

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

<p>Yaron Colon 333 West Dayton Street, Apt. 615 Madison, WI 53703</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Famous Footwear 146 West Gate Mall Madison, WI 53711</p> <p style="text-align: center;">Respondent</p>	<p>RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p>Case No. 20747</p>
---	---

On February 20, 1987, Yaron Colon (Complainant) filed a complaint alleging Famous Footwear (Respondent) discriminated against him with regard to employment on the basis of his ancestry, national origin and handicap, in violation of the Madison Equal Opportunities Ordinance, sec. 3.23(7), Mad. Gen. Ord. The initial determination concluded there was probable cause to believe Respondent discriminated against Complainant in violation of the ordinance. Respondent waived conciliation and the case was then certified to hearing.

The hearing was held before MEOC Hearing Examiner Harold Menendez on April 27, 1988. Complainant appeared in person and by his attorney, Richard F. Rice. Respondent appeared by Joseph Terrell, personnel director of Famous Footwear, and attorney Pamela J. Moore.

Based on the evidence presented by the parties,¹ the hearing examiner makes the following recommended findings of fact, conclusions of law and order:

FINDINGS OF FACT

1. The Complainant, Yaron Colon, is an adult male of Hispanic ancestry. Complainant was born in Puerto Rico.
2. Complainant suffers from a hearing impairment and must wear a hearing aid in order to hear. Complainant has also been diagnosed to be depressed.
3. Respondent, Famous Footwear, is a retail shoe store located in the Westgate Mall in the City of Madison.
4. On or about December 23, 1986, Complainant went to the Famous Footwear store in the Westgate Mall for the purpose of applying for employment. On this occasion he was given an application form by an individual employed in the store. The identity of that individual is unknown.

5. The application form provided Complainant on or about December 23, 1986 by one of Respondent's employees is a product of V.W. Eimicke Associates, Inc. Respondent has purchased supplies from Eimicke in the past, but had been using application forms of its own creation for some time by December, 1986.
6. On December 26, 1986, Complainant returned to Respondent's store and attempted to submit the application he had obtained there earlier in the week. He was advised by a store employee that the form he sought to submit was not Respondent's application form and was provided with a different form, bearing Respondent's name, which he completed and submitted to a store employee that same day. He was informed at that time that Respondent would be hiring "in a couple of weeks." The identity of the employee who spoke with Complainant on this occasion is uncertain.
7. On December 29, 1986, Complainant returned to Respondent's store and asked about Respondent's hiring plans. He was advised by an employee that the hiring had not yet been done. Complainant had no subsequent contact with Respondent, except to go into the store to look around in early January, 1987.
8. During December, 1986, the assistant managers at Respondent's Westgate store were Carla Luckow Green and Sherri Zimmerman. Neither of them saw an application form for Complainant prior to the commencement of these proceedings.
9. Respondent did not interview or hire Complainant.
10. Complainant has had retail shoe sale experience in two establishments and has worked on a cafeteria serving line and as a cashier.
11. In December, 1986 and January, 1987, Respondent hired three part-time employees at its Westgate store. None of the three was Hispanic by birth or ancestry and none was handicapped.
12. On January 22, 1987, Complainant became employed at the University of Wisconsin Memorial Union. He worked a minimum of twenty hours each week and earned an hourly wage of \$4.20.
13. In March, 1987, Carla Luckow Green reviewed the application forms filed at Respondent's Westgate store for a period that included December, 1986. No application was found for Complainant at that time. Another search was conducted in 1988 and again no application was found for Complainant.
14. Respondent has lost the applications of at least two individuals it hired to work at the Westgate store in December, 1986 and January, 1987.
15. Respondent failed to consider Complainant for employment because it did not have his application form on file. The loss of Complainant's application was not related to his handicap, national origin or ancestry.

CONCLUSIONS OF LAW

16. Complainant is protected by the Madison Equal Opportunities Ordinance, sec. 3.23(7), Mad. Gen. Ord., from discrimination in employment on the basis of handicap, national origin or ancestry.

17. Respondent is an employer subject to the employment discrimination provisions of the Madison Equal Opportunities Ordinance.
18. The Madison Equal Opportunities Commission has jurisdiction over this matter.
19. Respondent did not discriminate against Complainant with regard to employment on the basis of his handicap, national origin or ancestry.

ORDER

20. IT IS HEREBY ORDERED that the complaint herein be and is dismissed.

MEMORANDUM DECISION

In the absence of direct evidence of discrimination, Complainant may prevail by first establishing the existence of facts which, if unexplained, raise a presumption of discrimination and then proving either that any explanation offered by Respondent is unworthy of credence, or that another discriminatory reason actually motivated Respondent. See, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-256 (1981).² Under this approach, the burden of proceeding may shift from one party to another, but the burden of proof remains with the complaining party at all times. id. at 256.

In the instant case, Complainant has made out a prima facie case of discrimination. It is undisputed that he is Puerto Rican born and Hispanic, or that his hearing is seriously impaired. Complainant's testimony that he has twice held jobs selling shoes and that he has held other jobs involving customer contact is uncontroverted and credible. He was therefore qualified for the position. In addition, the evidence offered by Respondent's witnesses established that in December, 1986 and January, 1987, Respondent hired three new part-time employees at its Westgate store. None were Hispanic or handicapped.

