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

Rory Rolack 222 S. Bedford St. Madison, WI Complainant vs. Speedway Self Service 4602 Verona Rd. Madison, WI 53711 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER Case No. 22354

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, Jacquline 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'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

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

Rory Rolack c/o Jacqueline Macaulay 222 S. Bedford St. Madison, WI 53703 Complainant vs. Speedway Self Service 4602 Verona Rd. Madison, WI 53711 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS AND FOR SUMMARY JUDGEMENT Case No. 22354

BACKGROUND

On October 30, 1995, the Complainant, Rory Rolack, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent,

Speedway Self Service, discriminated against him on the basis of his race (African American) when it failed or refused to hire him at one or more of its locations in Madison, Wisconsin. The complaint was assigned to a Commission Investigator/Conciliator for investigation and issuance of an Initial Determination with respect to the allegations of discrimination.

The Respondent denied the allegations of the complaint and asserted that the complaint was not timely filed. The Respondent's questions concerning the timeliness of the complaint were answered to the satisfaction of the Investigator/Conciliator. Subsequent to his investigation, the Investigator/Conciliator issued an Initial Determination that there was probable cause to believe that the Respondent had discriminated against the Complainant on the basis of his race.

After attempts to conciliate the complaint proved unsuccessful, the complaint was transferred to the Hearing Examiner for a public hearing on the allegations of the complaint. Prior to a Pre-Hearing Conference, the Complainant indicated that he wished to amend his complaint. The Hearing Examiner canceled the scheduled Pre-Hearing Conference and once the amendment was filed, remanded the complaint to the Investigator/Conciliator for further investigation and issuance of an amended Initial Determination. The amended complaint re-alleged the allegations of the original complaint and added as protected classes "sex" and "sex plus race." Subsequent to an investigation of the additional allegations, the Investigator/Conciliator issued his amended Initial Determination on May 28, 1996. The amended Initial Determination concluded that there was no probable cause to believe that the Respondent discriminated against the Complainant on the basis of his sex or sex plus race when it failed or refused to hire him. The Complainant timely appealed the amended Initial Determination's conclusion of no probable cause. The Hearing Examiner permitted the parties time in which to conduct discovery and to submit additional materials to supplement the record. Subsequent to the additional time permitted by the Hearing Examiner, the Hearing Examiner issued his Decision and Order on Complainant's Appeal of Initial Determination.

The Hearing Examiner affirmed the amended Initial Determination's conclusion of no probable cause with respect to the added allegations. The Hearing Examiner also addressed certain additional arguments forwarded by the Respondent.

As part of its argument in support of the amended Initial Determination's conclusion of no probable cause, the Respondent renewed its assertion that the complaint was not timely filed. The Hearing Examiner concluded that certain of the allegations contained in the record were time barred but that others weren't. The Complainant did not appeal the Hearing Examiner's Decision and Order. The Hearing Examiner transferred the remaining allegations of discrimination, i.e. those of discrimination on the basis of race, to the Conciliator. Prior to undertaking efforts at conciliation, the Respondent sought to have the complaint dismissed contending that the original complaint had been superceded by the amendment and the Investigator/Conciliator's and the Hearing Examiner's conclusions that there was no probable cause with respect to the allegations of the amended complaint. The Commission indicated that the amended complaint was not intended to nor did it in fact erase the original Initial Determination's conclusion that there was probable cause to believe that discrimination had occurred on the basis of the Complainant's race. Efforts to conciliate the complaint proved unsuccessful and the complaint was once again transferred to the Hearing Examiner for a public hearing on the allegations stated in the original complaint and re-alleged in the amended complaint.

Subsequent to a Pre-Hearing Conference and the Scheduling Order stemming from that conference, the Respondent filed the present motion(s) on August 6, 1997 seeking dismissal of the complaint.

DECISION

The Respondent presents two arguments for the dismissal of the complaint that have been seen in similar forms in the past. First, it contends that the complaint is untimely and because of that lack of timeliness, the complaint fails to state a claim upon which relief can be granted. The statement of this argument in the Respondent's brief and reply brief is somewhat of a refinement of the arguments presented at earlier stages. The second argument is that the amended complaint and its subsequent Initial Determination completely supercede and entirely replace the original complaint and Initial Determination. Because the Initial Determination relating to the amended complaint found no probable cause, the Respondent asserts that the original finding of probable cause with respect to the original allegations is a legal nullity and cannot be the basis for the jurisdiction of the Commission. Both of these arguments are premised on a relatively strict application of rules developed in the context of judicial proceedings rather than relating to the somewhat more flexible requirements of an administrative process.

In analyzing the facts to render a decision on the Respondent's motions, the Hearing Examiner will view all evidence and inferences as favoring the Complainant. This is not intended to indicate that the Hearing Examiner accepts these facts or inferences as proven. The parties will have all the rights to present and dispute evidence at hearing irrespective of the Hearing Examiner's findings of fact embodied herein.

The complaint indicates that the Complainant applied for a position with the Respondent during the last week of November, 1994. He alleges that he continued to check on the status of his application over the next four to five months until he left the Madison area. the Complainant filed his complaint on October 30, 1995. Separate from the allegations specified in the complaint, the record indicates that the Complainant submitted or resubmitted his application on January 2, 1995. This additional submission was triggered by a visit to the Respondent by the Complainant which indicated that there was no sign of the Complainant's November, 1994 application.

The ordinance indicates that a complaint will not be processed if the allegations of discrimination occurred more than 300 days prior to the filing of the complaint. MGO Sec. 3.23(9)(c)1. While this restriction is stated in "bright line" terms, application of the provision is somewhat less definite. The Commission has recognized circumstances in which events occurring more than 300 days prior to the filing of a complaint may form the basis of the complaint. Ennis v. Local 965 IBEW, MEOC Case No. 22118 and Ennis v. WP&L, MEOC Case No. 22119 (Ex. Dec. on Jur. 02/03/95 and 03/17/95), Krebs v. Don Miller Pontiac Subaru, Inc., MEOC Case No. 22127 (Ex. Dec. on Jur. 03/29/96, Ex. Dec. on Jur. 03/16/95).

The Respondent has consistently maintained that the complaint in this matter is time barred. In his Decision and Order on Review of Initial Determination issued on February 12, 1997 in this case, the Hearing Examiner addressed the timeliness issues. In summary, the Hearing Examiner held that the date of application was not necessarily controlling because jurisdiction of the Commission is premised on when one or more acts of discrimination actually occurred. Decisions on applications may or may not be made on the date the application is submitted. To the extent that the record eventually demonstrates the date upon which a decision on the Complainant's application or applications was made, the Hearing Examiner will apply the 300 day limit to that date. The Hearing Examiner indicated that since the record demonstrated that there was no record of the Complainant's November, 1994 application as of January 2, 1995, one could fairly conclude that, assuming an application had been made, a decision on that application had been reached on or before January 2,

1995 and that claims premised on such were time barred.

The Hearing Examiner did not intend by this ruling to exclude or limit any argument that under the test set forth in Ennis, the Complainant did not know nor could he have reasonably known that he had been the victim of discrimination until sometime after January 2, 1995. This argument has not yet been and might not be forwarded by the Complainant.

The Hearing Examiner additionally found that the record did not support a claim of a continuing course of conduct or continuing violation. The Complainant argued that he had continued to inquire about the status of his application until he left Madison in April of 1995. The Hearing Examiner found that each inquiry did not represent a separate violation but was merely a continuation of the result of an earlier employment decision. The Hearing Examiner concluded that despite the jurisdictional shortcomings noted above that the Commission nevertheless had jurisdiction because it seemed unlikely that the Respondent acted on the Complainant's January 2, 1995 application on the same day it was submitted. The Hearing Examiner, without determining the date of the decision on the January 2, 1995 application, determined that because this question was open and because he was compelled to draw all inferences in favor of the Complainant and to view all evidence regardless of dispute in favor of the Complainant, the Commission would retain jurisdiction until the issues could be appropriately resolved.

The Respondent now reasserts its timeliness argument and refines it with a new twist. The Respondent contends that because the Hearing Examiner has indicated that the November, 1994 application cannot be the basis of a claim and because only the November, 1994 application is referenced in the complaint and amended complaint, the complaint must be dismissed for failure to state a claim upon which relief can be granted under the ordinance. This argument has a certain cold logic to it that is appealing. However it fails to give recognition to the peculiarities of the administrative complaint process.

The record in this complaint indicates that both the Complainant and the Respondent have made mistakes during the processing of this complaint. In retrospect, the Complainant should have amended his complaint to specifically allege a violation of the ordinance relating to the January 2, 1995 application. The Hearing Examiner's February 12, 1997 decision clearly indicates that a continuing violation theory had not been demonstrated on the record before the Hearing Examiner as of that date. The Complainant should have understood that the January 2, 1995 application could not be part of his continuing violation theory. However, in his Decision and Order, the Hearing Examiner, on the basis of the record and the arguments of the parties, indicated that the January 2, 1995 application could provide the basis for Commission jurisdiction. Given the fact that the Respondent had not objected in its argument that the January 2, 1995 application was not within the jurisdiction of the Commission because it was not referenced in the complaint, it is somewhat understandable that the Complainant may have come to the conclusion that amendment was not necessary.

The Respondent could have taken advantage of this lack of amendment at the Pre-Hearing Conference. The Hearing Examiner established the issues for hearing as "1. Did the Respondent discriminate against the Complainant on the basis of his race in refusing or denying him employment in January of 1995?" and "2. If discrimination is demonstrated, to what damages, if any, is the Complainant entitled?" The Respondent could have sought to limit the statement of the first issue to the Complainant's November, 1994 application as stated in the complaint. The Respondent did not seek this limitation or clarification. While the Respondent wished to preserve its arguments relating to timeliness, there was no indication that the Respondent intended to present this more refined

argument. The Respondent consented to the statement of the issues as framed by the Hearing Examiner and may not take advantage of the situation now.

The parties' errors, particularly that of the Complainant, may well be fatal in a judicial process. However, the requirements of procedure must be liberally and somewhat flexibly applied to accomplish the goals of the underlying legislation. While this flexible approach may be applied to encourage Complainants to bring and pursue claims under the ordinance, they must not deprive a Respondent of due process. The most important elements of due process to be protected for a Respondent are adequate notice of the claim against the Respondent in order to permit the Respondent to prepare a defense, and the opportunity to fairly put on its defense. If a Respondent is denied these two important rights, then the Respondent's rights would be violated.

In the present case, it would appear that the Respondent has had adequate notice of the claim against it. During the investigation, it provided materials to the Investigator/Conciliator relating to the January 2, 1995 application. Certainly, the Hearing Examiner's February 12, 1997 Decision and Order alerted the Respondent to the fact that the January 2, 1995 application might form the basis of a claim against it. In general, the Complainant has claimed that the Respondent has failed or refused to hire him on the basis of his race. The particulars of that claim have been the subject of two investigations, the appeal of a finding of no probable cause and discovery in preparation for hearing. The Respondent has not indicated that it does not know or understand the basis of the Complainant's claim. Under the circumstances of this complaint, the Respondent cannot reasonably contend that it has been deprived of due process as a result of a lack of reasonable notice of the nature of the claim against it.

In the context of an administrative process, the issue of notice is not so clear cut as in the judicial process. In the judicial process, there is one complaint, though potentially amendable, that drives and limits the process. In this administrative forum, the complaint filed by the Complainant is merely the beginning point in a process that refines, adds and deletes issues from consideration. Given the investigatory process, it may be more appropriate to view the Notice of Hearing to be more analogous to the complaint in the judicial setting. It is the Notice of Hearing that finally establishes the issues for hearing based upon the complete record that has come before. In this instance, the issue relating to liability is broadly stated and is not limited by reference to a specific application. As noted above, the Respondent participated in the Pre-Hearing Conference where the issues were set and consented to the particular statement. If as now, the Respondent believed that the issue was too broadly set and included claims not properly before the Commission, it should have taken steps to limit the issue.

On this record, the Hearing Examiner concludes that the Respondent has had adequate notice of the claim of liability against it and that claim reasonably includes the January 2, 1995 application. Though most claims based upon the late November, 1994 application are time barred, it is conceivable that the Complainant could present evidence demonstrating that he did not know that he had been the victim of discrimination nor could he have reasonably known of this fact until sometime after January 2, 1995. These claims would not be time barred.

The second argument for the dismissal of the complaint put forth by the Respondent is that the amended complaint superceded the original complaint and therefore the amended Initial Determination and the Hearing Examiner's review on Appeal of the Initial Determination finding that there was no probable cause to believe that discrimination had occurred render the original complaint and Initial Determination meaningless. The Respondent rests its argument on the case of Schlumpf v. Yellick, 94 Wis. 2d 504, 288 N.W.2d 834 (1980) which holds that the allegations of an amended complaint supercede the allegations of an underlying complaint and the amended complaint relates

back to the original filing date so long as the allegations of the amendment stem from the same facts and circumstance of the original complaint. The Hearing Examiner understands the importance of the Schlumpf case to be in its statement of the relation back doctrine instead of the notion of which complaint controls which. However even if the Respondent is correct in its reliance on Schlumpf, the facts surrounding this complaint undercut the effect of Schlumpf and the Respondent's related cases.

The Complainant incorporated by reference and with specificity, the allegations of his original complaint in the amended complaint. In his amended Initial Determination, the Investigator/Conciliator specifically incorporated the findings and conclusion of his earlier Initial Determination. It can hardly be more clear that both the Complainant and the Investigator/Conciliator intended to preserve the allegations of discrimination on the basis of race and the conclusion that there was probable cause to believe that such discrimination had occurred in amending the complaint and in acting upon that amendment. The actions of the Complainant and the Investigator/Conciliator in documenting the intent to preserve the findings and allegations of the original complaint overcome any preclusive effect the amendment of the complaint might have on the original complaint or allegations.

Given the incorporation of the earlier allegations and findings, those issues were not before the Hearing Examiner when the Complainant appealed the finding of no probable cause on the allegations specific to the amended complaint. The Hearing Examiner noted this fact by remanding the original issues to the Conciliator when he upheld the Investigator/Conciliator's finding of no probable cause with respect to the issues added by the amended complaint.

Accordingly, the Hearing Examiner denies the Respondent's motion(s) for the reasons set forth above. A separate notice scheduling hearing of this matter will be issued by the Hearing Examiner.

Signed and dated this 5th day of December, 1997.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner