

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

David Severson
740 Selden St
Columbus WI 53925

Complainant

vs.

Kaplan, Inc.
315B W Gorham St
Madison WI 53703

Respondent

HEARING EXAMINER'S DECISION AND
ORDER ON RESPONDENT'S MOTION
TO DISMISS

CASE NO. 20112122

BACKGROUND

On August 16, 2011, the Complainant, David Severson, filed a complaint of discrimination with the Department of Civil Rights, Equal Opportunities Division (EOD). The Complainant alleged that the Respondent, Kaplan Test Prep, Inc., failed to hire him on account of his credit history, arrest record and conviction record. The Respondent denies discriminating against the Complainant and asserts that its actions were sanctioned by the Madison General Ordinance.

The Respondent also challenged the EOD's geographic jurisdiction over the allegations of the complaint. On September 26, 2011, the case Investigator/Conciliator transferred the complaint to the Hearing Examiner for a determination as to jurisdiction. Before the Hearing Examiner could issue a briefing schedule, the Complainant filed a brief opposing the Respondent's motion. The Hearing Examiner then afforded to the Respondent an opportunity to reply to the Complainant's submission.

DECISION

One might think that questions of geographic jurisdiction would be clear and unambiguous. However, as the parties seem to recognize in their submissions, the question is often highly fact dependent. See generally Hawkins v. Volkmann Railroad Builders, Inc., MEOC Case No. 22451 (Ex. Dec. 2/17/00); White v. Work Bench, Inc., MEOC Case No. 19982018 (Ex. Dec. 12/15/98); Zabit v. Kraft Foods, Inc., et al., MEOC Case No. 22563 (Ex. Dec. 5/19/98); William (f/k/a Stevenson) v. Copps Food Center, MEOC Case No. 20042113 (Ex. Dec. 2/9/05). This is no less the case in the matter presented by the Respondent's motion.

The Respondent puts forth three contentions that it categorizes as being jurisdictional. From the perspective of the Hearing Examiner, only one of these contentions is really jurisdictional, as the other two are merely part in parcel of the Respondent's defense.

The two arguments posed by the Respondent that do not rise to the level of a jurisdictional challenge concern whether the Complainant's convictions were substantially related to his employment so as to require his termination and whether the basis for the Respondent's decision was the Complainant's conviction record or an alleged misrepresentation of his conviction record on his application. The Hearing Examiner will not address these allegations as they fall outside of the scope of a jurisdictional challenge. These questions would be best answered through the investigation process, assuming that the EOD has jurisdiction.

The question of whether the EOD has geographic jurisdiction in this matter is complicated by the lack of a clear factual record. Some facts mediate in favor of jurisdiction and others in favor of a lack of jurisdiction. It appears that the Complainant filed an online application to work for the Respondent as a Campus Manager for the University of Wisconsin in the spring of 2011. The Complainant's contacts were primarily with a recruiter based in New York. As part of the Respondent's hiring process, a third party company conducts a review of applications for consistency with the Respondent's employment standards. In the present matter, it appears that it was this third party reviewer that flagged the Complainant's conviction record and credit history as potential problems.

The position for which the Complainant was tentatively hired was that of Campus Manager for the University of Wisconsin. Though the Complainant lives in Columbus, Wisconsin, he would report to a location within the City of Madison at 315B West Gorham Street. The duties connected with this location appear to be minimal. Such duties essentially included unlocking the doors in the morning, perhaps some maintenance of the site and its equipment and locking the doors at night. It appears that the Complainant could have performed certain administrative duties at his home, though they could be performed elsewhere, too. Finally, the Complainant would be responsible for recruiting students to sign up for the Respondent's services. This recruitment would take place on and around several campuses including the University of Wisconsin and other campuses in and around the Madison area. The Complainant's direct supervisor, Jeremy Joecks, was located in Sussex, Wisconsin and the regional or territorial office was located in the state of Illinois.

Initially, the Respondent cited Hawkins v. Volkmann Railroad Builders, Inc. for the proposition that the basis for jurisdiction is the location where the allegedly discriminatory decision was made. This represents an unnecessarily narrow reading of the holding in that case. In the present matter, the allegedly discriminatory employment action seems to have occurred outside of the City of Madison. Virtually all the Respondent's administrative structure lies outside of Madison and none of the potentially key decision-makers had any contact with the Complainant in Madison, except for transmission of the decision to rescind the offer of employment.

In response, the Complainant points to the Hearing Examiner's decision in William (f/k/a Stevenson) v. Capps Food Center as support for his contention that it is not the site of the decision which is critical for determining jurisdiction, but the location where the effects of the discriminatory decision will be felt. The Complainant asserts that the effect of the discrimination will fall within the geographic limits of Madison because the Respondent's only physical location is found in Madison and it is where the Complainant performs his duties.

The Respondent, while minimizing the Complainant's contacts with its location at 315B West Gorham Street, does indicate that the Complainant performs recruiting duties on various campuses without specifying those locations by name or address. The question of recruitment takes on particular significance given the minimal physical contact with Madison and the likely minimal administrative duties to be performed from home. It appears that the recruitment or sales function is really at the crux of the Campus Manager position for the Respondent. Recruitment helps to funnel students into the Respondent's program to pay for its services.

What makes this recruitment function particularly interesting in the context of this jurisdictional challenge does not appear to be recognized by the parties. Presumably, much of the Complainant's efforts at recruitment would be focused on students from the University of Wisconsin. The Respondent indicates that these efforts occur wherever students congregate or recreate—on campus, at the union, at sports venues, etc. They may also occur at locations off campus such as restaurants, clubs or the like.

In its initial brief, the Respondent seems to indicate that all of these recruitment activities involve students at the University of Wisconsin. As a municipal agency, the EOD may not exercise jurisdiction over facilities or locations that are essentially state property or over state activities. Had the Respondent clearly stated that the Complainant's recruitment activities would be limited to the University of Wisconsin campus, it would have further enhanced its argument that the position involved in this matter had no meaningful connection with the City of Madison. In its reply brief, the Respondent states that the Campus Manager position was responsible for recruiting students from other campuses beyond the University of Wisconsin. On this record, it is not possible to tell whether those other campuses would be ones within the City of Madison or otherwise subject to the jurisdiction of the EOD.

Given the state of this record it is tempting to remand this matter to the Investigator/Conciliator for further fact finding on the issue of jurisdiction. However, the Hearing Examiner finds that the record, while slim, is sufficient to find that the results of the Respondent's alleged actions fall within the geographic limits of the City of Madison. The Complainant's primary job duties of running its facility located at 315B West Gorham Street are within the City of Madison and some of the Complainant's anticipated recruitment duties appear likely to occur within the City of Madison. The lack of any quantification of the administrative duties to be performed at the Complainant's residence do not help the Respondent in its characterization of a job performed outside of the City of Madison.

While the facts of this matter do not clearly require the Hearing Examiner to closely analyze the purposes of the ordinance as in the Copps Food Center case, the Complainant's contacts appear to be more than trivial.

For the foregoing reasons, the Hearing Examiner concludes that the EOD has geographic jurisdiction over the allegations of the complaint. As in the Copps Food Center case, the effects of the alleged discrimination are arguably most felt within the City of Madison. Though the loss of income to the Complainant may be felt most clearly in Columbus, there is economic loss that occurs within the City of Madison as the Complainant can be expected to use his purchasing power while in Madison for activities related to the position of Campus Manager. The Respondent's reading of the Hawkins decision is somewhat restricted. While many of the employment decisions were made outside of the City of Madison, equally important

to the outcome in that case was the fact that none of the work performed by the Complainant, and for which there was a claim of discrimination, occurred within the City of Madison.

ORDER

The Respondent's motion to dismiss is denied and this matter is remanded to the Investigator/ Conciliator for investigation and issuance of an Initial Determination.

Signed and dated this 22nd day of December, 2011.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Dixon R Gahnz
Lisa Baiocchi