

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

<p>Rory Rolack 222 S. Bedford St. Madison WI</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Speedway Self Service 4602 Verona Rd. Madison WI 53711</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. 22354</p>
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BACKGROUND

A public hearing on the merits of the above-captioned complaint was held on January 20, 1998 before Hearing Examiner Clifford E. Blackwell, III in Room LL-120 of the Madison Municipal Building 215 Martin Luther King, Jr. Boulevard Madison, Wisconsin. The Complainant, Rory Rolack, appeared in person and by his attorney, Jacqueline MacCaullay. The Respondent, Emro Marketing d/b/a Speedway, appeared by John K. Maguire, corporate counsel, and by its attorney, Christine Cowles of Borgelt, Powell, Peterson & Frauen, S.C. Based upon the record of the proceedings in this matter and the arguments of the parties, the Hearing Examiner makes his Recommended Findings of Fact, Conclusions of Law and Order as follows:

FINDINGS OF FACT

1. The Complainant is an African American male.
2. The Respondent is a corporation with several commercial outlets within the city of Madison. Specifically, the Respondent has a gas station/convenience store located on Verona Road within the city of Madison, as well as one on Williamson Street, also within the city of Madison.
3. On or about November 30, 1994, the Complainant submitted an application for employment at the Verona Road store. That application was lost or discarded, and no longer exists.
4. At the time of this application, the Store Manager at the Verona Road location was Steve McKinnon. McKinnon reported to Rick DeLacy, a District Manager for the Respondent. There are between nine (9) and eleven (11) stores in the district managed by DeLacy. DeLacy reported to James Basler, the Regional Manager.
5. It does not appear that the Respondent was hiring during the month of December, 1994, until close to the end of the month. On December 31, 1994, Michael Eveland began employment at the Verona Road location as an Assistant Store Manager. Eveland had previously been employed by the Respondent and was considered to be a rehire. The Complainant was not similarly situated to Eveland as the Complainant was not qualified for the position of Assistant Store Manager and had never been employed by the Respondent.
6. Despite the lack of available positions, the Complainant frequently checked at the Verona Road store to inquire about the status of his application. The Complainant had moved to an apartment

within walking distance of the Verona Road store and it would have been very convenient for him. The Complainant was not told that his application was missing.

7. On January 2, 1995, the Complainant and his White girlfriend, Juli Philumalee stopped at the Verona Road store to inquire about the Complainant's application. They spoke with Eveland. Eveland told them that he could not locate the Complainant's application and gave the Complainant another to complete.
8. It is not clear whether the Complainant completed the application and returned it to Eveland on January 2, 1995, or if the Complainant took the application home and returned it on January 3, 1995. That application was forwarded to the Respondent's Williamson Street location at some unidentified time.
9. The Respondent hired Greg Zorn on January 4, 1995. Zorn is a White male. Zorn was more qualified than the Complainant in that Zorn had more education and relevant employment experience.
10. The Complainant again frequently inquired at the Verona Road location about the status of his application. On those occasions, he most likely spoke with either McKinnon or Eveland. No interviews were set up pursuant to the Complainant's application or inquiries.
11. Juli Philumalee submitted an application for employment at the Verona Road store on or about January 31, 1995. Philumalee was not contacted for an interview or offered employment by the Respondent.
12. In mid-February, 1995, the Respondent hired Mike Hartley. Hartley was not similarly situated to the Complainant in that Hartley had been previously employed by the Respondent. From January 4, 1995, until Hartley's hire, the Respondent did not hire any other employees at the Verona Road store.
13. On or about January 31, 1995, Carlie Cage, a White male, submitted an application for employment at a store owned by the Respondent in Stoughton, Wisconsin. Cage and his family were regular customers at that location. The Store Manager at the Stoughton store, Arnie Edgington, knew Cage and highly recommended him for employment. Edgington forwarded Cage's application to the Verona Road store. It was common practice for store managers to forward applications to other stores where there might be vacancies.
14. Cage was hired for employment at the Verona Road location on February 24, 1995. Though there are substantial similarities between Cage's application and the Complainant's application, they were not similarly situated. Cage had been highly recommended by a store manager who DeLacy worked with frequently and whose opinion DeLacy respected.
15. At the time in question, Cage, a current high school student, had completed the 11th grade. The Complainant had completed the 11th grade before dropping out of high school. Neither Cage nor the Complainant did well on the basic arithmetic test, both having missed six (6) questions. Both Cage and the Complainant listed references though the Complainant omitted the telephone number of one.
16. The Complainant moved from the Madison area on or about April 1, 1995, and had not been hired or interviewed for employment at any time from November 30, 1994, until he left.
17. Though the Respondent's policies would permit a store manager such as McKinnon to make hiring and firing decisions, Basler required that all of his district managers including DeLacy interview or screen all employees. Basler's policy was not written. For all hires at the Verona Road store except one from the end of October, 1994, until the end of 1995, DeLacy signed the hiring sheet. In the single instance where DeLacy did not sign, McKinnon signed. That single instance occurred in early November, 1994, prior to the Complainant's application.
18. DeLacy hired Bertram Oparaji, a Black Nigerian, to work as an employee who could be assigned to various locations. Oparaji worked at the Verona Road store during January, 1995. DeLacy also hired Nick Plummer and Arthur Thompson, both African Americans, to work at

the Verona Road store. Both Plummer and Thompson were hired before the Complainant filed his complaint of discrimination though after he had submitted his application.

19. Though McKinnon did not have actual authority to make hiring decision, he frequently accepted applications, conducted qualification tests, checked references and made hiring recommendations to DeLacy.
20. The Complainant's race was not a factor in the Respondent's failure to interview or hire him for employment.

CONCLUSIONS OF LAW

21. The Complainant is a member of the protected class "race."
22. The Respondent is an employer within the meaning of the Madison Equal Opportunities Ordinance (Ordinance).
23. The Respondent did not violate the Ordinance and did not discriminate against the Complainant on the basis of his race when it failed to interview or hire him for employment in 1995.

ORDER

24. The complaint is hereby dismissed. Each party shall bear his or its own costs.

MEMORANDUM DECISION

This complaint has been extensively litigated by both parties. The Complainant initially filed a complaint alleging discrimination on the basis of race. After receiving an Initial Determination of probable cause with respect to that claim, he amended his complaint to add a claim of discrimination on the basis of sex. It appears that the Complainant wished the Commission to investigate whether the discrimination alleged had occurred specifically because he is an African American male. The Investigator/Conciliator concluded that there was no probable cause with respect to the Complainant's sex claim. The Complainant appealed the finding of no probable cause. The Hearing Examiner affirmed the amended Initial Determination's finding of no probable cause.

The Respondent has challenged the Commission's jurisdiction on the basis that the Complainant's complaint was untimely throughout the proceedings. Once the amended Initial Determination was issued, the Respondent added a challenge to jurisdiction on the basis that the amended Initial Determination, particularly the finding of no probable cause on the Complainant's sex discrimination allegation, supplanted the Initial Determination's finding of probable cause with respect to the Complainant's allegation of race discrimination. The Hearing Examiner denied the Respondent's motions in part and upheld them in part. The Hearing Examiner concluded that the record did not support a finding of a continuing violation and that any alleged violation occurring prior to January 2, 1995, was precluded by the Ordinance's 300 day limit. The Hearing Examiner did find, however, that the Complainant's allegation of discrimination occurring on or after January 2, 1995, was timely filed. The Hearing Examiner found no basis for the Respondent's contention that the amending of the complaint and the Initial Determination eliminated the allegations of the original complaint or findings of probable cause.

The Respondent did not appeal the Hearing Examiner's decision, but once again interposed its jurisdictional claims as part of this claim. The Hearing Examiner will not further address these arguments and rests on his decision dated December 5, 1994. The outcome of this case is not dependant upon those jurisdictional claims.

In November of 1994, the Complainant, his girlfriend, Juli Philumalee, and two other friends moved into the general area of the Respondent's location at 4602 Verona Road. The Complainant sought work in the general vicinity of the apartment so that he might be able to walk to work. On or about November 30, 1994, the Complainant filled out an application at the Respondent's Verona Road store. Despite the Complainant's inquiries about the status of this application, he was never asked to an interview or offered employment. It appears on this record that the Complainant's application was lost. The Complainant asserts that it was intentionally thrown out, but there is no evidentiary support for this allegation.

There were only two (2) positions available at the Respondent's store in December of 1994. The Complainant apparently concedes that he was not qualified for either of these positions.

On January 2, 1995, the Complainant and his girlfriend stopped at the store. While purchasing something to eat, the Complainant inquired about his application again. The person at the counter, probably Michael Eveland, indicated that he, Eveland, could not find the Complainant's application. The Complainant took an additional application. The Complainant completed the application and turned it in the next day. The following day, January 4, 1995, the Complainant took the mathematic skill test. When submitting his completed application and taking the test, the Complainant dealt with Eveland.

Over the next three (3) months, until the Complainant left Madison, He frequently inquired about the status of his application. During the three month period before leaving Madison, the Respondent hired three (3) individuals. The Complainant concedes that he was not as qualified as two (2) of those applicants, but contends that he was at least as qualified as the third.

Carlie Cage, a White male from Stoughton, Wisconsin, submitted an application for employment on or about January 31, 1995. Cage's application had been forwarded by the Manager of the Stoughton store with a strong recommendation to hire Cage. The managers of the Respondent's stores would occasionally forward applications of good employment prospects to another store if the forwarding manager did not need to hire someone at the time. The manager of the Stoughton store, Amie Edginton, had worked extensively with Rick DeLacy, the Respondent's District Manager and he valued her opinion highly.

Initially, the Complainant's January 2, 1995, application couldn't be located. Eventually, it was found at another of the Respondent's stores in Madison. Though the Respondent hints that perhaps the Complainant submitted his application at this other more distant store, it is much more likely that the application was submitted at the Verona Road store and was subsequently transferred to the Williamson Street location during a period when the Respondent did not need additional employees at the Verona Road store. Given the distance between the Complainant's apartment and Williamson Street, it is extremely unlikely that the Complainant would have sought employment at that location.

The Complainant asserts that his application was at least as good as that of Cage. While there are significant similarities between the Complainant's and Cage's applications, there is one critical factor in which Cage was a superior applicant to the Complainant. Cage came highly recommended by a Store Manager who DeLacy knew and respected. The facts that Cage and the Complainant both did miserably on the math test and had both only completed the 11th grade, do not demonstrate that the Complainant was similarly situated to Cage in light of the recommendation. The Respondent attempts to draw other distinctions between Cage and the Complainant. The Respondent asserts that the Complainant had failed to provide contact information for one of his references. Also, the Respondent

argues that though Cage had only completed the 11th grade, he was still in school while the Complainant had dropped out of school several years prior after the 11th grade.

The Hearing Examiner does not find that DeLacy credibly relied upon these additional factors in reaching his decision about whom to hire. Neither of these distinctions are meaningful. The Hearing Examiner can accept, however, that DeLacy might easily choose between Cage and the Complainant on the basis of Edgington's recommendation. DeLacy's reliance on the recommendation of a subordinate in whose judgment he trusted carries Cage out of the same applicant pool as the Complainant.

On this record, DeLacy was the person who made hiring and personnel decisions. The Regional Manager required all of his district managers to at least review the applications of all hires in their respective districts. Though this requirement does not appear to be written in any form, it is not an inherently unreasonable requirement which would lead the Hearing Examiner to suspect that it was a pretext for discrimination. Given the apparent turnover in store and assistant store managers, having the District Manager actively involved in the hiring process may promote consistency in hiring practice at least within districts.

DeLacy's record of hires does not indicate a predisposition to discriminate on the basis of race. Shortly after the Complainant left Madison, but prior to the Complainant's filing of this complaint, DeLacy hired two African Americans, Nick Plummer and Arthur Thompson. Also, DeLacy had hired Bertram Oparaji, a Black African, who worked on an "as assigned basis" in a number of stores overseen by DeLacy. In fact, Oparaji worked at the Verona Road store occasionally during January, 1995.

The Complainant argues that despite the fact that DeLacy apparently made most, if not all, of the hiring decisions, he relied heavily on the recommendations of his store managers. In the case at hand, the Store Manager from early November, 1994, until approximately February, 21, 1995, was Steve McKinnon. The Complainant contends that McKinnon acted as the "gatekeeper" for applications and it was McKinnon's racial bias that prevented DeLacy from reviewing the Complainant's application or hiring him. The record does not support this conclusion.

While McKinnon's testimony on many points seemed deliberately evasive and self-promoting, it was corroborated in main by the testimony of DeLacy. DeLacy, despite having a motive to shade the truth, was more credible than the Complainant gives him credit for being. He appear to be forthright in his answers while admitting what he couldn't remember or know.

Both DeLacy and McKinnon assert that their discussions about candidates for employment never included the race of the applicant. There is no reason on this record to doubt this testimony.

The Complainant contends that even though DeLacy hired two African Americans, they were not hired until after McKinnon left employment with the Respondent. The Complainant argues that McKinnon must have been guilty of screening out African American applicants and that DeLacy's hiring of African American individuals after McKinnon's departure is evidence of the screening.

The Hearing Examiner disagrees. The Complainant admits that there was only one position for which he might have been considered during the relevant period. The Hearing Examiner has already determined that the Complainant was not similarly situated to the White person who was hired for that one position. Even if McKinnon had been filtering out African American applicants, it would not

have made any difference to the outcome. The position went to another because of that applicant's special circumstances. The Complainant's race had nothing to do with that decision.

The Complainant contends that the Respondent's reliance on the recommendation of a Store Manager from Stoughton has a differential impact on applicants of color because of the racial makeup of Stoughton. There is nothing in the record to base such a claim upon. While it may be tempting to impose one's own personal beliefs on society, it lacks the verifiability upon which judicial and quasi-judicial bodies must rest their decisions.

Based upon the record of the proceedings, the Hearing Examiner concludes that the Respondent did not discriminate against the Complainant on the basis of his race when it failed to offer him employment in the first quarter of 1995 at its store located at 4602 Verona Road. The Respondent demonstrated an impressive failure to follow good recordkeeping practices. That failure is likely to give the Respondent significant problems in the future if it persists.

The Complainant is an appealing individual. He has taken responsibility for himself and took the steps expected of him. It is unfortunate that he was unable to find employment with the Complainant, but that lack of employment was not a result of discrimination.

Signed and dated this 11th day of February, 2000.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner