

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

<p>Percy Lynes 1923 Sherman Ave., # 5 Madison, WI 53704</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Marquip, Inc. 1245 E. Washington Avenue Madison, WI 53703</p> <p style="text-align: center;">Respondent</p>	<p>HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER</p> <p>Case No. 21797</p>
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**BACKGROUND**

On November 9, 1993, a public hearing was held on the allegations of the complaint in this matter before Hearing Examiner Clifford E. Blackwell, III. The hearing commenced at 8:40 a.m. in the conference room of the City of Madison Purchasing Office. The Complainant, Percy Lynes, appeared in person and without counsel. The Respondent, Marquip, Inc., appeared by its Director of Human Resources, Mark Meunier, and by its attorneys, Lathrop and Clark by Michael Lawton. Based upon the record of this proceeding, the Hearing Examiner makes his Recommended Findings of Fact, Conclusions of Law and Order as follows:

1. The Complainant is a Black or African American male.
2. The Respondent is a corporation with a manufacturing and assembly plant located at 1245 E. Washington Avenue within the City of Madison. The Respondent employs approximately 400 people at its Madison facility in conjunction with its operations.
3. The Complainant began his employment with the Respondent on October 15, 1990 as a Panel Assembler. His initial supervisor was Paul Ederer. In the late summer or fall of 1991, Eric Severson became the Complainant's supervisor. Severson remained the Complainant's supervisor until October or November of 1992 when the Complainant was transferred at his own request to the Electronics Department. At that time Doug Janson became the Complainant's supervisor.
4. Throughout his employment with the Respondent, the Complainant has been employed on a part-time basis. He works approximately 32 hours per week. At no time has he been a full-time employee. Except for one period of layoff, the Complainant has been continuously employed by the Respondent since his hire in October of 1990.
5. The Panel Shop is divided into several different departments. These included panel assembly and testing or quality control. The supervisors of the different departments would, from time-to-time cover for each other if someone was going to be out of the area for some period of time. In this way, a supervisor of a department might have actual supervisory experience with an employee employed in a different department. In 1992, Eric Severson was the supervisor in the Assembly Shop and Jeff Gensler was the supervisor in the Test Shop.

6. The Respondent relies on part-time student employees to fill out its workforce. Turnover is high with many positions being advertised frequently. The Respondent attempts to fill vacancies through hires from within its own workforce before advertising outside of the company. The Respondent is not a unionized employer and has no seniority system. Except where explicitly stated, the only hiring consideration is for the most capable applicant to be selected.
7. In February and July of 1992, the Test Department within the Panel Shop had openings for a Test Assistant. There were no explicit prerequisites for these positions. The job announcement indicated that 6 months of experience in the Panel Shop would be preferred and that knowledge of electronics would be a plus. Neither of these items were actual requirements for the position. A Test Assistant would be required to conduct a large number of different tests on a range of products from outside vendors used in the Respondent's own products. Knowledge of electronics was not required, neither were troubleshooting nor problem-solving skills necessary. Dependability was a concern for Gensler because it would take between 6 and 8 months to adequately train a new Test Assistant. Also important was the ability to learn new and different tasks quickly and to keep to assigned jobs and schedules. These latter traits were important because Gensler was also performing the duties of a Test Technician and could not often directly supervise or train his supervisees.
8. In February, 1992, the Complainant, along with Cory Hoel, Percy Lawrence, Mike Richter, Steve Wishard and Theresa Miller applied for a vacant Test Assistant position. The supervisor, Jeff Gensler, interviewed each applicant asking each a series of set questions. These included questions about the applicants' desire for the position and the applicants' long and short-term plans. Gensler narrowed the list of candidates to Cory Hoel, the Complainant and Percy Lawrence on the basis of the interviews and his personal knowledge of the applicants. He then sought the impressions of the applicants' supervisors. In the case of Hoel and the Complainant, that was Severson. Gensler did not ask for a recommendation nor did Severson provide one. In making his decision, Gensler also had each applicants' personnel file including their "gold card". An employees "gold card" is a record of his or her attendance and discipline.
9. Gensler was most concerned about how long the new Test Assistant would be likely to remain available. This was because of the lengthy training period required by the position. The individual tasks required by the position were not very difficult to master but there were a large number of different tasks to learn.
10. Cory Hoel, a White male, was selected for the position. The record does not indicate the race of Percy Lawrence.
11. Hoel was selected because he was likely to remain available for at least two years. Hoel had also demonstrated that he could learn new tasks quickly and did not need a great deal of supervision.
12. It was perceived that the Complainant might be available for only six months. Severson indicated in his personnel reviews and in response to Gensler's inquiries about the Complainant, that while he was a hard worker, he did not learn new tasks easily and if switched frequently between different tasks, he would need a significant amount of coaching. Severson also indicated that despite the Complainant's interest in doing a "good job", his work quality was only average.
13. It was believed that Percy Lawrence would not be available for a significant period of time because he had recently finished his degree at school.
14. Hoel had just begun a two year degree program at the Wisconsin School of Electronics the previous fall. Gensler, based upon the interview, felt that finishing school was a high priority for Hoel and therefore he would be available for the period of time that it would take him to complete his studies.

15. In late 1991 and early 1992, the Complainant had made his intent to return to school in the fall of 1992 known to his supervisors. He was considering a move to Mississippi to study electronic technology. This course of study would have begun in August of 1992. During his interview with Gensler, the Complainant indicated that if he were awarded the Test Assistant position that he might not return to school because the job would provide good experience. Gensler did not take the Complainant's statement as a commitment not to return to school if he was awarded the position.
16. Hoel had initially been hired by the Respondent in October of 1991. He was significantly less senior than the Complainant. Hoel also did not possess the level of related schooling that the Complainant had. These factors were deemed to be less important than Hoel's almost assured availability for the next two years. Hoel could be trained for the position as was the Respondent's practice, and extensive electronics education or experience, though perhaps useful, was not required by the tasks to be performed.
17. The Complainant's race was not a factor in Gensler's decision not to promote the Complainant to the position of Test Assistant in February of 1992.
18. In July of 1992, Gensler had another Test Assistant position come open. The position was internally posted as was the earlier vacancy. The Complainant, Jason Stengel and Jerry Taylor applied for the position. Gensler had supervisory experience with all three applicants. He conducted the hiring process in the same manner as for the open position in February.
19. Gensler held interviews with the candidates. During the interview with Taylor, Gensler indicated that because Taylor was scheduled to graduate from his electronics program in the near future, he was not likely to be hired for the Test Assistant position. This was because he was not likely to be available for a long enough period of time. After further discussion, Taylor withdrew his application leaving the Complainant and Stengel as the only candidates.
20. Gensler asked the Complainant and Stengel the same questions as he used in the February interviews. Stengel impressed Gensler with his aggressiveness and his desire to take on new tasks and challenges. Stengel exhibited an open manner and good communication skills. Gensler observed that the Complainant seemed apprehensive or reserved during the interview. Gensler concluded that the Complainant was leery or apprehensive about taking on the responsibilities of the new complex position.
21. Gensler's personal observations of Stengel and the Complainant also favored Stengel. Gensler observed Stengel to be productive, interested in new tasks and able to get along with other workers and supervisors. Gensler observed that the Complainant was slower than other workers at accomplishing tasks and that he needed a higher level of supervision to answer his many questions.
22. Gensler sought the observations of the Complainant's and Stengel's supervisor, Severson, and their team leader, Terry Gensler. The information obtained from these sources only confirmed Gensler's own impressions. Gensler did not ask Severson or Terry Gensler for a recommendation.
23. Gensler selected Stengel, a White male, for the position. Gensler found that Stengel would require less supervision than the Complainant, that Stengel could communicate more effectively with others than the Complainant, and that Stengel had more interest in and a greater desire for the position than the Complainant.
24. It was important for the successful candidate to need light supervision because Gensler was still performing some of the duties of a Test Technician and would not always be available to supervise or to answer questions.
25. It was important for the successful candidate to possess good communication skills because the position required the successful candidate to be in contact with other workers, supervisors, and outside vendors and customers on a frequent basis.

26. It was important for the successful candidate to have initiative and desire for the job because of the large number of different tasks and duties that would need to be learned and mastered.
27. The Complainant's race was not a factor in his failure to be promoted in July of 1992.
28. In September of 1992, another Test Assistant position became available. The Complainant applied for this position and was awarded it. The Complainant declined to accept the position because he viewed the position to no longer represent a promotion.
29. At the end of the summer of 1992, the position of Test Assistant was down-graded. All of the functions and responsibilities remained the same except that certain high-powered machine tests were reassigned. The record does not reflect in what manner the position was down-graded except for this change.

### **CONCLUSIONS OF LAW**

30. The Complainant, an African American male, is a member of the protected class "race" and is entitled to the protections of the ordinance.
31. The Respondent is an employer within the meaning of the ordinance and does business within the City of Madison. The Respondent is subject to the terms of the ordinance.
32. The Complainant was not discriminated against on the basis of his race when he was not promoted to the position of Test Assistant in February, 1992.
33. The Complainant was not discriminated against on the basis of his race when he was not promoted to the position of Test Assistant in July, 1992.

### **ORDER**

35. The complaint of discrimination is hereby dismissed. The parties shall be responsible for their own costs and attorney's fees.

### **MEMORANDUM DECISION**

The Complainant's claim of discrimination is premised upon the circumstances surrounding his failure to be promoted to the position of Test Assistant in February and July of 1992. During these events there were no overt signs of racial animus on the part of any of the Respondent's managers. There were no racially derogatory words used. It is typical of discrimination claims these days for there to be no explicit language about race or for there to be no obvious evidence of discrimination. In these cases it is entirely appropriate for the Hearing Examiner to make reasonable inferences from the facts and circumstances. Where the circumstances and inferences support a finding of discrimination, the Hearing Examiner may enter that finding. The record in this matter does not support the inferences necessary to a finding of discrimination.

The Complainant was able to establish a prima facie case of discrimination. There was no dispute that he is a member of a protected class. He is an African American and is a member of the protected class race. He used the Respondent's procedures to apply for two positions that would have resulted in a higher wage for the Complainant. He was qualified for those positions. Persons not of the Complainant's protected class received the promotions instead of the Complainant. There is a reasonable inference on the record that the Complainant's race might have been a factor in the Complainant's failure to be promoted.

The testimony of Jeff Gender and the notes taken by him after his interviews demonstrate that he believed that the Complainant could do the job of a Test Assistant. The fact that the Complainant was a finalist for both of the position supports the finding that the Complainant was a qualified applicant.

There is no dispute that both positions for which the Complainant applied were given to White males. The February position was awarded to Cory Hoel. The July position was given to Jason Stengel. Both Hoel and Stengel are White.

The Complainant had been employed by the Respondent since October of 1990. Both Hoel and Stengel were substantially less senior than the Complainant. They were both hired in October of 1991. The Complainant held a Certificate in Electronics from Madison Area Technical College and had taken a number of related classes. Both Hoel and Stengel had just recently started work towards similar certificates at other Madison schools. They possessed less actual schooling in electronics than the Complainant.

The facts of the greater seniority and greater educational training of the Complainant could lead one to the conclusion that his race was a factor in the Respondent's decision to promote two White employees. Taken alone, these facts tend to show the Complainant to have been more qualified than Hoel and Stengel for the Test Assistant positions.

The Complainant's having made out a prima facie case of discrimination, the Hearing Examiner must now review the record to see if the Respondent has stated a legitimate, non-discriminatory reason for its actions. This represents a burden of production, not one of proof. In other words, the Respondent must be able to state its legitimate reason but is not required to prove that it actually acted on that reason.

It is the Respondent's position that it promoted Hoel and Stengel over the Complainant because they were more qualified for the positions than the Complainant. Additionally, the Respondent asserts that the Complainant's greater seniority and education were not particularly relevant to the open positions. These represent legitimate, non-discriminatory reasons for the Respondent to have promoted Hoel and Stengel over the Complainant. Nothing in the ordinance requires an employer to select a less qualified applicant for a position even where another employee was qualified. Oviawe v. Madison United Hospital Laundry Ltd., MEOC Case No. 20723 (Comm'n. Dec. August 3, 1990).

Since the Respondent has stated a legitimate, non-discriminatory reason for its decision to promote Hoel and Stengel, the burden shifts back to the Complainant to demonstrate that the reason or reasons set forth by the Respondent is not worthy of credence or is a pretext for other discriminatory reasons. In this way, the Complainant bears the ultimate burden of proof with respect to the issue of discrimination. Saint Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

There are disputes in the record about certain facts necessary to the final resolution of this complaint. Most notable is the difference in Jeff Gensler's recollection of the Complainant's possible return to school and the Complainant's recollection of the same. This is an important issue because Gensler testified that one of the key factors in his decision to award the Test Assistant position to Cory Hoel in February of 1992 was the fact that the Complainant was undecided about his plans to return to school in the late summer or early fall of 1992.

The Test Assistant position in question in this complaint is assigned to the Test Department within the Panel Shop. The Panel Shop inspects and tests a broad range of equipment provided to the Respondent by outside vendors for installation in equipment manufactured by the Respondent. The purpose of the tests was to determine whether a specific piece of equipment worked or not. This was referred to as an "off-on" test. It is not the job of the Test Assistant to determine why a piece of equipment did not work. The Test Assistant was not required to troubleshoot. If a piece of equipment did not work, it was sent back to the vendor to fix. This process might take a considerable period of

time to set up an individual test. Different tests might have to be conducted on dozens of different pieces of equipment. Because of the large number and variety of pieces of equipment that might need to be tested and the difference in tests to be conducted, it would take six to eight months to properly train individuals to perform the duties of a Test Assistant.

The Respondent provides specific training for all individuals coming into a position. Training periods are built into the probation period for an employee and training is required regardless of the qualifications of an employee. The Complainant acknowledged that he had been trained for each of the two positions that he has held with the Respondent.

Due to the number of tasks required to be learned by a new Test Assistant, the Respondent reasonably wishes to hire someone who is going to be able to justify the time spent in training before moving on. It is simply not efficient to hire a person and train him or her for six or seven months if they are going to leave a month or so after their training is complete.

The parties agree that the Complainant had made known in late 1991 and early 1992 that he was considering relocating to Mississippi in the fall of 1992 to pursue further education in the field of electronic technology. When the Complainant had his interview with Gensler in February of 1992, the topic of his intentions was explicitly discussed. The Complainant testified that he told Gensler that he was considering going back to school, but that if he was awarded the Test Assistant position, he would stay for the additional job experience. Gensler testified that the Complainant had indicated that he might stay if the job were offered to him but that there was no firm commitment to staying.

Gensler completed a post-interview form required by the Respondent of its supervisors. The notes on this form support the testimony of Gensler. The form indicates that Gensler questioned the Complainant's long-term commitment to the position because of Complainant's possible return to school.

The Hearing Examiner believes that the Complainant's testimony represents the Complainant's best effort to remember the interview. It seems likely that the Complainant truly believes that he made his intention to remain with the Respondent clear at the time of the interview. The record reflects that despite his efforts, the Complainant was not clear about his intention to stay if the Test Assistant position were offered to him. It is entirely normal for a job applicant who is uncertain about his or her prospects to hedge about future plans. This may be what happened in this particular instance. Somewhat supporting this hypothesis is the testimony of Eric Severson. Severson was the supervisor during the period of time in question. Severson indicated that the Complainant's communication skills were weak. This is evidenced on the record by the Complainant's frequent problems asking questions of the witnesses at the hearing.

There was apparently a misunderstanding about the Complainant's intentions. The consequences of this misunderstanding, unfortunately, are to be borne by the Complainant. The misunderstanding about his future plans led to the decision to promote Hoel and not the Complainant in February of 1992.

Hoel had just begun a two year course of study at the Wisconsin School of Electronics in the preceding fall. He expressed his desire to complete his schooling. This meant that Hoel was likely to be available for almost a year and a half after his promotion to Test Assistant. This would give the Respondent sufficient work time to recover the time that it would spend training Hoel.

The Complainant had finished his certificate program at MATC in the fall of 1991. Gensler testified that it was customary for someone who had finished their electronics schooling to leave employment with the Respondent for some full-time employment. All of the positions in question here were part-time. Even if the Complainant had not expressed his intention to return to school, he would not have been so desirable as Hoel because of his status as a person who had finished his schooling. This last point does not seem to have weighed heavily in Gensler's decision.

Another possible argument that the Complainant might point to as demonstrating pretext is the fact that both Hoel and Stengel were substantially less senior to the Complainant. This falls short of demonstrating pretext for several reasons.

First, the Respondent had no formal or informal seniority system. It is a non-unionized employer and has no contractual duty to hiring or promoting on the basis of seniority. There seems to have been no practice of seniority promotion by the Respondent.

Second, to the extent that the Complainant believes that his seniority over Hoel and Stengel was an important factor, it is derived either from a misplaced general notion that all employers must consider seniority in employment decisions or the job announcement's indication that six months of employment in the Panel Shop was preferred. The length of service statement is not made as a requirement but as a preference. This indicates that a well qualified applicant with less than six months of employment in the Panel Shop could be considered without a problem.

Third, the six month preference would have only applied to the February hire. By the time of the July hire, Stengel had been employed in the Panel Shop for over six months. It was only Hoel that was promoted prior to six months in the Panel Shop.

The final possible argument about pretext that might be raised by the Complainant concerns his greater level of education and experience in the area of electronics than that of Hoel or Stengel. Clearly the Complainant had a greater level of experience and education in the area of electronics. This is evident from the fact that he had completed the degree just recently begun by Hoel and Stengel and that he had been employed in the Panel Shop for approximately a year longer than Hoel or Stengel. The Respondent successfully counters this argument by demonstrating that other factors were more important and specific knowledge of electronics was not required for the position.

The education and experience in the field of electronics possessed by the Complainant was not necessary to the Test Assistant position. While the job announcement indicated that such knowledge would be a plus, the position did not require detailed electronics knowledge. As indicated above, the Test Assistants did not need to be able to troubleshoot. The primary duties of a Test Assistant required one to be able to connect equipment to other equipment for testing, operate the test equipment and evaluate the test. It is presumably in the ability to connect and remove the test equipment that a knowledge of electronics would be useful. However, the record is not clear on this point.

What is clear is that Gensler felt that he needed a person who could learn quickly and act independently. These were important qualities because of the large number of individual tasks involved in working in the Test Shop and Gensler's own work load. Gensler was also performing the work of a Test Technician during this period. This meant that he would not be able to closely supervise a Test Assistant and would not always be available to answer questions.

In making his two hiring decisions, Gensler relied upon his own knowledge of the applicants, the interviews of the applicants and the impressions of the applicants' supervisors and team leaders. In

both hires, Gensler had been able to directly observe the work of the applicants because of his proximity to their work area and his occasional substitution for the applicants' supervisor, Eric Severson. In both hires the applicants' team leader was Terry Gensler, Jeff Gensler's brother.

With respect to the July hire, the record is clear that Stengel had expressed keen interest in the position while the Complainant was distinctly more reserved. At the hearing, Gensler described the Complainant's attitude as being leery or uncertain.

Gensler's observations of Stengel and the Complainant indicated that Stengel was an interested and enthusiastic worker who was always looking for a challenge or something new. Gensler found the Complainant to work more slowly and to be most comfortable doing the same job repeatedly. When the Complainant moved from task to task, he had to take more time to learn the task and spent much time asking the same question over and over. Gensler observed the Complainant to be less productive and to be more prone to making errors than Stengel.

Gensler sought the impressions of the supervisors of the applicants. Severson and Terry Gensler gave their impressions without giving a recommendation. These impressions served to confirm Gensler's own judgement.

The Hearing Examiner concludes that Stengel would have required less supervision and would perform at a higher level than the Complainant. These factors were more important to the hiring decision than the respective level of education or experience of Stengel and the Complainant. Given the dictates of the situation in July of 1992, it was reasonable to give these factors great weight in the decision to promote Stengel.

With respect to the February promotion decision, these factors were also present though less important. As indicated above, the key factor was the Complainant's possible return to school and hence unavailability after training. This factor had been removed by the time of the July vacancy.

Again, Gensler's observations and the impressions of Severson and Terry Gensler indicated that Hoel would need less supervision than the Complainant and that Hoel's productivity and quality were superior to that of the Complainant. It is not unreasonable for Gensler to have considered these factors given the circumstances at the time.

In reaching these conclusions, the Hearing Examiner found that the three primary witnesses, the Complainant, Jeff Gensler and Eric Severson, all testified truthfully within the limitations of their memories. The Complainant appeared to be a sincere and honorable person who genuinely believes that he was the victim of discrimination. The fact that his testimony does not reflect the circumstances as found by the Hearing Examiner does not diminish the sincerity of his personal beliefs. Eric Severson impressed the Hearing Examiner as a person who took his job seriously but was interested in those who worked under his supervision. His testimony was delivered with a manner that was thoughtful and complete. In criticizing the Complainant's work, he did not take the opportunity to be mean-spirited or hurtful. Gensler also testified with a similar mix of honesty and concern for the feelings of the Complainant. All witnesses had to have their memories refreshed from time to time. This occurred well within the bounds normally expected by the Hearing Examiner.

For the foregoing reasons the Hearing Examiner concludes that the Complainant was not discriminated against when he was not awarded a promotion to the position of Test Assistant in February and July of 1992. The complaint is hereby dismissed.



Signed and dated this 12th day of December, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III  
Hearing Examiner