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

William Toomer P.O. Box 45112 Madison, WI 53744 Complainant vs. Meriter Hospital 202 S. Park Street Madison, WI 53715 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 21582

This matter came on for a hearing before Madison Equal Opportunities Commission Hearing Examiner Clifford E. Blackwell, III on September 1, 1992 at 9:30 a.m. The Complainant, William Toomer, appeared in person. The Respondent appeared by its representatives Charl Groom and James Rothfuss and its counsel, Michael Westcott of the law firm of Axley Brynelson. On the basis of the evidence presented the hearing examiner now makes his Recommended Findings of Fact, Conclusions of Law and Order, as follows:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, William Toomer, is a black male.
2. The Respondent, Meriter Hospital, is a hospital with its principle place of business within the City of Madison. It employs numerous workers to accomplish its purposes including workers in the Environmental Services area. Environmental Services is also known as housekeeping.
3. The Complainant has applied for employment with the Respondent or its predecessor, Madison General Hospital, in at least the years of 1983, 1985, 1987, 1989, 1990 and 1991. Specifically, the Complainant submitted an application to the Respondent in either late June or early July, 1991. Approximately a month after submitting this application, the Complainant contacted the Respondent's office to inquire about the status of his application. He was told that his application had apparently been lost. In 1990, the Complainant's application was lost under similar circumstances.
4. During the period of his visit on the above occasion, the Complainant spoke with Charl Groom, the Respondent's Employment Coordinator and Affirmative Action Officer. He informed Groom that he had 15 years of janitorial experience that would be directly relevant to housekeeping jobs with the Respondent. On the basis of his conversation, Groom asked the Complainant to resubmit his application and indicated that she would consider him for future vacancies in the housekeeping area. The Complainant did resubmit his application dated July 24, 1991.
5. In September of 1991, the Respondent had an opening(s) for which the Complainant may have been qualified. The Respondent attempted to contact the Complainant to set up an interview. Groom twice called the Complainant to set up an interview. Groom twice called the Complainant at the telephone number listed on his application. On both occasions, she was told

by an unidentified woman that the Complainant was not there. Groom left messages both times indicating that the Complainant should contact her to set up an interview. When the Complainant failed to contact her, Groom sent him a card requesting that he contact her to set up an interview. The Complainant failed to contact Groom prior to the date on which she made her hiring decision. He later contacted her and told her that he had not received her messages in time to get an interview. He gave Groom a new address and telephone number.

6. In October of 1991, the Respondent had another position for which the Complainant was apparently qualified. There were two housekeeping positions available on the night shift. He was contacted and an interview was set up.
7. During his interview, Groom attempted to elicit from the Complainant information that would demonstrate that the Complainant actually had 15 years of relevant work experience. The Complainant's application only documents approximately two years or less of actual experience. Despite not being able to reconcile the Complainant's claims of experience and the experience set forth on his application, the Complainant performed adequately enough for Groom to ask the Complainant to speak with James Rothfuss. Rothfuss is the Director of Environmental Services and has the final hiring authority for his Department.
8. During his interview with Rothfuss, the Complainant was asked if he had a preference for working on the Day shift or on the Night shift. The Complainant stated that he would be willing to work either shift. This is also reflected on the Complainant's application. Rothfuss was favorably impressed with the Complainant even though there appeared to be a discrepancy in the Complainant's record of experience.
9. After the interview with the Complainant, Rothfuss and Groom met to decide upon who would be offered the two available positions. Both Groom and Rothfuss knew that there would be additional positions available on the day shift shortly. They agreed that the Complainant would not be offered one of the available night shift positions because there were other equally qualified applications that had expressed a preference for the night shift.
10. When the anticipated additional positions opened on the day shift in November, 1991, the Respondent offered and the Complainant accepted a full-time housekeeping position. The Complainant did not have to interview for this position but was selected on the basis of his earlier interview.
11. John Lind is a white male. He was selected for one of the positions that were available in October, 1991. His application reveals that he had several years of relevant experience more than the Complainant. According to Rothfuss, Lind had expressed a preference for the night shift due to personal considerations.
12. Wendy Casper is a white female. She was selected for the other position available in October, 1991. Her application demonstrates that she was at least as qualified as the Complainant for the available position. Similar to the Complainant's application, Casper's application makes substantial reference to experience that is not directly relevant to the housekeeping positions. However, the application demonstrates that she had at least as much housekeeping experience as the Complainant and probably more experience than the Complainant. According to Rothfuss, Casper expressed preference for the night shift due to personal circumstances.

RECOMMENDED CONCLUSIONS OF LAW

13. The Respondent is an employer subject to the Madison Equal Opportunities Ordinance.
14. The Respondent did not discriminate against the Complainant on the basis of his race in failing to hire him for the position of housekeeping on the night shift in October, 1991.
15. The complaint is dismissed.

MEMORANDUM DECISION

The Complainant, a black male, has attempted to gain employment with the Respondent or its predecessor since the middle 1980's. The reasons for his nonselection until October, 1991 are not part of this record. In the summer of 1991, the Complainant applied for a housekeeping position with the Respondent. Approximately a month after submitting his application, the Complainant either wished to amend his application or to check on the status of his application. In July of 1991, he was told that his application had been lost or misplaced. When told of the loss of his application, the Complainant spoke with Charl Groom, the Respondent's Employment Coordinator and Affirmative Action Officer.

At all times during this proceeding, the Complainant asserted that he has 15 years of experience that is directly related to the duties of a housekeeper. During his conversation with Groom in July of 1991, the Complainant told Groom this. On the basis of this representation, at least in part, Groom asked the Complainant to submit a new application and indicated that she would consider the Complainant for some upcoming positions. The Complainant completed another application and submitted it on July 24, 1991.

When a housekeeping position became open in September of 1991, Groom sought to interview the Complainant for this position. She twice called the Complainant at the telephone number listed on his application. On both occasions, the telephone was answered by an unidentified female who indicated that the Complainant was not there. Groom left a message on both occasions asking the Complainant to contact her for an interview. When there was no response, Groom sent the Complainant a postal card requesting that the Complainant contact her to set up an interview. The Complainant did not contact Groom until after the date upon which Groom made her hiring decision. At this time the Complainant told Groom that he had not gotten the messages or the postal card in time to set up the interview. The Complainant did not blame the Respondent for these problems. He seems to admit that the failure of communication was due to his roommate. During this conversation wish Groom, the Complainant gave her a new address and telephone number where he could be reached. Groom again indicated that she would consider his application as positions became available because of his representations concerning the extent of his experience.

During October of 1991, two housekeeping positions on the night shift became available with the Respondent. The Respondent has a day shift and a night shift for its housekeeping staff. The day shift runs from approximately 8 a.m. to 4:30 p.m. The night shift runs from about 4 p.m. until around midnight. It is the experience of James Rothfuss, Director of Environmental Services for the Respondent, that a worker hired for one shift will seek to move to the other shift as soon as possible, if they have a preference for the shift for which they were not hired. Because of contract obligations and other administrative matters, such shift changing is not desirable. From the Respondent's perspective, it is easier and better to hire a person for a shift who has expressed a preference for that shift. Assuming equal qualifications of prospective employee, hiring pursuant to such a preference would not be illegally discriminatory in that it does not take into consideration an applicants membership in a protected class. It also represents a legitimate business consideration intended to reduce an employer's administrative cost and burden

The Complainant was contacted by the Respondent for an interview. He was first interviewed by Charl Groom. During this interview, Groom attempted to reconcile the extent of experience claimed by the Complainant and that actually reflected by him in his application. The Complainant asserts that he had 15 years of related experience but his application, at best, documents less than two years. At the time of hearing, the Complainant testified that he provided Groom with additional employment data demonstrating the 15 years of experience that he claimed. During the hearing, the Complainant

was unable to name or in any other manner point to experience that totals near 15 years. Giving the Complainant the benefit of the doubt in this regard, it could be said that he testified to no more than 5 years of experience with really less than 3 years of continuous experience. Despite these shortcomings, the Complainant interviewed well enough to favorably impress Groom. Groom introduced the Complainant to Rothfuss. Rothfuss had final hiring authority but generally reached a decision after discussion with Groom. Rothfuss noted the experience discrepancy but felt that the Complainant would be a good employee. He asked the Complainant if he had a preference for one shift over the other. The Complainant stated that he would work either shift. In Requests for Admissions filed by the Respondent, it was accepted as fact that the Complainant expressed a preference for the day shift. During their interviews of the Complainant, Groom and Rothfuss knew that there would be some as yet undecided number of day shift positions available during the month of November.

After the Complainant had met with both Groom and Rothfuss, Groom and Rothfuss discussed the pool of applicants in order to make a hiring decision. They decided not to offer the Complainant either of the available positions but felt that it was likely that the Complainant would be offered one of the day shift positions that would open in November. Though the Complainant was qualified for the night positions, Groom and Rothfuss offered the positions to two other equally qualified applicants who had expressed a distinct preference for working on the night shift.

The Complainant was in fact offered a day shift position in November of 1991. He accepted that position. The position was a full-time position paying the same amount as the earlier positions. While it is true that this position was offered subsequent to the Complainant's filing of this action, the Complainant did not point to this as evidence of discrimination. There is nothing in the record that casts doubt upon Groom's and Rothfuss' explanation that they had decided in October to offer the expected November position to the Complainant.

The positions available in October of 1991 were given to John Lind and Wendy Casper. Both of these applicants are white. Lind had extensive experience in janitorial and housekeeping services. Solely based upon the quantity of experience documented by his application, Lind was significantly more qualified than the Complainant for the position for which he was hired. Additionally, he had expressed a specific preference for a position on the night shift. Wendy Casper's application indicates that she was also well qualified for the housekeeping position. As documented in her application, Casper's experience was not so extensive as that of Lind but was at least as extensive and probably more extensive than the Complainant's. In the view of the Respondent, it was more extensive. This conclusion was not directly attacked by the Complainant at the time of hearing. He did assert that he was more qualified than either applicant. The record does not support this contention. As with Lind, Casper expressed a preference for a position on the Night shift.

The actions of the Respondent are not consistent with those of someone who seeks to discriminate. Groom's actions in July of 1991 in encouraging the Complainant to resubmit his application and her words of encouragement based upon the Complainant's representation indicate an interest in the possible employment of the Complainant. Groom spoke to the Complainant in person and as a result knew of his race. With this knowledge she made three separate attempts to contact the Complainant in September of 1991 for a position that was then available. The failure of those attempts was a result of the Complainant's living arrangement and was not attributable to the Respondent. The Respondent contacted the Complainant for the next available openings and interviewed the Complainant. While he was not hired for those positions, he was hired without a further interview for the positions that became available in November. Had the Respondent discriminated against the Complainant on the

basis of his race, it is not likely that it would have expended its efforts in contacting him, interviewing him and ultimately hiring him within two months of the act of alleged discrimination.

The Complainant's contention that he was discriminated against because he had more experience than Lind and Casper simply has not been proven. At the hearing of this matter, the Complainant was only able to point to jobs and training that equaled approximately 3 years of experience. Lind was clearly more experienced and Casper appears to have been more experienced but was at least as experienced as the Complainant. Beyond the Complainant's testimony, there is nothing in the record to support his contention that he had 15 years of experience. Clearly the Complainant genuinely feels that he has the experience that he has consistently claimed but there is no credible proof in support of his belief.

The Respondent's primary contention other than the greater experience of Lind and Casper is that Lind and Casper had expressed a preference for the night shift, while the Complainant had indicated that he had expressed a preference for the day shift. As explained by Rothfuss, selecting applicants with a preference tends to lend stability to the Respondent's work schedule because it decreases the likelihood that employees will want to transfer from shift to shift once they have obtained employment with the Respondent. Such transfers involve considerations under the Respondent's Union contracts and can lead to some problems in filling positions. This type of consideration is a legitimate, nondiscriminatory explanation of the Respondent's hiring decision. The Complainant provided no evidence that would lead one to believe that either this explanation is without credence or that it is a pretext for other discriminatory motives. This explanation becomes even stronger when one considers that the Complainant was offered the next available day shift position and that he was employed by the Respondent within a matter of weeks of his nonselection for the positions in October of 1991.

The Complainant's case is not proven. The complaint is hereby dismissed.

The Respondent has a Motion for the Assessment of Costs pending. This motion relates to the Complainant's failure to appear for a properly scheduled deposition. The deposition was subsequently scheduled and taken. The Respondent asks for its attorney fees and the reporter costs attendant to the Complainant's failure to appear at the first scheduled deposition. The Respondent's motion is denied. The Commission must balance the need to assure that complainants are not hindered in their right to bring discrimination actions against the interest that the Commission has in seeing that its orders are followed and against the rights of respondents to use the tools provided by the Rules of the Commission to defend themselves. Under the circumstances of this case that balance favors the Complainant. While these facts in themselves should not and do not shield the Complainant from meeting his responsibilities as a party, his later conduct in submitting to the Respondent's deposition and his answering the Respondent's interrogatories and requests for production of evidence tends to demonstrate that the Complainant was not being willfully obstructive in failing to appear for his deposition. The Respondent aggressively pursued its rights to discovery and while it had a right to do so, it is not immune to some questions as to the need to carry on such an extensive campaign in this case given the lack of any complex issues. The Respondent indicates at various points that it wished to use discovery to evaluate its settlement position. From the perspective of an outside observer, the Respondent's use of discovery and motions to compel discovery appear to have been more designed to force the Complainant to settle his claim on terms favorable to the Respondent than to accurately assess the Respondent's possible exposure. Under these circumstances to grant the Respondent's motion could tend to deter complainants from filing complaints if they thought that they would have to pay respondents each time they failed to understand a part of the legal process or to agree to settle their case on the respondent's terms. If the complaint process is to be effective in remedying

discrimination complainants should not be punished without some showing of actions that constitute willful or repeated misconduct.

There is nothing in this record to indicate that there was willful or repeated misconduct that actually prejudiced the Respondent on the part of the Complainant in his failing to appear for his initially scheduled deposition. While this may place a somewhat higher burden on respondents, it is a cost that is consistent with the overall purposes of the Ordinance.

The Respondent's motion is denied and the complaint is dismissed.

Signed and dated this 10th day of November, 1992.

IT IS SO ORDERED,

Clifford E. Blackwell, III
Hearing Examiner

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CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
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William Toomer P.O. Box 45112 Madison, WI 53744 Complainant vs. Meriter Hospital 202 S. Park Street Madison, WI 53715 Respondent	DECISION AND ORDER Case No. 21582

BACKGROUND

On October 23, 1992, the Complainant, William Toomer, filed a claim of discrimination against the Respondent, Meriter Hospital. The claim alleged that the Respondent discriminated against the Complainant on the basis of his race, African American, when he was not offered a position of employment by the Respondent. After investigation by a Commission Investigator/Conciliator, an Initial Determination was issued concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant. Conciliation either failed or was waived by one of the parties and the case was certified to hearing.

A Pre-hearing Conference was held on May 8, 1992 and notice of Hearing and Scheduling Order was issued on May 12, 1992. The Scheduling Order amongst other provisions required the parties to file with the Commission and exchange with other parties in an initial witness list on or before June 1, 1992. The parties must also file with the Commission and exchange with each other a final witness

list on or before July 31, 1992. This date was subsequently extended to August 14, 1992. This date is the same number of days before the close of discovery as was the July 31, 1992 date in the original Scheduling Order.

The Complainant has not filed an initial witness list with the Commission and has apparently not provided the Respondent with such a list either. On July 24, 1992, the Respondent filed a motion for sanctions against the Complainant for this failure. The motion seeks an array of relief in the alternative from dismissal of the Complainant to preclusion of the testimony of any witness at the time of hearing other than the Complainant.

DECISION

There is no doubt that the Complainant has failed to comply with the Scheduling Order's requirement regarding an initial witness list. The Respondent in its supporting documentation also correctly points out that the Complainant was reminded at a hearing on Respondent's earlier discovery motions that it is important for the Complainant to obey the requirements of the Scheduling Order and all subsequent orders of the Hearing Examiner. Given the fact that there can be no real dispute over the Complainant's failure to comply with the terms of the Scheduling Order, we now must turn to see what remedy if any is appropriate to redress the failure.

The primary purpose of the initial witness list is to assist the parties in discovery. It gives a convenient starting point for the scheduling of interviews and, if necessary, the scheduling of depositions. Neither side is "locked in" to a witness list until the final or amended witness list. It is the final witness list that the parties should be able to rely upon in their final hearing preparations. By providing for the submittal of a final witness list, the Commission recognizes that at the time of the initial witness list neither party may have a full grasp of what witnesses will be necessary to prove their case or to rebut the other side's case. There is also a recognition that until the final witness list parties have to live with some degree of uncertainty over the nature of the opposing party's case. It is in part because of this uncertainty that parties are provided with the opportunity to engage in discovery.

In this case the Respondent is fully exercising its rights to remove any uncertainty that it may have about the Complainant's case through an extensive use of discovery. After a hearing on the Respondent's motion to compel discovery, the Complainant was ordered to respond to the Respondent's Interrogatories, Demands to Produce Documents and Requests for Admissions. These responses were due on or before July 27, 1992. The Complainant's deposition was rescheduled for and was presumably taken on July 10, 1992, the same day as the hearing on the Respondent's motion. At the time of the deposition, it would be customary for the Respondent to have inquired as to witnesses that the Complainant would call or at least upon which the Complainant would rely. Given this opportunity to become familiar with the Complainant's case, it is difficult to see how the Respondent has been damaged or how the Respondent's task of preparing its case has been made more difficult by the Complainant's failure. Nowhere in its supporting materials does the Respondent indicate that it has been prejudiced by the Complainant's failure or, even if it has been prejudiced, how the discovery activity of the Respondent has failed to remove the prejudice. Given the apparent lack of prejudice to the Respondent, the sanctions requested by the Respondent seem somewhat draconian. While the fact that the Complainant is unrepresented does not excuse his repeated failures to comply with the Scheduling Order and the Respondent's discovery demands, it is a factor to be considered in determining what sanction, if any, should be assessed. The Complainant at the various hearings held in this matter has not really seemed to understand, without careful explanation, the responsibilities of a Complainant in the hearing process. When these responsibilities have been explained, the Complainant seems to have tried to fulfill those responsibilities. This would indicate that the

application of sanctions to the Complainant is not likely to alter or change the Complainant's conduct in this matter in the future. Equally, since the Respondent has not apparently been prejudiced by the Complainant's failure, application of sanctions is not necessary to protect the Respondent's interests or position. The Commission's interest in assuring compliance with its orders does not appear to be significantly threatened if sanctions are not applied.

The Respondent's motion also seeks an order compelling the Complainant to pay for the costs of a deposition that was properly scheduled and noticed at which the Complainant failed to appear. The Complainant's failure to appear was not excused. This failure to appear was addressed at the hearing held on July 10, 1992. At the time, the Hearing Examiner reserved a ruling on the Respondent's request for an award of costs. The request in the current motion adds nothing to the record to indicate that either party would be prejudiced by the reservation of this decision. Absent a demonstration of prejudice, I will reserve my ruling on this issue until the conclusion of this matter.

For the foregoing reasons, I will dismiss the Respondent's motion. Nothing in this decision shall preclude the Respondent from filing a motion in limine or any other appropriate motion in the event that the Complainant fails to timely file and exchange a final witness list.

Signed and dated this 5th day of August, 1992.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner