

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

Leif Hanson  
2221 Allied Drive #4  
Madison WI 53711

Complainant

vs.

Motel 6  
4202 East Towne Boulevard  
Madison WI 53704

Respondent

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

CASE NO. 20182029

On August 10, 2018, the Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, held a public hearing in Room 351 of the Madison City County Building, 210 Martin Luther King, Jr. Boulevard. The Complainant, Leif Hanson, appeared in person and without counsel. The Respondent, Motel 6, appeared by its representative Alex Tank and without counsel. 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. Leif Hanson is a person with a conviction record.
2. Respondent, Motel 6, is a motel chain with a location at 4202 East Towne Boulevard, Madison, Wisconsin 53704. It is unknown how many individuals the Respondent employs.
3. Complainant applied for employment as a Maintenance Engineer with Motel 6 on January 24, 2018 through the website, Indeed.
4. The Maintenance Engineer position the Complainant had applied for was full-time employment with a starting wage rate of \$12.00 per hour.
5. At some time after the Complainant submitted his application through Indeed, he was contacted by the Respondent to fill out an application and participate in an interview.
6. The application for the Maintenance Engineer position asked whether or not the Complainant had been convicted of a felony. The Complainant checked the box next to "yes."
7. On January 25, 2018, the Complainant was contacted by an individual named Essence, who left a voicemail for the Complainant, inquiring whether he was still interested in the Maintenance Engineer position for which he had applied.

8. Essence McCauley was employed by the Respondent as a General Manager at the Motel 6 located at 4202 East Towne Boulevard, Madison, Wisconsin at the time of Complainant's application for employment.
9. Complainant saved the voicemail from Ms. McCauley inquiring about his interest in the position and presented the saved voicemail as evidence at hearing.
10. Complainant placed a return telephone call to Ms. McCauley in response to her voicemail, and during that phone call, Ms. McCauley asked the Complainant to confirm whether he had been convicted of a felony.
11. During the telephone conversation with Ms. McCauley, the Complainant indicated that he had been convicted of forgery in 2004. Ms. McCauley indicated that the Complainant could not be hired because of his conviction record and hung up.
12. Complainant was not contacted again by the Respondent following the conversation with Ms. McCauley wherein she inquired about the Complainant's felony conviction.
13. The Complainant had not obtained employment as of the time of the hearing.
14. The Complainant did not offer any testimony concerning his efforts to mitigate his damages by applying for other employment opportunities.
15. The failure of the Respondent to hire the Complainant for a position for which he believed himself to be qualified caused the Complainant to be upset, anxious and irritated.

#### 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 discriminate against the Complainant on the basis of his conviction record in its failure to hire the Complainant in violation of the Equal Opportunities Ordinance.
4. The Complainant did suffer a compensable loss for humiliation, embarrassment and emotional distress due to the Respondent's failure to hire the Complainant in violation of the Equal Opportunities Ordinance.

#### ORDER

1. No later than 30 days from the date upon which this Order becomes final, the Respondent shall pay Complainant \$1,920.00 as back pay damages for the Respondent's failure to hire the Complainant due to his conviction record in violation of MGO 39.03.
2. No later than 30 days from the date upon which this Order becomes final, the Respondent shall pay Complainant \$1,000.00 as compensatory damages for the Respondent's failure to hire the Complainant due to his conviction record in violation of MGO 39.03.

3. No later than 30 days from the date upon which this Order becomes final, the Respondent shall pay Complainant pre-judgement interest on the award of \$1,920.00 calculated at 3% per annum from January 25, 2018 until the date of this Decision.

#### MEMORANDUM DECISION

In his complaint, filed on February 12, 2018, MEOD Case No. 20182029, 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) decisions and the cases that follow those decisions.

There was limited testimony and evidence offered at the hearing in this matter, and 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 of discrimination on the basis of conviction record must meet the *prima facie* standard; that is, the Complainant must establish that 1) he is a member of a protected class as defined by the Madison General Ordinance Sec. 39.03, 2) he was qualified for the job that had been applied for, 3) he suffered an adverse employment action and 4) 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 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 against the Respondent on February 12, 2018, in relation to employment (failure to hire), based upon his conviction record. 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. The evidence presented at the hearing in this matter as to the Complainant's qualifications was limited to his own testimony that he would have easily qualified for the Maintenance Engineer position based on his prior background in construction work. Neither an application for employment nor a resume outlining the Complainant's qualifications were submitted to the record, however, the Respondent offered no rebuttal to the Complainant's testimony that he was qualified for the position, and the Complainant's testimony that he was qualified was credible. A position description for the Maintenance Engineer position for which Complainant had applied was offered into evidence by the Respondent, and the Hearing Examiner finds the Complainant applied for the position with good faith that he was qualified for the job. The Hearing Examiner thus finds Complainant has established the second element of a *prima facie* claim.

The Hearing Examiner now turns to whether or not the Complainant suffered an adverse action. The Complainant applied for employment with the Respondent on January 24, 2018 through the job search website "Indeed." Following the submission of his online application, the Complainant was asked to come and fill out an application in person and attend an interview. It was not clear from the testimony which agent for the Respondent reached out to the Complainant to do this. Complainant did fill out an application, on which the question was asked whether or not the Complainant had been convicted of a felony. Complainant checked "yes," but provided no further information. On January 25, 2018, Complainant received a voicemail from Essence McCauley, General Manager for Motel 6, inquiring whether he was still interested in the maintenance position available with the Respondent. Complainant saved this voicemail, and produced the same as evidence at hearing. At some point after the receipt of this voicemail, Complainant returned Ms. McCauley's phone call, during which conversation she asked him whether or not he had been convicted of a felony. Complainant stated that he had, and that in 2004 he was convicted of forgery. Complainant testified that Ms. McCauley then stated that the Respondent could not hire him due to his conviction record, and hung up the phone. Complainant testified this was his last contact with the Respondent. Respondent's failure to hire the Complainant for a position for which he claimed to be qualified, demonstrates the third element of Complainant's *prima facie* claim.

The Hearing Examiner now turns to the issue of whether or not the Complainant can demonstrate that Respondent's failure to hire the Complainant was causally connected to his membership in the conviction record protected class.

The Hearing Examiner finds that the Complainant's testimony of his phone call with Ms. McCauley demonstrates that the reason he was not hired was simply because he checked "yes" to having been convicted of a felony, and then confirmed the same in their telephone conversation. The application process did not advance further following Complainant's conversation with Ms. McCauley, effectively eliminating him from the hiring pool. The Hearing Examiner finds Complainant's testimony of his conversation with Ms. McCauley to be credible, thus establishing the fourth element of the *prima facie* claim.

The burden now shifts to the Respondent to demonstrate a legitimate, non-discriminatory reason for its actions. This is a burden of production, and not one of proof. Again, the testimony and evidence offered at the hearing in this matter was minimal. To demonstrate a legitimate business reason for its failure to hire the Complainant, Alex Tank, on behalf of Respondent, began by testifying to a hiring process that was much lengthier than what the Complainant had gone through. Mr. Tank outlined a step-by-step process that included applying for a position, a telephone interview, an in-person interview, a property assessment test, an

aptitude test, reference checks, a background check, credit check, driver's license validation, and then finally a job offer, orientation, training, and 90-day probation period. The Respondent claims the Complainant never made it past the in-person interview step and, therefore, was never actually denied employment.

Additionally, Respondent argues that in its responses to the EOD Investigative Questionnaire, which was submitted to the record at hearing, Ms. McCauley, as agent for the Respondent, denied ever receiving an application from, or interviewing, the Complainant. At hearing, Mr. Tank indicated that he had no evidence that the Complainant had ever applied for employment with Motel 6. Complainant had provided the voicemail from Ms. McCauley to Mr. Tank, who testified that Ms. McCauley was no longer employed with Motel 6, and that he could not confirm or deny the existence of an application and interview with the Complainant. Mr. Tank went on to testify that Complainant's conviction record could not have been the cause of his not being hired, because the voicemail from Ms. McCauley inquiring about the Complainant's interest in the position, came after the Respondent's knowledge that Complainant had a conviction record, as demonstrated on his application for employment and, therefore, did not automatically disqualify him.

The Hearing Examiner finds the Respondent's testimony to be lacking credibility. Mr. Tank's testimony demonstrates that the Respondent wishes to say that it had never heard of the Complainant, but if it had, the fact that its General Manager reached out to the Complainant about his interest in the Maintenance Engineer position for which he had applied, after knowing from the written application submitted by the Complainant that he had been convicted of a felony, would suggest its motives were free from any discriminatory intent.

Whether Mr. Tank personally had knowledge of the Complainant's application is wholly irrelevant. Ms. McCauley clearly did have knowledge of the Complainant's application as evidenced by the voicemail entered into evidence, and the Complainant's follow-up conversation with her about his conviction record. As agent for the Respondent, Ms. McCauley's failure to further process the Complainant's application because of his conviction record, binds the Respondent as liable for her discriminatory behavior, as she was acting within the agency and apparent authority of the Respondent and, from the testimony given, had the authority to hire and fire. Ms. McCauley's decision not to process the Complainant's application further, after his verification of a conviction record, is evidence of discrimination for which the Respondent is liable.

Having found the Respondent did discriminate against the Complainant in its failure to hire, the Hearing Examiner turns to the issue of damages. The Complainant testified that the Maintenance Engineer position for which he had applied was a full-time position, with a starting wage of \$12.00 per hour. From the evidence in the record, the Hearing Examiner accepts that the conversation between the Complainant and Ms. McCauley discussing his conviction record happened on or about January 25, 2018, which is also the date that Ms. McCauley left the Complainant a voicemail inquiring about his interest in the position.

The Complainant testified that he was still unemployed at the time of hearing, but offered no testimony on his efforts to mitigate his damages. Once injured in a discrimination [claim], a prevailing Complainant must demonstrate that she or he has taken reasonable steps to mitigate or replace the lost wages. Laitinen-Schultz v. TLC Wisconsin Laser Center, MEOC Case No. 19982001 (Ex. Dec. 7/1/2003). While a failure to mitigate damages must be raised by the Respondent, it is the Complainant's burden to present some testimony indicating that mitigation has occurred. Carver-Thomas v. Genesis Behavioral Services, Inc., MEOC Case No. 19992224

(Ex. Dec. 1/25/06). Despite Complainant's testimony that he continued to be unemployed at the time of the hearing, Respondent did not raise the issue of mitigation, nor did it provide or elicit any testimony regarding the same. For the Hearing Examiner to award damages for any lengthy period of time would be speculative, as the testimony at hearing was devoid of any reference to mitigation. Therefore, the Hearing Examiner finds that an appropriate award of back pay in this matter would be for four weeks of lost wages at the wage rate of \$12.00 per hour for forty hours of work per week. The Hearing Examiner selected the period of four weeks as being reasonable given the tight employment market in the Madison area and the fairly low requirements for similar employment. Had the Complainant been taking reasonable steps to mitigate his damages, the Hearing Examiner finds that the Complainant should have been able to find some work to replace, if not his complete wage loss, but at least some portion of that loss.

The Hearing Examiner has made an award of pre-judgement interest in the interest of making the Complainant whole. Such an award is intended to replace the lost opportunity costs or the investment value of the Complainant's lost wages. The Hearing Examiner selected the per annum rate of three percent as being reasonable given the relatively low rate of return on investments in the recent past.

The Complainant testified that he felt frustrated and irritated by Respondent's failure to hire him for the position of Maintenance Engineer. He testified that he "loves to work and make money." Given the limited amount of testimony at hearing as to the emotional distress impact on the Complainant, the Hearing Examiner finds that an award of \$1,000.00 is appropriate. In Chung v. Paisans, MEOD Case No. 21192 (Ex. Dec. 2/10/93), the Hearing Examiner observed that "...discrimination has an emotional impact" and that given that "there was no testimony that [these] effects were long lasting or caused a serious disruption in the Complainant's life or relationships" that only a nominal award of damages was appropriate. So too is the case here.

This case presented difficulty due to the lack of representation for either party. While the complaint process is intended to be navigable by those who choose not to be represented or who cannot afford the admittedly high costs of representation, the process of presenting a claim of discrimination at the hearing stage involves certain skills and knowledge not usually possessed by the general public. While the Hearing Examiner can and does attempt to mitigate the difficulties of proceeding without representation, there are limits to what the Hearing Examiner can do while preserving a neutral process that protects the due process rights of both parties. The Hearing Examiner has worked to balance the needs of due process with the parties' decisions to proceed without representation.

Signed and dated this 2nd day of April, 2019.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III  
Hearing Examiner

cc: Tank Alex