

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

<p>Louise Lewis 721 Columbus Street Sun Prairie, WI 53590</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> <p>Elma Thorson, Executive Director Creative Community Living 314 East Main Street Watertown, WI 53094</p> <p style="text-align:center">Respondent</p>	<p style="text-align:center">HEARING EXAMINER'S DECISION AND ORDER ON APPEAL FROM INITIAL DETERMINATION</p> <p style="text-align:center">Case No. 21063</p>
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RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came on for a hearing before Madison Equal Opportunities Commission Hearing Examiner Clifford E. Blackwell, III, on January 15, 1991 at 8:30 am. The Complainant, Louise Lewis, appeared in person and without representation. The Respondent appeared by its representative, Christine Sarbacker and Dalmer Thorson and by its counsel Thomas Zaremba. On the basis of the evidence presented, the Hearing Examiner now makes his Recommended Finds of Fact, Conclusions of Law and Order, as follows:

RECOMMENDED FINDINGS OF FACT

1. The Complainant is a woman who began working as a Program Administrator for the Respondent on May 15, 1986. In 1988, she was the Program Administrator for the Respondent's group home located at 5210 Cottage Grove Road in the City of Madison.
2. The Respondent is a Wisconsin corporation that runs or administers group homes and independent living arrangements throughout Wisconsin for persons with developmental and other disabilities. Its main business offices are located in Watertown, Wisconsin. Its south central region includes Dane and Rock counties. The offices of the south central region are located in Madison. It maintains six group homes in Dane County and one in Rock County. These homes or programs are funded by contracts with various governmental units. The Respondent employs people to care for its clients and to maintain its services, including three persons at its Cottage Grove Road group home. At the Cottage Grove site, the Respondent, in 1988, employed a Program Administrator and two Residential Coordinators, one living on-site and the other living off the site. The Complainant held the position of Program Administrator.
3. A Program Administrator is responsible for scheduling the employees at the home to assure that there is a staff person at the home whenever there is a client at the home. While clients live at the home, they are often away from the premises during weekdays for work or appointments of different kinds. The Program Administrator is also responsible for overseeing the medical care of the clients including the making of appointments with doctors, assuring that treatments are followed, assuring that medical specimens are taken and delivered, assuring that prescriptions

are filled and the medications taken, and that proper records concerning the clients medical care are maintained. The Program Administrator is also responsible for the development of Individual Service Plans (ISP). These plans are updated semiannually and constitute the record of treatments and services needed by a client and provided by the Respondent. The Program Administrator is responsible for keeping accurate records concerning the client and for assuring that records are transferred with the client if the client moves from the group home. The Program Administrator also is responsible for the actual provision of services to the client.

4. The Residential Coordinators have less administrative responsibility than the Program Administrator. The Residential Coordinator is primarily responsible for the day-to-day provision of services to the client. It is easier to replace a Residential Coordinator on a temporary basis because there is a pool of emergency help and part-time employees from which to pull. There is no easy way to replace a Program Administrator on a temporary basis and if a Program Administrator were to be absent, the Regional Director would have to assume the duties of an absent Program Administrator in addition to fulfilling the regular duties of the Regional Director. On a permanent basis, it is easier to replace a Residential Coordinator than a Program Administrator because of the lack of administrative duties accompanying the position of Residential Coordinator.
5. On or about October 3, 1988, the Complainant contacted Christine Sarbacher, the Regional Director for the Respondent, and indicated that she would be looking for a new job. She also indicated that Jean Southerland, the live-in Residential Coordinator at the Cottage Grove Road group home would be a good replacement. Neither the Complainant nor the Respondent took any further action with respect to this conversation.
6. On November 13, 1988, the Complainant broke her wrist in a hunting accident. The cause of this injury was in no way related to the Complainant's employment. The Complainant kept the Respondent apprised of her medical condition and indicated that she would not be able to return to work until at least December 15, 1988 and possibly not until January 1, 1989. The Respondent acknowledged the Complainant's injury and indicated that before the Complainant would be eligible for a medical leave, she would have to use all of her vacation leave and sick leave.
7. The Respondent arranged for a meeting with the Complainant on November 28, 1988 to discuss leave arrangements. The Respondent also decided to inform the Complainant on November 28, 1988, that she would be changed from the position of Program Administrator to the position of Residential Coordinator as of December 1, 1988 with a corresponding decrease in pay effective December 16, 1988.
8. In a Personnel Notice dated November 28, 1988, the Respondent notified the Complainant of her transfer and stated as the reasons for the action that the Complainant was unable to perform the duties of Program Administrator, the Regional Director (Christine Sarbacher) was unable to assume the additional duties of the Complainant, the Complainant had indicated an intention to leave the Respondent's employment and a new Program Administrator needed to be trained. The Complainant and Respondent did not discuss this notice. Sarbacher did not consider whether there would be things that could be done to accommodate the Complainant's broken wrist in deciding to transfer her from the position of Program Administrator.
9. On or about December 2, 1988, the Complainant filed the Complaint of Discrimination that commenced this action. The Complaint was amended on December 15, 1988. The original complaint was served on December 5, 1988 and was actually received by the Respondent at its Watertown office and its Madison office on December 7, 1988.
10. During the Complainant's absence, her duties were partially filled by the Regional Director, Christine Sarbacher. While Sarbacher was at the Cottage Grove home, she became aware of significant neglect of duties on the part of the Complainant. This included the discovery of fecal

samples that were a year old and had not been sent for analysis, client record summaries that should have been completed in June or July of 1988 and had not been completed, evidence that prescriptions for custom fit shoes had not been followed up and that client files had not been transferred with the client when the client moved from the home. Sarbacker was disturbed by this evidence of neglect and on December 6, 1988 began to write a Notice of Discipline for the Complainant.

11. On December 6, 1988, Sarbacker was informed by Jean Southerland that doctors working with the Respondent's clients were very upset about the failure to have specimen samples processed and the apparent failure to have set a follow-up appointment for a client. The follow-up appointment was critical because prolonged use of a medication in question could cause serious side effects.
12. Based upon the new information that she had received on December 6, 1988, Sarbacker changed her mind about disciplining the Complainant and instead decided that the Complainant's employment should be terminated for gross neglect. Sarbacker prepared a Notice of Improper Performance and a Notice of Termination on December 6, 1988 and delivered it on the same day to the typing service used by the Respondent. Sarbacker picked up the personnel actions from the typing service at approximately noon on December 7, 1988 and mailed it prior to 1:00 p.m. on the same day. Upon returning to her office after mailing the personnel action to the Complainant, Sarbacker found a notice that there was mail to be picked up at the local post office. She did not pick this mail up until December 8, 1988 because she had received a telephone call at approximately 3:30 p.m. on December 7, 1988 from Theresa Lopez, the Personnel Manager for the Respondent. Lopez informed Sarbacker that the Respondent had received the complaint in that day's mail. Sarbacker assumed correctly that the mail to be picked up was a copy of the complaint.
13. The Respondent became aware of the complaint filed by the Complainant between 11:30 a.m. and noon on December 7, 1988 when the Respondent's Controller first reviewed the mail that had arrived on that day. He placed copies of the Complaint on Lopez's desk so that she would see it upon her return from lunch and on the desk of the Executive Director who was not expected in the office that day.
14. The Complainant had not returned to work prior to her receiving the Notice of Termination. She was unable to write and did not regain any ability to write until around December 16, 1988. Her arm was in a form of a hard cast from the day she broke it until the cast was replaced with a brace in late December of 1988. The brace was removed around the end of January. Throughout this period, the Complainant was significantly limited in her ability to hold or lift objects.
15. Had the Complainant been able to return to work prior to her termination, there were aspects of her job that she could have performed. The Respondent made no inquiry of the Complainant concerning possible accommodations that could have been made to allow her to perform her tasks. The Respondent performed no individual analysis of the Complainant's ability to work and perceived the Complainant to be unable to work so long as her wrist was broken. The Complainant suffered no long-term disability as a result of her broken wrist and was hampered by the injury for approximately two and a half months.
16. The Respondent's decision to terminate the Complainant's employment was not based upon her injury and was completed prior to receiving actual or constructive notice of the complaint filed with the Commission.
17. Sarbacker, the Complainant's immediate supervisor perceived the Complainant to be handicapped by her broken wrist.
18. The Complainant suffered no economic loss or any other loss recognized by the Commission.

CONCLUSIONS OF LAW

19. The Complainant was handicapped within the meaning of Madison General Ordinance 3.23(7).
20. The Respondent, in changing the Complainant's position from Program Administrator to Residential Coordinator, discriminated against the Complainant on the basis of her handicap.
21. The Respondent did not retaliate against the Complainant for the filing of her complaint with the Commission or for any other reason.
22. The Complainant suffered no economic loss because she received her full pay and benefits for the approximately one week that she held the position of Residential Coordinator prior to her justified termination of employment for gross misconduct.
23. The Complainant failed to demonstrate any entitlement to other non-economic damages such as embarrassment or humiliation.

ORDER

24. The Respondent is ordered to cease and desist from its discrimination against the Complainant or any other employee on the basis of handicap.

MEMORANDUM DECISION

The Ordinance does not define handicap and so the Commission has used other sources such as the Wisconsin Fair Employment Act (FEA), Wis. Stats. sec. 111.31 et seq. for guidance in applying the prohibitions against discrimination against the handicapped. Wopat v. St. Vincent de Paul Society, MEOC Case No. 2551 (October 7, 1980), Omachinski vs. Seireg, MEOC Case No. 1395 (May 2, 1989). As a general matter, cases decided under the FEA have held that temporary conditions such as the broken arm suffered by the Complainant in this case are not handicapping conditions that qualify for the protection of the Act. Keith v. AFK (LIRC, 08/14/82), Terrell v. Pabst Brewing (LIRC, 03/04/81). However, there are conditions, though apparently temporary, that qualify for coverage.

Goldberg v. Dept of Personnel (Wis. Personnel Comm., 10/17/1980). This would seem to apply with particular strength when the definition of handicap is met by the Respondent's perception that the Complainant is unable to do the job. In this case, there is no question that the Complainant's supervisor, Christine Sarbacker, believed that the Complainant was unable to perform the job. The personnel action taken on November 28, 1988, to be effective on December 1, 1988, clearly states that among other reasons, one reason for the action was the inability of the Complainant to do the work. This was echoed in Sarbacker's testimony at the time of hearing. The Complainant was never given the opportunity to explain or suggest to what extent she might be able to perform the duties of her job with or without accommodation. Sarbacker suggests that there were elements of the job that the Complainant could perform and that there might be ways for the Complainant to perform other functions. Given these facts, I conclude that the Complainant was handicapped within the meaning of the Ordinance because the Respondent perceived her to be handicapped and unable to perform her job because of her broken wrist.

Having found the Complainant to have been handicapped, we would normally see if the Complainant could perform the requirements of her job without accommodation or whether some accommodation might be necessary. Since the finding of handicap is based upon the Respondent's perception that the Complainant was handicapped, this analysis is not necessary. The case of State ex Rel. Elizabeth Busto v. Madison Equal Opportunities Commission and Wisconsin Power and Light Co., Case No. 90 CV 1594 (Dane Cty. Cir. Ct., January 9, 1991) clearly holds that there is no duty to accommodate a perceived handicap in the absence of an actual handicapping condition. In this case, the Complainant's broken wrist by itself would not constitute a handicapping condition because it was a very temporary condition that is not the type of condition that was intended to be protected by the Ordinance's

prohibition against handicap discrimination. This is primarily because the Complainant's broken wrist is not the type of condition that would make achieving work or obtaining work unusually difficult beyond the short time needed for her wrist to mend. Without a truly handicapping condition, the Respondent had no obligation or duty to accommodate the perceived handicap.

It is the responsibility of the Complainant to establish not only entitlement to an award of damages but to the amount of damages to be awarded. This proof must be made by the preponderance of the evidence for non-economic emotional damages. That such damages can be awarded by the Commission, in employment cases, was established in the case of Nelson v. Weight Loss Clinic of America Inc. et al, MEOC Case No. 20684, (September 29, 1989). Other than the Complainant's request for an award of such damages, there is nothing in the record from which the amount of such damages may be determined. While, in some cases, such an emotional injury may be inferred or presumed, the facts in the record are insufficient to justify such a presumption in this case. The only facts testified to by the Complainant, with respect to the issue of emotional damage, was that she was shocked to hear of her demotion and that she did not discuss it with Sarbacker because she felt that it would do no good. Beyond her immediate reaction, the Complainant did not testify about any other emotional feelings of loss, embarrassment or humiliation. It is not possible to separate out one's understandable surprise at being told of an unexpected demotion and those emotions generated from the realization that one has been discriminated against. Since it is the Complainant's burden to prove all elements of her claim, she will receive no award for non-economic damages because she has failed to prove them.

In all employment cases, it must be determined whether the Complainant who has been the victim of discrimination shall be awarded their job back. The facts in this case do not support an order to rehire. The Complainant was properly terminated from the Respondent's employment after what can only be termed gross misconduct was discovered. While the Complainant was on sick leave recovering from her injury, Sarbacker took over the Complainant's day-to-day duties. Upon examining the Complainant's office, Sarbacker discovered medical samples that had been taken almost a year prior that had not been sent for analysis. She also found client records that had not been completed and records that should have been sent with a client that had not been sent. The Complainant does not seriously dispute these findings. The lack of attention to fecal samples is particularly shocking. Sarbacker also determined that the Complainant had failed to use the proper procedure to follow-up on a prescription for shoes for a client and that a client was allowed to continue on a dangerous medication for several months because of a failure to establish a follow-up medical appointment. The Complainant disputes her culpability with respects to these last two items. Her protests are not credible. These were items under her control and she should have seen that they were accomplished. Initial problems which the Complainant does not dispute were in themselves sufficient grounds for her dismissal without reference to the disputed items. Given these instances of neglect, there can be no consideration of ordering the Respondent to reinstate the Complainant as a Program Administrator. It would appear fortunate that the Respondent escaped liability for its neglect of its duty to its clients while the Complainant was a Program Administrator, it would be harsh to expect it to assume such a potential liability again.

With respect to the Complainant's claim that she was retaliated against by the Respondent for the filing of her complaint, she fails to meet her burden of proof. In essence, her case is that since the Respondent received the complaint on the same day that it sent its notice terminating her employment, that it must have been retaliation. She made no effort to contradict the explanation of the time sequence laid out by the Respondent. While the Complainant's position was sufficient for a finding of probable cause, it is insufficient at the hearing stage. I find that the Respondent's explanation of the

sequence of events is entirely credible and is consistent with the operation of an enterprise with several different worksites. The Respondent clearly had sufficient cause to terminate the Complainant's employment without regard to its receipt of the Commission's complaint. The schedule of work performed by the Respondent's typing service supports the Respondent's explanation that the termination was sent before Sarbacker knew of the discrimination complaint. The Complainant has failed to demonstrate that the Respondent took its action of termination because of the complaint filed by the Complainant with the Commission.

Signed and dated this 28th day of September, 1992.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner