

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

Paul Baxter
N9697 Hwy CC Apt 2
Belleville WI 53508

Complainant

vs.

Courier Personal Services WHII
1918 Bartillon Dr
Madison WI 53704

Respondent

HEARING EXAMINER'S RECOMMENDED
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

CASE NO. 20082105

On April 7, 2009, the above-captioned matter came on for a hearing on the merits of the complaint before Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, in Room LL-120 of the Madison Municipal Building 215 Martin Luther King, Jr. Blvd. in the City of Madison, Wisconsin. The Complainant, Paul M. Baxter, appeared in person and by his attorney, Nicholas Fairweather of Cullen, Weston, Pines and Bach, S.C. The Respondent, Personal Courier Services WHII, did not appear in person or by a representative or by counsel.

Based upon the record of proceedings in this matter, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant is an adult male resident of Bellville, Wisconsin.
2. The Respondent is a document/parcel delivery company with a worksite at 1918 Bartillon Drive in the City of Madison. The Respondent employs sufficient employees to require a night shift including a Night Shift Supervisor.
3. The Complainant began working for the Respondent as a Night Shift Dock Handler in November of 2006. His employment was terminated at the end of February, 2008.
4. The Complainant was convicted of identity theft on August 5, 2004. The record does not indicate what penalty was paid or what, if any, time was served either in jail, prison or on probation as a result of this conviction.
5. As a Dock Handler, the Complainant loaded and unloaded trucks and other vehicles.
6. It is not clear from the record whether the Respondent knew of the Complainant's conviction record at the time of the Complainant's hire. However, in November of 2007, the Complainant's supervisor, Dave Nelson, told the Complainant that the Respondent

- would have to let him go because of his conviction record. Despite Nelson's notice to the Complainant, the Complainant's employment was not terminated until February, 2008.
7. At no time during his employment was the Complainant told that he would need to be bonded to work in his position.
 8. The Complainant was given no explanation for his termination other than his conviction record.
 9. At the time of his termination, the Complainant worked a 40 hour week and was paid \$12.88 per hour.
 10. After his termination, the Complainant attempted to find employment. At the end of April, 2008, he obtained employment through a staffing agency, Celerity Staffing Solutions. He was paid \$10 per hour and worked full time for Celerity.
 11. Between the time of his termination and his employment by Celerity, the Complainant only received \$197.00 per week in the form of unemployment compensation.
 12. While employed through Celerity, the Complainant continued to seek additional employment. On November 27, 2008, the Complainant received full time employment as an Order Picker with Certco. He is paid \$12.00 per hour for full time (40 hours per week) employment. As of the time of hearing, the Complainant has received no raises and still is paid at the rate of \$12.00 per hour.
 13. In October of 2007, the Complainant was married. He and his wife have 4 children and the Complainant is the sole wage earner.
 14. After Nelson told the Complainant that the Respondent would have to let him go because of his conviction record in November of 2007, the Complainant experienced anxiety and emotional distress resulting from worry about his potential job loss. After February of 2008, the Complainant's distress and anxiety continued.
 15. The Respondent's termination of the Complainant occurred more than three years after the Complainant's conviction for identity theft. The Complainant also had a conviction for operating a vehicle while intoxicated sometime in 2006, however, this was a first offense and not a criminal conviction.

CONCLUSIONS OF LAW

1. The Complainant is a person with a conviction record within the meaning of the Equal Opportunities Ordinance.
2. The Respondent terminated the Complainant's employment more than three years after his conviction of a felony. This termination violates the provisions of the Equal Opportunities Ordinance that make it illegal to discriminate against an individual with a conviction record in employment.

3. The Respondent's illegal termination of the Complainant's employment because of the Complainant's conviction record is the proximate cause of wage loss to the Complainant and emotional distress and anxiety of the Complainant.
4. The Complainant took reasonable steps to mitigate his damages by looking for and ultimately finding nearly equivalent employment.

ORDER

Based upon the record of the proceedings and the Recommended Findings of Fact and Conclusions of Law, the Hearing Examiner now enters the following Order:

1. Within 15 days of this Order becoming final, the Respondent shall offer the Complainant re-employment to the next available Dock Handler position or its equivalent.
2. Within 15 days of this Order becoming final, the Respondent shall pay to the Complainant back wages in the amount of \$9,232.00.
3. The Respondent shall pay to the Complainant pre-judgment interest on his award of back wages at the rate of 4% per annum simple interest until the back wages are paid in full.
4. The Respondent shall within 15 days of this Order becoming final, pay to the Complainant the amount of \$15,000.00 for his emotional distress and anxiety caused by the Respondent's discrimination.
5. The Respondent shall pay to the Complainant the weekly sum of \$35.20 (.88¢ x 40 hours per week) until it either rehires the Complainant or the Complainant declines employment with the Respondent from the date of this Order.
6. The Complainant is directed to pay to the unemployment compensation fund any amount that is required to be repaid as a result of his receipt of unemployment compensation in 2008.
7. Within 15 days of this Order becoming final, the Complainant's attorney shall file a petition for the Complainant's reasonable costs and fees, including a reasonable attorney's fee, to compensate the Complainant for his costs and expenses incurred in bringing and pursuing this complainant. The Respondent may file objections to the Complainant's petition within 15 days of its filing.

MEMORANDUM DECISION

Following timely notice, a hearing commenced on April 7, 2009. The Respondent did not appear at the time of hearing, nor within 30 minutes of the time set for hearing. The Respondent did not request rescheduling of the hearing and did not object to the time and date as scheduled.

The Respondent did not respond to an Order to Show Cause issued by the Hearing Examiner on April 21, 2009, after the hearing on April 7, 2009. In fact, the Respondent did not

accept receipt of the Order to Show Cause and it was returned without delivery to the Hearing Examiner.

The Complainant appeared in person and by counsel. The Complainant testified under oath or affirmation about the circumstances of his employment, his termination and the impact that the termination had upon him. The Complainant's testimony is sufficient to establish a *prima facie* claim for discrimination and the Hearing Examiner knows of no reason to doubt the credibility of the Complainant's testimony. Had the Respondent chosen to appear, it would have had the opportunity to cross-examine the Complainant and to put into evidence contrary testimony and facts. It did not. The Hearing Examiner is left with a record consisting entirely of the testimony of the Complainant.

The Complainant began his employment with the Respondent in November of 2006. At the time of his entering employment, he had a conviction record stemming from a felony conviction for identity theft on August 5, 2004. It is not clear whether the Respondent knew of the Complainant's conviction record at the time of the Complainant's hiring or not.

The Complainant worked sufficiently well so that there was no reason for the Complainant to expect any adverse employment action. In October of 2007, the Complainant married. The Complainant and his wife had four children in their household. The Complainant was the sole wage earner in the household. Had the Complainant doubted the stability of his employment, it seems likely that he would not have chosen to formalize his family relations in October of 2007.

At some point in November of 2007, the Complainant's supervisor on the Night Shift, Dave Nelson, informed the Complainant that the Respondent would have to terminate his employment because of the Complainant's conviction record. Nothing in the record indicates whether the Respondent had recently become aware of the Complainant's conviction record or what circumstance called the Complainant's conviction record into question.

What is of importance is that the first mention of the Complainant's conviction record occurred more than three years after the conviction. The Complainant's felony conviction occurred on August 5, 2004.

Under the terms of the Madison Equal Opportunities Ordinance, sec 39.03(8)(a), (i)(3)(a), (b), it is illegal for an employer such as the Respondent to discriminate against the Complainant on the basis of a conviction record unless the employer's adverse employment action occurs no later than three years from the date of conviction and the circumstances of the conviction bear materially upon the individual's terms and conditions of employment. There are other events from which the three-year period might be measured such as the payment of a fine or being placed upon probation, but the record in this matter is silent as to those additional conditions.

In the present matter, the Respondent might have been able to act upon the Complainant's conviction record if it had acted prior to August 5, 2007 and been able to demonstrate a credible connection between the circumstances of the Complainant's employment and the circumstances that led to his conviction. However, there is nothing in this record demonstrating that such a "safe haven" for the Respondent existed or was applicable in the present case.

Nelson's announcement to the Complainant of his impending termination created emotional distress and anxiety in the Complainant stemming from his being the sole wage earner in the household and having the economic responsibility for a wife and four children. Despite placing the Complainant in this anguishing position, the Respondent did not act upon its announcement until the end of February, 2008. The Hearing Examiner takes administrative notice that February, 2008 was a Leap Year and the last day of February was Friday, February 29, 2008. The Complainant testified that his termination occurred at the end of February, 2008, and it is entirely consistent with the Complainant's testimony that his last day of employment was or would have been February 29, 2008.

There is nothing in the record to explain why the Respondent waited for over two months to act upon its notice to the Complainant. On one hand, perhaps the Respondent wished to attempt to find some basis for retaining the Complainant. On the other hand, perhaps the Respondent did not wish to enter the busy end of the year delivery period without the services of the Complainant. In either event, the Respondent's absence deprives us of an explanation.

Nothing in the record gives any explanation for the Complainant's termination other than the Respondent's stated intention to terminate his employment because of the Complainant's conviction record. As noted previously, the Complainant felt sufficiently safe in his employment to wed in October of 2007 and there is nothing in the record to indicate any problem with the Complainant's performance or attendance. Given the record, the Hearing Examiner can reach no conclusion but that the Complainant's employment was terminated because of his conviction record. Since the Complainant's conviction record falls outside of the three-year period in which the Respondent might have acted, the Hearing Examiner must find that the Respondent violated the Equal Opportunities Ordinance prohibition against discriminating against the Complainant on the basis of his conviction record.

Having found that the Respondent violated the ordinance's prohibition against discrimination because of the Complainant's conviction record, the Hearing Examiner must determine a remedy that might make the Complainant whole or place in approximately the same position he would have been had the discrimination not occurred. In this regard, the Hearing Examiner will look to the future as well as to the past.

In a claim of employment discrimination, the ultimate goal is to place the complainant back into the position he might have been had there been no discrimination. While economic damages can assist, the best remedy is to require the Respondent to employ the Complainant in as similar a position as possible. Where this goal is not possible, the Hearing Examiner might consider other damages most often in the form of "front pay." Nothing in this record indicates that the Complainant might not be able to fit back into the employment setting at the Respondent's Madison facility.

If there was evidence of distrust or deeply discriminatory animus, it might not be reasonable to think that the Complainant could step back into his former position. However, the record indicates that the Complainant performed his work well and fails to show the type of contentious atmosphere that would mediate against re-employment of the Complainant. See Miller v. CUNA, MEOC Case No. 20042175 (Ex. Dec. 5/16/08). Given the record, it seems most equitable that the Respondent offer the Complainant the next available position or reach some other agreement with him concerning his employment status.

Until the Respondent is able to offer the Complainant a substantially similar position at an appropriate wage, the Respondent must continue to make the Complainant economically whole. As of the time of hearing, the Complainant was making \$12.00 per hour for a 40-hour work week. This is \$.88 less than the \$12.88 per hour the Complainant was making at the time of his termination. In order not to fall further behind economically, the Respondent will be required to make up the difference in the Complainant's wage and what he was making or would have been making at his former position.

The Complainant is also entitled to receive back pay to compensate him for the wages lost as a result of the Respondent's discrimination.

The record indicates that the Complainant was entirely without wages for approximately eight weeks from the end of February until the end of April, 2008. For the period of time, the Respondent must pay to the Complainant the full wage loss. This would be eight weeks of 40 hours per week at the rate of \$12.88 per hour. For this eight-week period, the wage loss is calculated to be \$4,121.60.

The Complainant's testimony, though not entirely clear, indicates that he began seeking employment as soon as his position with the Respondent was terminated. The only income received by the Complainant for the period from the end of February, 2008 until the end of April, 2008 was unemployment compensation in the amount of \$197.00 per week. Under some circumstances, the Complainant might be required by state law to repay all or some of the unemployment compensation he received. To the extent required by the Department of Workforce Development, the Complainant is directed to repay the unemployment compensation fund from the amount received as back pay in this matter.

At the end of April, likely the 25th of April, 2008, the Complainant obtained full-time employment through a staffing agency, Celerity Staffing Solutions. While employed through Celerity, the Complainant worked 40 hours per week at the rate of \$10.00 per hour. This left the Complainant with a difference between what he had been paid by the Respondent and what he was being paid by Celerity of \$2.88 per hour. In order to compensate the Complainant for his wage loss during the period for which he worked for Celerity, the Respondent is required to make up the hourly difference of \$2.88 per hour.

The Complainant left his employment with Celerity when he obtained a full-time position at Certco as an order picker at the end of November, 2008. As required by law, it is clear that the Complainant was continuing to attempt to mitigate his damages by finding work that was more comparable to that which he had with the Respondent.

The compensation due the Complainant during his employment with Celerity can be calculated by multiplying \$2.88 times the number of weeks between April 28, 2008 and November 28, 2008, times 40 hours per week. This calculation results in a wage loss owed to the Complainant of \$3,456.00.

At Certco, the Complainant is paid \$12.00 per hour for a 40-hour work week. That is still less than the \$12.88 per hour that the Complainant was paid while employed by the Respondent. The Complainant is entitled to that difference from the time when he began his employment with Certco to the date of this Order. By multiplying the difference by 40 hours per

week and that by the number of weeks from November 28, 2008 to the present date, the Hearing Examiner finds a wage loss for this third period to be \$1,654.40.

As noted above, the Complainant will continue to have a wage loss so long as there is a difference in what he's being paid and what he would have earned had his employment not been terminated. To that end, the Respondent will be required to pay the Complainant \$35.10 per week for each week until the Complainant is either rehired and placed in a substantially similar position or is otherwise fully compensated.

In order for the Complainant's economic loss not to be reduced by the passage of time and lost investment opportunity, the Hearing Examiner orders the Respondent to pay pre-judgment interest on the reasonably fixed amount of back pay. Taking the interest stipulated to by the parties in Cronk v. Reynolds Transfer and Storage, MEOC Case No. 20022063 (Ex. Dec. 8/29/06, other citations omitted), the Hearing Examiner will use the 4% per annum interest rate imposed in that case.

In addition to the loss of wages resulting from the Respondent's act of discrimination, the Complainant has experienced other losses. These additional losses also require compensation. The Commission has opted to compensate prevailing Complainants for their loss of dignity and their emotional distress and humiliation as part of the concept of a "make whole remedy." Leatherberry v. GTE Directory Sales Corporation, MEOC Case No. 21124 (Ex. Dec. 1/5/93), Laitinen-Schultz v. TLC, MEOC Case No. 19982001 (Ex. Dec. 7/1/03); Miller v. CUNA, MEOC Case No. 20042175 (Ex. Dec. 5/16/08). It is always difficult to fix with any precision what amount of damages will properly compensate a victim of discrimination. Certainly, the worry and distress caused in one's family life and obligations play an important role. In Leatherberry, Laitinen-Schultz and Miller, the Hearing Examiner relied heavily on the Complainant's worries about the effect on their families' economic prospects and the inability to explain what had happened to other family members.

In the present case, the Complainant was the sole wage earner for a family of 6. At \$12.88, the Complainant's income was not large and the loss of that income through no fault of his own placed the Complainant in a position of worry and concern for his family's well-being. In Miller, the Complainant's income was much greater and he had some alternative sources of income to help alleviate the worry, but the loss of health insurance benefits and an inability to explain to his son why the family could no longer afford certain things warranted a substantial award of damages.

In the present matter, the Complainant had little opportunity to quickly replace the lost income and had a greater responsibility for more dependents than in Miller. However, the Complainant's income was lower and it is assumed the standard of living was not so high as in Miller.

The Complainant, as a convicted felon, had apparently paid his debt to society as a result of his conviction. For the Respondent to use facts that society should deem irrelevant as presumed by the provisions of the ordinance, undoubtedly caused the Complainant distress and feelings of a loss of control over his life and employment. Though perhaps not quite so eloquent as the testimony in Miller, the Hearing Examiner was moved by the distress demonstrated in the Complainant's voice when talking about the impact of the discrimination upon him and his family.

Given the past awards of the Commission and the Hearing Examiner's observation and assessment of the Complainant, the Hearing Examiner concludes that an award of \$15,000.00 might adequately compensate the Complainant for the emotional distress, loss of dignity and humiliation caused by the Respondent's discrimination. It is not possible to completely utilize the awards in other cases to determine the appropriateness of the award in this case. However, the Hearing Examiner is aware of those other awards and finds that \$15,000.00 is neither too much nor too little given the specialized circumstances of the present matter.

The Commission has long determined that a prevailing Complainant should receive the reasonable costs and fees required to bring a complaint to the end of its process. This is to encourage the private bar to undertake such representation and to assure that those Complainants who are willing to act as a private attorney general further the important social goals of the ordinance. It would be wrong to force those Complainants to expend the awards calculated to replace lost wages or to compensate for other injuries to use those funds to bring their complaints. Accordingly, the Hearing Examiner requires the Respondent to pay to the Complainant the reasonable costs and fees including a reasonable attorney's fee required in the processing of this complaint.

Signed and dated this 3rd day of November, 2009.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Nicholas E Fairweather