

**EQUAL OPPORTUNITIES COMMISSION  
CITY OF MADISON  
210 MONONA AVENUE  
MADISON, WISCONSIN**

<p>Kathy Wroblewski 1341 E. Dayton St. Madison WI 53703</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Rock-A-Bye Youth Center 1230 Regent St. Madison WI 53715</p> <p style="text-align: center;">Respondent</p>	<p><b>EXAMINER'S DECISION</b></p> <p>Case No. 20206</p>
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A complaint was filed on December 20, 1983 with the Madison Equal Opportunities Commission (MEOC) alleging discrimination on the basis of sex in regard to employment.

The matter was investigated by Mary Pierce of the MEOC staff and an Initial Determination dated March 20, 1984 was issued finding probable cause to believe that discrimination had occurred as alleged. Conciliation failed or was waived, and the matter was certified to hearing.

A hearing was held commencing on October 4, 1984. Atty. Nancy Danielson appeared on behalf of the Complainant who also appeared in person. Atty. James Ewers appeared on behalf of the Respondent who also appeared by Seymour C. Levey (the party of interest and owner of Rock-A-Bye Youth Center).

Based upon a review of the record, including consideration of any written posthearing arguments timely submitted by the parties (the Complainant's attorney submitted a written document entitled "Closing Argument," the Respondent did not submit any written posthearing arguments), the Examiner enters the following **Recommended Findings of Fact, Conclusions of Law and Order:**

**RECOMMENDED FINDINGS OF FACT**

1. The Complainant, Kathleen A. Wroblewski, is an adult female who resides in the State of Wisconsin.
2. Seymour L. Levey is the owner of a business known as the Rock-A-Bye Youth Center. Levey employs persons in various capacities to perform work out of his business location in the City of Madison.
3. Levey needed to fill a warehouse/delivery position urgently when one of his warehouse/delivery persons left for other employment during the busy season around the December holidays in 1983.
4. Levey usually advertised jobs in the newspaper, but due to his urgent need to fill the vacant warehouse/delivery position he called the Youth Services agency which referred two persons within twenty-four hours of his request.
5. The Complainant and Scott Spengler were the two persons referred by Youth Services. Each was interviewed separately by Levey with the Complainant being interviewed first. Levey also received a resume for each candidate.
6. Levey was looking primarily for an individual who had the capability to learn to assemble cribs and other furniture and who had the capability to learn to deal with customers in a satisfactory manner while delivering or servicing furniture and other items. Levey was willing to train whomever he hired in both furniture assembly and customer relations. The job required no specific previous work experience and

Complainant's Exhibit 4 is hereby incorporated into this Finding of Fact as a description of the job duties which a warehouse/delivery person was required to perform.

7. At the end of 1983, twenty-four persons, other than Levey and his wife, were employed at the Rock-A-Bye Youth Center. Seventeen employees were female and seven were male.
8. While most employees were involved with direct sales, Levey and two other employees worked in warehouse/delivery. All the warehouse/delivery persons Levey had employed prior to December, 1983 were males; no female had ever previously applied for a warehouse/delivery position at the Rock-A-Bye Youth Center.
9. The Complainant was interviewed by Levey on December 16, 1983 for approximately an hour. During the interview, Levey told the Complainant that he had never considered a woman for the position (as a warehouse/delivery person). Levey also said that it might be nice to have a woman in the job because female customers who just, had babies might be more comfortable with a woman than with a strange man at their home.
10. Neither the Complainant nor Spengler was directly asked by Levey, during their respective interviews, how long each intended to be employed if hired.
11. During the course of her interview, the Complainant was told by Levey that he would like an employee who would continue working at Rock-A-Bye Youth Center for a long time. The Complainant indicated to Levey that she wanted the warehouse /delivery job because she was seeking physical work and was interested in getting a job in law enforcement. The Complainant then volunteered information that she had taken a State Patrol exam and that she could be called in approximately six months from the time of the interview. The Complainant said she would definitely leave to pursue the State Patrol job if she were selected.
12. During the course of his interview, Spengler told Levey that he was receiving welfare and that he would be grateful for the opportunity to learn retailing because his future plans were to open an electronics repair shop.
13. Both the Complainant and Spengler had high school diplomas.
14. Levey was made aware, prior to making his hiring decision, that the Complainant had held five previous jobs and that Spengler had held two previous jobs. According to the resume submitted by the Complainant, she had worked about three months at one job, about six months each at two other jobs, about ten months at a fourth job and about sixteen months at a fifth job. According to Spengler's resume, he had worked about three months at one job and about eight months at another job.
15. When the Complainant asked if her previous job history would cause a problem in her being considered for the warehouse/delivery position, she was told by Levey that it would not because she had provided him with explanations of the reason(s) for leaving each job.
16. The Complainant's resume indicated she had previous experience working with customers in a restaurant setting. Spengler's resume indicated no previous experience that he had working with customers in any setting.
17. Spengler's resume indicated an interest in electronics, mechanics and appliance repair. Spengler also had some familiarity with electronics. The Complainant's resume did not indicate any interest in or knowledge of electronics.
18. About sixty percent of the warehouse/delivery job involved customer relations; about ten percent of the warehouse/delivery job involved working with electronics.
19. The Complainant's previous experience working with customers in a restaurant setting, while different from the type of customer relations involved in the warehouse/delivery job, was a plus in her favor; Spengler's interest in and familiarity with electronics was a plus in his favor.
20. Both the Complainant and Spengler were adequately qualified for the job in that they both had the capability to learn and perform the duties required of a warehouse/delivery person.

21. The Respondent did not hire the Complainant because he preferred a long term employee and the Complainant indicated she would leave in six months if called by the State Patrol. The Respondent believed that Spengler, in contrast, would stay longer than six months because he had said he was receiving public assistance payments at the time of his interview and the Respondent thought it unlikely that Spengler could accumulate sufficient funds in less than six months to start an electronics repair shop.
22. At the time of the hearing in October, 1984, Spengler had been employed by the Respondent for over nine months.
23. Some time in the summer of 1984, prior to the October hearing, Levey advertised in a newspaper another vacancy for a warehouse /delivery position. The Complainant called Levey, identified herself and inquired about the job vacancy. Levey invited her to come in to Rock-A-Bye Youth Center and fill out an application and submit a resume so she could be considered. The Complainant decided, after her conversation with Levey, not to pursue the job vacancy because she did not want to mix matters - i.e., her pending discrimination case with an application for a new job vacancy with the Respondent.
24. Complainant's sex was not a factor in Levey's failure or refusal to hire her for the December, 1983 job opening to be a warehouse/delivery person.

### **RECOMMENDED CONCLUSIONS OF LAW**

1. The Complainant is a member of the protected class of sex within the meaning of Sec. 3.23, Madison General Ordinances.
2. The Respondent is an employer within the meaning of Sec. 3.23, Madison General Ordinances.
3. The Respondent did not unlawfully discriminate against the Complainant on the basis of sex in regard to employment - specifically in regard to the Respondent's failure or refusal to hire the Complainant as a warehouse /delivery person - within the meaning of Sec. 3.23, Madison General Ordinances.

### **RECOMMENDED ORDER**

That this case be and hereby is dismissed.

### **MEMORANDUM OPINION**

The Complainant testified that after she learned she was not hired, a person at the Youth Services agency expressed surprise because the person at the agency thought the Complainant was more qualified than Spengler. The testimony is blatant hearsay and carries no weight in determining whether or not the Complainant was or was not more qualified than Spengler. Because the person from Youth Services who made the statement did not testify, there is no way of knowing how much weight, if any, that person's opinion would have. However, that the Complainant was told she was more qualified by someone at the agency that referred her for the job is certainly one reason why the Complainant thought she had been discriminated against when she was not hired as a warehouse/delivery person.

But whatever the basis for the Complainant's beliefs, the decision in this case turns on an examination of the relevant factual evidence presented. Simply put, the Complainant - despite some inconsistency in the Respondent's testimony - did not carry her ultimate burden of proof to show by a preponderance of the evidence that the Respondent had failed or refused to hire her on account of her sex.<sup>1</sup>

When all of the evidence has been let in (i.e., when a case has not been dismissed after the Complainant's initial presentation but the Respondent has been required to go forward and the Complainant has had an opportunity to present rebuttal evidence), there is no need to spend time analyzing whether the Complainant met the interim burden of establishing a prima facie case of discrimination.<sup>2</sup> It can, for argument's sake, be presumed that the Complainant met her interim burden.

I will, therefore, proceed directly to an analysis of the Complainant's ultimate burden of proof. This first requires an examination of the reasons articulated by the Respondent for not hiring the Complainant and then requires

an examination of whether the Complainant has shown by a preponderance of the evidence that her sex was a (but not necessarily the sole) motivating<sup>3</sup> factor in the Respondent's action notwithstanding the Respondent's articulated reasons.

#### **A. RESPONDENT'S ARTICULATED REASONS**

The primary reason articulated by the Respondent for not hiring the Complainant was that the Respondent believed that Spengler, the male applicant, was going to remain employed by the Respondent for a longer period of time than the Complainant would.

#### **B. COMPLAINANT'S ATTEMPT TO SHOW PRETEXT**

The Respondent's position is essentially that he relied on two component factors in forming his belief that the Complainant would not stay employed as long as Spengler:

The Complainant's statements that she had taken a State Patrol exam and would leave if called, which she indicated could be as soon as six months; and the Respondent's belief that the Complainant had left a previous job as a processor aboard a boat in the Alaska area four days prior to the end of the Complainant's employment.

The Respondent compared these two component factors to Spengler's statements that he was on welfare and wanted to learn retailing in order to some day open an electronics repair shop.

I reject the Respondent's second component factor - that the Complainant had left the Alaska processor job early - and find the Complainant's testimony on this point more credible. The Complainant testified that the Respondent had told her at the interview that her previous job history would not be a problem because she had explained her reasons for leaving each of her five jobs (including the Alaska processor job). She had been under no specific contract to stay until the end of the fishing season just as her employer had not obligated itself to employ her until the fishing season ended. She left partly because she was concerned about some strange occurrences on the boat, and the Respondent acknowledges this latter point in his testimony.

Nevertheless, it was reasonable for the Respondent to conclude that Spengler would stay longer than the Complainant based on the Complainant's statements that she would leave for the State Patrol if called and that she could be called as soon as a six months from the time of her interview. While Spengler also expressed interest in another occupation, opening an electronics repair shop, it was reasonable for the Respondent to believe that an individual who said he was receiving welfare payments at the time of his interview would not be likely to accumulate enough money to start an electronics repair shop within six months.

And while the focus here is on the factors involved in Levey's December of 1983 decision to hire Spengler rather than the Complainant, it is still worthy of note that Spengler was employed at the time of the October, 1984 hearing in this matter which was more than nine months after he had been hired.

In light of the Complainant's testimony that Levey expressed to her at her interview that he desired to hire persons who intended to be employed for a long time, and in light of the evidence supporting that Levey had a reasonable belief that Spengler would stay longer than the Complainant, I find the Respondent's reason to be credible.

The Complainant argues that if the Respondent was so concerned with the length of an employee's stay, then why didn't Levey directly ask Spengler how long he would stay. The evidence shows, however, that neither the Complainant nor Spengler was directly asked how long each intended to stay. Rather, Levey discussed with each applicant reasons why the person wanted the job. During the course of his discussion with the Complainant, she indicated that she was seeking physical work because she wanted to pursue a career in law enforcement. She then volunteered the information about the State Patrol exam and her intent to leave if called, which could be as soon as six months. Spengler indicated he had a desire to learn retailing in order to open an electronics repair shop. Given Spengler's stated circumstances that he was receiving public assistance at the time, the Respondent surmised it would take Spengler longer than six months to realize his electronics repair shop dream.

The Complainant's other attempts to show sex discrimination also failed. No woman had ever previously applied for a warehouse/delivery position. Levey's statement to the Complainant that he had never considered a woman for the position was simply an honest recitation of fact. It is notable that Levey spent almost an hour interviewing the Complainant during the busy holiday season when he had an urgent need to fill the vacant warehouse /delivery position. The Respondent does not dispute that the Complainant was adequately qualified for the job. In short, the Complainant failed to show any evidence that she was given less consideration than Spengler.

Finally, in terms of their previous education, both had high school diplomas at the time of interview. In terms of previous work experience, both had a spotty job history although the Complainant had more jobs and had worked for a longer time than Spengler. However, the warehouse/delivery job required no specific previous work experience. Although the Complainant and Spengler each had different attributes in their favor (the Complainant's experience with customers in a restaurant setting and Spengler's familiarity with electronics), neither had direct experience in furniture assembly or in dealing with customers while delivering or repairing items in a customer's home. Essentially, the Complainant did not prove that she was more qualified than Spengler, although she certainly was on an equal footing. In conclusion, the Complainant did not carry her burden of proof to show that the Respondent had failed or refused to hire her on account of her sex in violation of Sec. 3.23, Madison General Ordinances.

Signed and dated this 24th of January, 1985.

#### EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent  
Hearing Examiner

1. Texas Dept. of Community Affairs v. Burdine, 101 S. Ct, 1084, 25 EPD par. 31,544 (1981).

2. U.S. Postal Service Board of Governors v. Aikens, 103 S. Ct. 1478, 31 EPD par. 33,477 (1983). Aikens makes clear that once all the evidence has been let into the record (i.e., the case has proceeded to completion and was not dismissed via an interim motion), the analysis should focus on the Complainant's ultimate burden of proof, not the interim burden.

3. See Wisconsin Dept. of Agriculture v. Wisconsin Labor and Industry Review Commission, 17 EPD par. 8607 (1978) which makes reference to Muskego-Norway C.S.J.S.D. v. WERB (35 Wis. 2d at page 562); see also Madison General Hospital v. MEOC (Dayton), 34 EPD 34,304 (1982).