

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

<p>John James 2202 Simpson Street Madison, WI 53713</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Klein Dickert Co., Inc. 1124 Regent Street Madison, WI 53705</p> <p style="text-align: center;">Respondent</p>	<p>NOTICE OF RIGHT TO APPEAL</p> <p>Case No. 20612</p>
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Attached are the Recommended Findings of Fact, Conclusions of Law, and Order of the Equal Opportunities Commission's Hearing Examiner. The Rules of the EOC provide for appeal of this decision in the following terms:

10.1 Either party may appeal the recommended findings of fact, conclusions of law, and order of the Commission's designee by filing written exceptions to such findings, conclusions, or order in the EOC offices no later than ten (10) days after receipt of said findings, except that where the tenth day falls on a federal holiday or on a non-business day, the appeal will be accepted on the first business day thereafter.

10.2 If neither party appeals the recommended findings of fact, conclusions of law, or order within ten (10) days, they become final findings, conclusions and order of the Commission. If an appeal is made to the Commission, it shall consider only the record of the hearing, written exceptions to the recommended findings, conclusions and order, any brief properly submitted before it, and oral arguments presented by the parties at a review hearing scheduled by the Commission. To be properly submitted, briefs by any party must be served upon opposing parties or their counsel and received by the Commission at least ten (10) days prior to any scheduled oral arguments or by another date determined by the Commission. Cross appeals are allowed in accordance with Rule 15.521. Any party requesting a written transcript of the hearing that was held by the Hearing Examiner shall pay the actual cost of preparing the transcript, including copying costs. The Commission shall affirm, reverse or modify the recommended findings, conclusions and order. Any modification or reversal shall be accompanied by a statement of the facts and ultimate conclusions relied on in rejecting the recommendations of the Commission's designee. Such decision of the Commission shall be the final findings of fact, conclusions of law and order of the Commission.

This Notice and the attached Recommended Findings of Fact, Conclusions of Law, and Order have been sent to all parties by certified mail. Any appeal from these Recommended Findings of Fact, Conclusions of Law and Order must be delivered at the offices of the EOC within ten (10) days of the

date of receipt. Cross appeals are allowed in accordance with EOC Rule 15.521. Unless timely appealed, the enclosed Recommended Findings of Fact, Conclusions of Law and Order will become final without further notice to the parties.

Signed and dated this 23 day of February, 1989

EQUAL OPPORTUNITIES COMMISSION

Harold Menendez
Hearing Examiner

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<p>John James 2202 Simpson Street Madison, WI 53713</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Klein Dickert Co., Inc. 1124 Regent Street Madison, WI 53705</p> <p style="text-align: center;">Respondent</p>	<p>RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p>Case No. 20612</p>
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This matter came on for a hearing before the MEOC on June 14 and 15, 1987, on Complainant's claim of employment discrimination on the basis of handicap.¹ Complainant appeared in person and by his attorney, A. Steven Porter. The Respondent appeared by F. X. Dickert and by its attorneys, Melli, Walker, Pease & Ruhly, by John R. Sweeney.

Based on the hearing record, the hearing examiner now makes the following Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. The Complainant, John James, is an adult male, who, at times relevant hereto, has used marijuana and cocaine.
2. The Respondent, Klein-Dickert Co., Inc., is in the business of interior and exterior painting and has an office located on Regent Street in the City of Madison. Respondent usually employs between twenty and thirty-five painters. The number of painters employed varies seasonally and is also dependent on the amount of work available at any given time.
3. Since 1982, F. X. Dickert has been Respondent's vice president and has been responsible for its painting operations and the hiring, firing and supervision of the painters employed by Respondent.

4. Respondent did not have any formal written employment guidelines, policies or practices at any time relevant hereto.
5. Respondent did not have any formal written guidelines, policies or practices regarding leaves of absences at any time relevant hereto. However, in a number of cases involving serious employee illnesses requiring lengthy absences, Respondent granted leaves and asked the employees to report to Respondent on a regular basis. They did so and eventually returned to work. The only exception was an employee who was granted a leave for alcoholism. While on leave he applied for unemployment compensation.
6. Respondent employed Complainant as a painter from June, 1985 until January 19, 1987. During this period, he was laid off on several occasions. He was also absent from work for varying periods due to injuries. Complainant's supervisor was F. X. Dickert.
7. Complainant was qualified to be an exterior painter and his work performance was acceptable. His discharge was not related to his qualifications or work performance.
8. On September 15, 1986, Complainant approached F. X. Dickert and requested a leave of absence for personal reasons. When asked what those reasons were, Complainant told Dickert he had a serious drug problem. Complainant had been using marijuana and cocaine.
9. Dickert granted Complainant's request for a leave and asked him to report monthly on his condition and his availability for work, but did not request medical verification before granting Complainant a leave of absence.
10. On September 23, 1986, Dickert wrote to Complainant to confirm his leave and to ask him to report monthly on his condition and his availability for work. Dickert's letter was returned, undelivered, in October. On October 20, 1986, Respondent again wrote to Complainant regarding his leave of absence, and enclosed a copy of Dickert's September 23rd letter.
11. Complainant tried to avoid any mail from Respondent during his leave of absence and did not read any of the letters sent by Respondent.
12. Complainant did not contact Respondent at any time between September 15, 1986 and December 2, 1986, except by letter dated October 6, 1986. That letter was in response to an August 1, 1986 letter discussing problems with Complainant's work performance and did not contain any reference to Complainant's drug problem, his leave of absence or his availability for work.
13. Complainant obtained no medical treatment, therapy or counseling during his leave. He spoke once or twice with his father about his use of drugs, but did not tell him he used cocaine. He also attended one revival and read magazines and a book. Complainant continued to use cocaine while on leave from his employment.
14. On December 2, 1986, Complainant contacted F. X. Dickert by telephone and informed Dickert he was ready to return to work. Because Complainant had not contacted him since going on leave September 15, 1986, Dickert requested that Complainant provide verification of his treatment and his ability to return to work.
15. On December 10, 1986, Dickert wrote to Complainant to confirm their telephone conversation of December 2, 1986.
16. On December 29, 1986, having received no verification from Complainant, Dickert wrote to him again. In this letter, Dickert expressed the belief that Complainant may have taken a leave under false pretenses and advised Complainant that, unless he provided verification of treatment by January 9, 1987, he would be discharged.
17. Complainant failed to provide the verification requested or to contact Dickert and was discharged on January 19, 1987.
18. Complainant was not discharged from his employment because of an actual or perceived problem with drugs or drug addiction.

RECOMMENDED CONCLUSIONS OF LAW

19. The Complainant is handicapped within the meaning of the Equal Opportunities Ordinance in that he was perceived by Respondent to have a drug use problem which affected his ability to work.
20. The Respondent is an employer and a "person" within the meaning of sec. 3.23(2)(a) and (7), Mad. Gen. Ord.
21. The Commission has jurisdiction over the parties to the complaint and over the subject matter of the complaint.
22. The Respondent did not discriminate against Complainant with regard to employment in violation of the Madison Equal Opportunities Ordinance, see. 3.23(7), Mad. Gen. Ord.

RECOMMENDED ORDER

23. IT IS HEREBY ORDERED that the complaint herein is dismissed.

MEMORANDUM DECISION

In the course of the hearing in this matter, Respondent moved for the dismissal of the complaint on the basis that Complainant had failed to prove a prima facie case of employment discrimination on the basis of handicap. Respondent's motion was denied, and the evidentiary and legal bases for the denial of that motion were set forth on the record by the hearing examiner. The prima facie case, therefore, will not be revisited at this point. Furthermore, once the parties have presented all their evidence and the hearing is concluded, it is appropriate to proceed directly to the ultimate question of discrimination without pausing to decide whether the Complainant has made out a prima facie case. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). In this setting, we consider all the evidence to determine whether the Complainant has sustained his burden of proving that the adverse employment action - in this case, Respondent's refusal to allow Complainant to return from a leave of absence and subsequent termination of Complainant's employment - was motivated in part² by an illegal discriminatory consideration. 460 U.S. at 716. He has not.

Although the parties are in agreement that the Complainant was granted an indefinite leave of absence due to a self-diagnosed serious drug problem, the two principals involved presented differing versions of the discussion which led to the granting of Complainant's request for a leave. F. X. Dickert, who granted Complainant's request, testified that he asked Complainant to report to him monthly, and that he wrote to Complainant the following week to confirm his leave and to remind him to check in each month. Complainant denies that he was told this was a condition of his leave of absence.

The evidence as a whole raises serious questions about Complainant's credibility. James testified that, as part of his efforts to address his drug use problem, he spoke with his father, a minister. His father, John James, Sr., testified that he and the Complainant discussed Complainant's drug use only twice, and that his son never told him he was using cocaine. James also testified that his "treatment" also consisted of reading magazines such as Time and National Geographic and one book, and attending a single revival and speaking once to the minister who conducted the revival. His testimony that the above amounted to treatment or therapy for a serious drug problem further undermines his credibility. Finally, Complainant's refusal to accept or read mail from Respondent indicates that he did not want to have written confirmation of the terms and conditions of his leave. For these reasons, I have rejected Complainant's testimony as to the terms and conditions of his leave.

That Complainant failed to report to Dickert for over two months is also undisputed, and Complainant has presented no evidence that other employees on leave for medical reasons were not required to call in periodically, or that others who failed to do so were nonetheless permitted to return to work. In short, he has failed to prove, either directly or by demonstrating that Respondent's explanation for his discharge was false or without merit, that Respondent's refusal to allow him to return to work and his eventual discharge were because he was perceived to have a handicapping condition rather than because he failed to comply with a reasonable and less than burdensome condition of his leave of absence. His complaint is, therefore, dismissed.³

Dated at Madison this 23 day of February, 1989

EQUAL OPPORTUNITIES COMMISSION

Harold Menendez
Hearing Examiner

¹The original complaint, filed May 22, 1986, alleged discrimination on the basis of race and handicap. The alleged handicap was, fractured ribs and torn muscles. An amended complaint was filed on May 12, 1987, and raised the additional claims of discrimination on the basis of color and retaliation. The amendment also identified a perceived drug problem as a basis of discrimination. Prior to the hearing, the Complainant filed an action in the United States District Court in which he raised all of the above claims, with the exception of the handicap discrimination claim. By order dated March 11, 1988, proceedings on all but the handicap discrimination claim were stayed pending a final resolution of those claims in the District Court action. Those claims were dismissed on the basis of a judgment entered in favor of Respondent by the District Court. The remaining claim of discrimination on the basis of handicap is the only one addressed in these Recommended Findings of Fact, Conclusions of Law and Order.

²The Commission adheres to the in-part test of Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540, 151 N.W. 2d 617 (1967). See, Sanders v. U-Haul Co., MEOC Case No. 20288 (Ex. Dec., May 22, 1985).

³Respondent has moved for the imposition of sanctions on Complainant and his counsel because of Complainant's late submission of his response to Respondent's summary judgment motion and his failure to make discovery. Although Complainant did file his response to the summary judgment motion beyond the date set in the amended pre-hearing order, he was, as he has noted, allotted an unusually brief period in which to submit his response and he has presented adequate reasons for his failure to meet the initial deadline. The circumstances which led to his request for a second extension, which was granted, are unfortunate and are to be avoided, but do not warrant the imposition of sanctions.

As for the discovery issue, the MEOC Rules authorize the imposition of sanctions only after the hearing examiner has issued an order directing a party to "answer or produce" and that party persists in failing or refusing to make discovery. MEOC Rule 15.351. Although Respondent did move to compel discovery, the hearing examiner did not enter any order compelling Complainant to make discovery or to otherwise "answer or produce", apparently because the discovery dispute was resolved before Respondent's motion was heard. Thus, the MEOC Rules do not permit the hearing examiner to impose sanctions in this case. Accordingly, the Respondent's motion is denied in all respects.