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

Andrew Obriecht 1420 1/2 Sheridan Drive Madison WI 53704 Complainant vs. Woodmans 3817 Milwaukee St Madison WI 53714 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CASE NO. 20172014

On February 15, 2018, the Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, held a public hearing in Room 108 of the Madison City-County Building, 210 Martin Luther King, Jr. Boulevard. The Complainant, Andrew Obriecht, appeared in person and by his attorneys David Bolles and Nils Wyosnick. The Respondent, Woodman's Food Market, Inc., appeared by its representatives William Hurst, Daniel Frederickson and Sara Eagle-Kjome, by its attorneys Husch Blackwell by Frank Gumina. Based upon the record of the proceedings, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. Andrew Obriecht is a person with a conviction record.

2. Respondent, Woodman's Food Market, Inc., operates two grocery stores within the City of Madison with one being located 3817 Milwaukee Street, Madison, Wisconsin 53714. The Respondent employs at least 15 individuals.

3. Complainant applied for employment with Woodman's Food Market, Inc. on January 24, 2016 and December 29, 2016.

4. Following his January 24, 2016 application, Complainant contacted Woodman's Food Market, Inc. and met with William Hurst to interview for a position.

5. Complainant contacted Mr. Hurst following his interview and was informed that the Respondent had no available positions at that time.

6. Complainant's application for employment on December 29, 2016 indicated an interest in employment for any shift available with the Respondent.

7. At the time of Complainant's December 2016 application, Respondent had both full-time and part-time third shift stocking positions available.

8. At the time of his December 29, 2016 application, the Complainant was employed with Mad City Windows and Baths as an Assistant Manager making $13.00 per hour plus commission. Complainant's position with Mad City Windows and Baths permitted him flexibility in his schedule should he obtain other employment.

9. At the time of Complainant's December 29, 2016 application, he handed his application to William Hurst and stated that if the Respondent did not hire him, that he would sue the Respondent.

10. William Hurst is an Assistant Manager with Woodman's Food Market, Inc. Madison East store, having been employed by the Respondent for 27 years.

11. William Hurst is the employee of Woodman's Food Market, Inc. who took the application from, and was engaged by, the Complainant at the time of his December 2016 application.

12. Daniel Frederickson is the Store Manager at Woodman's Food Market, Inc. Madison East store, having been employed by the Respondent for 32 years.

13. Daniel Frederickson is William Hurst's direct supervisor.

14. Complainant did not contact anyone at Woodman's Food Market after December 29, 2016 to follow up on his application for employment.

15. Complainant was convicted of, and incarcerated for, Sex With A Minor Age 16 But Not 18 on February 18, 2013.

16. Complainant was released from incarceration on September 23, 2014.

17. William Hurst and Daniel Frederickson contacted Respondent's in-house counsel, Sara Eagle-Kjome, following his December 2016 application to inform her that the Complainant threatened legal action if he was not hired.

18. Mr. Hurst and Mr. Frederickson discussed the Complainant's conviction record and prior employment with Ms. Eagle-Kjome and their concerns about the Complainant being present in the store during the third shift hours.

19. Ms. Eagle-Kjome instructed Mr. Hurst and Mr. Frederickson not to contact the Complainant.

20. Third shift employment working hours at Woodman's Food Market, Inc. Madison East location were between 10:00 p.m. or midnight until 6:30 a.m. or 8:30 a.m.

21. No minors are employed working third shift hours at the Respondent's Madison East location.

22. Minors may be working in the Respondent's Madison East location beginning as early as 7:00 a.m. and as late as 11:00 p.m.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class Conviction Record and is entitled to the protections of the City of Madison Equal Opportunities Ordinance 39.03.

2. The Respondent is an employer within the meaning of the City of Madison Equal Opportunities Ordinance 39.03 and is subject to its terms and conditions.

3. The Respondent did not discriminate against the Complainant on the basis of his conviction record in violation of the Equal Opportunities Ordinance.

ORDER

1. The complaint is hereby dismissed and the parties are to bear their own costs.

MEMORANDUM DECISION

In his complaint, filed on January 25, 2017, MEOD Case No. 20172014, the Complainant alleges that the Respondent discriminated against him on the basis of his conviction record when the Respondent failed to hire him in violation of MGO 39.03. The Initial Determination by the City of Madison Department of Civil Rights found that there was probable cause to believe that discrimination occurred in regard to employment (failure to hire) because of the Complainant's conviction record.

Cases of discrimination can be proven by either the direct or indirect method. In the direct method, the parties present their cases and the Hearing Examiner examines the facts and, without reliance on inference, reaches a determination of liability or not. Cases utilizing the direct method usually have convincing testimony of discriminatory language or conduct. In a case presented by the indirect method, the parties present their facts and apply those facts, be they inferential or direct, to the respective burdens of proof and production that the law places on the parties. The indirect method of demonstrating discrimination is also known as the burden shifting approach and derives from the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and the cases that follow those decisions.

The Hearing Examiner finds that the proof in this matter is best analyzed using the indirect method. When analyzing a case using the indirect method, the Hearing Examiner first must determine for each allegation of discrimination if the Complainant has established a *prima facie* claim of discrimination. A complaint for discrimination on the basis of conviction record must meet the *prima facie* standard; that is, the Complainant must establish that he is 1) the member of a protected class as defined by the Madison General Ordinance Sec. 39.03, 2) that he was qualified for the job that had been applied for, 3) that he suffered an adverse employment action, and 4) that the adverse action suffered was causally related to the Complainant's membership in the protected class. The Complainant must prove each element of the *prima facie* claim by a preponderance of the evidence, which can also be stated as, by the greater weight of the credible evidence.

Presuming the Complainant meets this burden of proof, the burden shifts to the Respondent to present a legitimate, nondiscriminatory explanation for its actions. This is a burden of production and not one of proof.

If the Respondent carries its burden of production, the Complainant might still prevail if he can point to evidence in the record demonstrating that the Respondent's proffered explanation is either not credible, or represents a pretext for an otherwise discriminatory motive. First, the Hearing Examiner will examine whether the Complainant has demonstrated that he has met the first element of the *prima facie* claim. The Complainant filed a complaint of discrimination in relation to employment (failure to hire), based upon his conviction record, against the Respondent on January 25, 2017. There is no dispute that the Complainant is a member of the protected class Conviction Record as defined in Madison General Ordinance Sec. 39.03(2) and thus meets the first element of the *prima facie* claim.

Next, the Hearing Examiner must examine whether the Complainant has established that he was qualified for the job for which he had applied. Complainant's job applications with the Respondent detail a background in both sales and retail capacities. At the time of his December 2016 application, Complainant believed he was applying for a third shift stocking position. Complainant was employed at the time of his December 2016 application with Mad City Windows and Baths as an assistant manager, primarily promoting and marketing the company's brand and products. The Complainant applied for a position with the Respondent looking for part-time work to supplement his income. Based upon the Complainant's job history as described in his December 2016 application, it seemed that he was more than qualified for the position he was seeking, thus establishing the second element of a *prima facie* claim.

The Hearing Examiner now turns to whether or not the Complainant suffered an adverse employment action. The Complainant applied for employment twice with the Respondent. From the record it is clear that the Respondent had a practice of only interviewing those candidates who contacted the Respondent to request an interview after submitting their applications. The Respondent testified that this was a way to determine which candidates showed real interest or initiative in the employment opportunities offered by the Respondent. When the Complainant first applied with the Respondent in January 2016, he left an application with the Respondent and later followed up to inquire about an interview. The Complainant met with William Hurst, assistant store manager at Woodman's Food Market, Inc.'s Madison East location, and at that interview, discussed with Mr. Hurst his prior employment with SPi Global (also referred to on the Complainant's December 2016 job application, and at the time of hearing, as "Laserwords"), as well as discussing his prior conviction record. Following the interview, the Complainant contacted Mr. Hurst, who informed him there were no positions available at that time. Any claim related to the January 2016 application is time barred by the statute of limitations for an employment discrimination claim, which is 300 days.

The Complainant then applied for a second time, on December 29, 2016, by taking another application for employment to the Respondent's Madison East location and handing the application directly to Mr. Hurst. At the time of this encounter, the Complainant indicated that he would pursue legal action if he were not hired by the Respondent. The Complainant did not follow up after this application to inquire as to the status of his application or to request an interview. The Complainant was not contacted for an interview and was not hired for any available position.

The fact that the Complainant did not receive an interview and was not hired for a position for which he appears to have been qualified represents an adverse action. The Complainant has established the third element of the *prima facie* claim.

As is frequently the situation, determination of this case turns on whether the Complainant can demonstrate that the adverse action of not being hired was due to his membership in the protected class conviction record. The Hearing Examiner now turns to that issue.

Despite the fact that the Complainant did not follow up on his application for employment, Mr. Hurst discussed the Complainant's second application with his supervisor, Daniel Frederickson, due to the fact that the Complainant had threatened legal action should the Respondent not hire him, and his concerns about the Complainant's criminal history as discussed in his first interview. Mr. Frederickson thought it prudent to contact in-house counsel due to the Complainant's threat of litigation. Mr. Hurst and Mr. Frederickson spoke with Woodman's Food Market, Inc.'s in-house counsel, Sarah Eagle-Kjome, and relayed their concerns about the Complainant's threat of legal action. At that time, Mr. Hurst also discussed the Complainant's first application and interview with Ms. Eagle-Kjome. Ms. Eagle-Kjome inquired as to the positions available with the Respondent at that time, and was told that there were only third shift stocking positions available. Ms. Eagle-Kjome instructed Mr. Hurst and Mr. Frederickson not to contact the Complainant, and that if the Complainant contacted the store to let him know that there were no jobs available.

The fourth element in establishing a *prima facie* case of discrimination is to demonstrate that the reason for the adverse employment action was causally related to a person's membership in a protected class. In this case, Complainant had applied for a third shift stocking position with the Respondent. The Complainant is protected under the Ordinance due to a conviction for sexual intercourse with a child age 16 but not 18 (Wis. Stat. § 948.095).

Discussions among Woodman's Manager, Assistant Manager, and Corporate Counsel show both a concern about the conduct giving rise to the Complainant's conviction record, as well as the conviction record itself. In her testimony, Ms. Eagle-Kjome, indicated that she was concerned that the Complainant would engage in similar activity during his employment that had led to his most recent conviction. Mr. Hurst and Mr. Frederickson both testified that they had concerns about the fact that there were several minors that worked for the Respondent, and that there were unaccompanied minors that shopped at the store during all hours of the day and night. Mr. Hurst and Mr. Frederickson also expressed concern that supervision was limited during the third shift, and that a store the size of Woodman's Food Market, Inc.'s Madison East Store offered numerous locations that would be secluded and offer the opportunity to engage in improper or illegal conduct. Despite the Complainant not calling to follow up on his second application, the fact that these discussions occurred, show that the Respondent's failure to hire the Complainant was motivated, at least in part, by his conviction record, and does show discriminatory intent.

Even though the Respondent's decision not to hire the Complainant was motivated in part by his conviction record, the Ordinance provides an affirmative defense if an applicant "has been within the past three (3) years placed on probation, paroled, released from incarceration, or paid a fine, for a felony, misdemeanor, or other offense, the circumstances of which substantially relate to the circumstances of the particular job or licensed activity" MGO 39.03(8)(a)(i)(3)(b). Where an employer denies employment to an applicant meeting those

conditions, that action is protected and does not constitute illegal discrimination within the meaning of the ordinance. It is not the intention of the Ordinance to require that an employer hire an individual who could present a liability insofar as jeopardizing the safety and wellbeing of other employees or customers.

As it appears that there is no question that the Complainant's conviction record complies with the time requirements of the ordinance's defense, the Hearing Examiner must determine whether the crime/crimes for which the Complainant was convicted relate substantially to the duties of the position for which the Complainant applied. In this regard, recent decisions of the Equal Rights Division of the Wisconsin Department of Workforce Development and the Department of Civil Rights afford some guidance.

The Respondent's testimony at hearing indicated that even though there were currently no minors employed on the third shift that the third shift somewhat overlapped with the prior and later shifts on which minors were employed. The Respondent also indicated that minors were present as customers throughout the day including the third shift. The fact that the third shift Stocker position required the employee to work independently of direct supervision and that the position would likely bring the employee into contact with minors, be they employees or customers, in circumstances that did not necessarily involve oversight of that contact, gave the Respondent great concern for the potential safety of minors in its building.

In Wollschlager v. Hy Vee, MEOD Case No. 20152022 (Ex. Dec. 6/16/2017), the Complainant was offered a third shift Meat Market position. The Respondent revoked its offer of employment once it became aware of the Complainant's conviction for possession of child pornography and the restrictions of the Complainant's probation. The Hearing Examiner determined that the Respondent had not violated the ordinance because the Respondent had a good faith belief that the nature of the Complainant's convictions were substantially related to the specifics of the position for which he applied. The Hearing Examiner found that, as in the present case, the Complainant would likely have had unsupervised contact with minors during the Complainant's work shift and that given the sexual nature of the Complainant's convictions involving minors, that the Complainant's conviction was substantially related to the circumstances of his potential employment.

The Respondent, in defending its revocation of its offer of employment in Wollschlager relied upon Holze v. Secure Link, LIRC (9/23/2005), which determined that any position that permitted regular contact with adolescents was substantially related to an underlying conviction for possession of child pornography. In the Holze case, it was determined that the essential nature of that crime was the gross objectification of adolescents. Here too, the Hearing Examiner finds that the Complainant's conviction of Sex With A Minor Age 16 But Not 18, fuels Respondent's legitimate concern for the safety and wellbeing of its employees and customers given the nature of the Complainant's crime and its relatedness to the duties and circumstances of the employment he sought with the Respondent, and provides a defense to the Respondent that bars liability.

The Complainant argues that it was unreasonable to conclude that the proximity of the Complainant to minor customers or employees would reasonably lead to the Complainant reoffending. The Hearing Examiner sees the question somewhat differently. In Schrankler v. Best Buy Stores, MEOC Case No. 20122001 (Ex. Dec. 9/08/2017), the Hearing Examiner concluded that "There is nothing in the Ordinance or the case law that requires the Respondent to establish the probability of future criminal activity." That the Respondent was legitimately

concerned for the welfare of its minor employees and customers, and that it could reasonably be concluded that the working conditions of the job for which the Complainant applied could afford him the opportunity to engage in inappropriate or illegal conduct, was likewise not unreasonable. This is consistent with the Hearing Examiner's holding in Schrankler, which found that the character traits for someone convicted of a sexual crime against a minor "include a person who is secretive, who does not care for the welfare of minors and who places a higher importance on his own self-interest than on that of minors…" (at p. 8). In short, the Hearing Examiner does not find that the Complainant would reoffend or perhaps would not be likely to reoffend, but the Respondent's good faith belief that the nature of the Complainant's conviction record is substantially related to the duties and circumstances of the particular position for which the Complainant applied is sufficient to establish the defense set forth in the ordinance.

Because Sec. 39.03(8)(i) establishes an affirmative defense to a violation of the ordinance, the Hearing Examiner need not proceed with the remaining elements of the burden shifting paradigm. The analysis is complete with the finding that the defense set forth in the ordinance has been met.

For the foregoing reasons, the complaint is dismissed.

Signed and dated this 11th day of September, 2018.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Emily A Constantine