The only point seriously disputed on the prima facie case is whether Complainant applied for work with Famous Footwear. The only direct evidence on this was Complainant's testimony, which was clear, straightforward and credible. Although the two assistant managers insisted that Respondent's policy dictated that a job applicant should always be greeted by one of them, they also admitted they devoted much of their time to serving customers and were not able to greet and speak with every individual who entered the store. Thus, the fact that neither recalls having met Complainant or discussing his employment application with him is not necessarily inconsistent with Complainant's testimony that he submitted an application for employment to Respondent on December 26, 1986. I therefore find that Complainant did apply for employment with Respondent on December 26, 1986.³

To rebut a prima facie case of discrimination, Respondent need only articulate, through admissible evidence, a legitimate, nondiscriminatory reason for having rejected Complainant. Burdine, 450 U.S. at 256. Respondent has presented the following evidence: neither assistant manager met Complainant or saw his application form prior to the commencement of these proceedings; a search of all applications was conducted in March of 1987, when applications filed in 1986 would still have been on file, and no application was found for Complainant; Respondent has been unable to locate the application forms of two individuals who were hired in December, 1986 and January, 1987. This evidence is sufficient to rebut the Complainant's prima facie case, for the loss of an application form is a nondiscriminatory reason for not hiring Complainant.

It is at the final stage of the prima facie case analysis that Complainant's case fails. To prevail, Complainant must show by a preponderance of the evidence that Respondent was more likely motivated by a discriminatory reason or that Respondent's proffered explanation is unworthy of credence. Burdine at 256; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-805 (1973). Although Complainant forcefully argues that Respondent's proffered explanation for not having hired him - the loss of his application - is nothing more than a falsehood devised to conceal deliberate discrimination on the basis of handicap, national origin and ancestry, he is unable to point to any evidence which would support such a finding of fact.⁴ He has also failed to show Respondent was actually motivated by other reasons or that the loss of applications impacts adversely on handicapped applicants or on applicants of any particular national origin or ancestry. In failing to make even the slightest showing that the reason proffered by Respondent for not hiring him was merely a pretext for discrimination, Complainant has fallen far short of proving his claim. His complaint is, therefore, dismissed.

Dated at Madison this 7 day of September, 1988

EQUAL OPPORTUNITIES COMMISSION

Harold Menendez
Hearing Examiner

¹The evidence considered includes portions of the deposition of Raquel Tomasini, a witness who was subpoenaed by Complainant and failed to appear at the hearing. The hearing examiner's rulings of the admission of portions of Tomasini's deposition are set forth in the appendix following the memorandum decision.

²Application of the Title VII prima facie case analysis is appropriate in this case. See, State Medical Society of Wisconsin v. Madison Equal Opportunities Commission, No. 82-CV-2560, Dane Co. Circ. Ct., Hon. R. Bardwell, Mar. 2, 1983.

³While I find that Complainant did file an application, I do not find it was submitted to either assistant manager. His testimony in this regard was uncertain, inconsistent with his prior identifications and was controverted by the direct testimony of both assistant managers.

⁴Complainant's belief in this theory, though firmly held, is not evidence. Furthermore, the testimony offered by Respondent is not inherently incredible, nor has Complainant shown that Respondent's witnesses are incredible on this point. Absent some showing that Complainant's application was not lost, that it was deliberately lost, or that Respondent has proffered inconsistent or contradictory reasons for not hiring Complainant, there is no basis for finding that Respondent's explanation is unworthy of credence.

APPENDIX

Complainant has moved the admission of the following portions of Raquel Tomasini's deposition:

1. Page 3, line 1 through Page 13, line 11
2. Page 16, line 13 through Page 23, line 22
3. Page 69, line 17 through Page 109, line 21
4. Page 112, line 5 through Page 114, line 21

5. Page 120, line 16 through Page 121, line 19
6. Page 149, line 19 through Page 151, line 19
7. Page 156, line 17 through Page 157, line 20
8. Page 158, lines 1 through 24
9. Page 201, line 1 through Page 206, line 19
10. Exhibit 1, entries from 12/23/86 through 1/5/87

Respondent's objections are sustained with respect to page 87, lines 7 through 15; page 99, lines 13 through 16; page 103, line 17 through page 106, line 16; page 157, lines 9 through 12; page 158, lines 21 and 22. All other portions of the deposition moved into evidence by Complainant, including Exhibit 1, are admitted.

Respondent has moved the admission of the following portions of Tomasini's deposition:

1. Page 39, lines 6 through 23
2. Page 40, line 11 through Page 41, line 7
3. Page 53, line 5 through Page 55, line 3
4. Page 61, line 12 through Page 62, line 23
5. Page 78, lines 21 through 24
6. Page 85, line 20 through Page 86, line 17
7. Page 88, line 24 through Page 89, line 21
8. Page 90, line 6 through Page 91, line 20
9. Page 92, lines 15 through 24
10. Page 95, lines 2 through 7
11. Page 96, line 5 through Page 100, line 24
12. Page 101, line 15 through Page 103, line 17
13. Page 109, lines 10 through 21
14. Page 120, line 2 through Page 122, line 13
15. Page 125, line 19 through Page 128, line 20
16. Page 151, line 15 through Page 153, line 1
17. Page 153, line 5 through Page 154, line 6

18. Page 172, lines 5 through 12

19. Exhibit 2

20. Exhibit 5, pages 3 through 6, pages 10 through 12, page 27

Complainant's objections are sustained with respect to page 126, line 7 through page 128, line 1; page 151, line 15 through page 153, line 1. All other portions of the deposition moved into evidence by Respondent, including Exhibit 2 and portions of Exhibit 5, are admitted.