William Stahl, Jerome Dillard and Leslie Westerfelt, all of whom generally testified to the Complainant's efforts to find employment along with some of the training the Complainant has received from various programs to assist him with finding employment. While these witnesses were generally supportive of the Complainant, none of them really had information directly relating to the Complainant's claims of discrimination in the present matter. Leslie Westerfelt's testimony helped to give some context to the Complainant's application for the laundry position and for the Respondent's provision of job notices to the YWCA. At best, these witnesses testified that the Complainant has shown great persistence in seeking employment and his efforts to better his life. However, particularly Stahl and Dillard recognized that the Complainant sometimes had difficulties presenting himself as an ideal candidate.

The Complainant's testimony was given with great emotion and sincerity. However, he was frequently unable to present clear timelines and dates. He was clearly frustrated by his experience in dealing with the Respondent and demonstrated that he could be angry and somewhat combative.

The Respondent's sole witness was Bethany Retzlaff. Ms. Retzlaff's manner was extremely reserved and precise. She could not testify directly about events occurring prior to her hire by the Respondent on December 3, 2007. At one point, she lied about her experience in dealing with the Complainant. She attempted to indicate that from the beginning, the Complainant had been combative. Complainant's counsel demonstrated that this was contrary to a written statement indicating that Retzlaff's initial contact with the Complainant was polite and cordial. Generally, speaking, Retzlaff came across as someone trying to be proper and absolutely correct, but devoid of humanity or social graces.

The Hearing Examiner is troubled that neither side produced Kathryn Hunter, the Human Resources Generalist for much of the period in question. As both sides might have benefited from Ms. Hunter's testimony, the Hearing Examiner can draw no inference favoring either party. However, as Ms. Hunter is still employed by the Respondent, the Hearing Examiner would have

expected to hear her testimony. Similarly, Brigitte Hinton was not called to testify. While her testimony might have more benefited the Respondent, it is not clear whether the Respondent failed to call her for fear of adverse testimony or for simple ignorance caused by the fact that the Respondent was not represented by counsel.

Given the record as a whole, the issue of credibility does not factor strongly into the Hearing Examiner's findings. While the Hearing Examiner finds the Complainant a sympathetic party and Retzlaff to not be the most forthcoming or personable witness, the basic facts of this case do not rely on finding one of them to be more credible.

For the foregoing reasons, the Hearing Examiner finds that the Complainant has failed to demonstrate by the greater weight of the evidence that the Respondent discriminated against him on the bases of his arrest record or conviction record in violation of the Equal Opportunities Ordinance. The complaint is hereby dismissed.

Signed and dated this 18th day of May, 2012.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Carolyn Whittaker