**EQUAL OPPORTUNITIES COMMISSION**
**CITY OF MADISON**
**351 WEST WILSON STREET**
**MADISON, WISCONSIN**

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| Judith Ann Newton<br>890 Woodrow Street<br>Madison, Wisconsin 53711<br><br>Complainant<br><br>vs.<br><br>Dr. Sara Sherkow<br>Madison Area Technical College<br>211 North Carroll Street<br>Madison, Wisconsin 53703<br><br>and<br><br>Madison Area Technical College<br>211 North Carroll Street<br>Madison, Wisconsin 53703<br><br>Respondent | MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER<br><br>Case No. 2242 |

On December 12, 1975, Complainant, who had earned a masters degree in adult education and several years experience teaching in, and administering programs in adult basic education, and English as a Second Language, spoke to Respondent, Dr. Sara Sherkow, Chair of the General Studies Division of Respondent Madison Area Technical College, about possible job opportunities in her areas of qualification in the Division. By December 16, 1975, Dr. Sherkow had received from Complainant a completed application for employment, (Complainant's exhibit 1) and a resume (Complainant's exhibit 2). Subsequently, Complainant received a letter signed by Respondent Sherkow dated January 9, 1976 informing her that no openings for which she was qualified were anticipated for the next school year.

On January 20, 1976, Respondents hired Mr. Nicolo Famiglietti as a part time "coach/tutor" in the Instructional Learning Center, a facility for students in Adult Basic Education and English as a Second Language courses.

The hiring of Mr. Famiglietti and reject of Ms. Newton was the basis for the original complaint filed with the Madison Equal Opportunities Commission on March 8, 1976.

**I**

The respective burdens of proof in cases of charges of discrimination in hiring were set forth by the U. S. Supreme Court in McDonnell Douglas vs. Greene 411 US 792, 5 PEP 965 (1973) as follows:

> "(i) he belongs to a racial minority; (ii) that he applied, and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

Upon completion of a complainant's case containing some credible evidence of each of these points, the burden or proceeding passes to the respondent. I£ the respondent can show a

"legitimate nondiscriminatory reason for the discharge" (Flowers vs. Crouch Walker Corp. 14 PEP at 1269, McDonnell Douglas vs. Green 5 PEP at 969) the respondent is entitled to prevail, unless the complainant can show that respondent's nondiscriminatory reason was mere pretext for prohibited discrimination. McDonnell Douglas vs. Green 5 PEP 970.

As the court foresaw, the specific elements of those standards must be modified to accommodate differing factual situations. McDonnell Douglas vs. Green, supra at 5 PEP 969 note 13.

In this particular case the complainant must prove:

(1) that she is a female
(2) that she applied for a position for which she was qualified, and for which a job opening existed
(3) that despite her qualifications she was rejected
(4) that a male was hired.

There is no controversy as to the elements of the Complainant's case. Judith Ann Newton is a female. She did apply for positions in the Adult Basic Education Program. Parties stipulated that she was qualified for the position filled by Famiglietti. And she was rejected in favor of employing Mr. Famiglietti.

Respondent set forth two reasons for choosing to employ Mr. Famiglietti rather than Ms. Newton. Those arguments must be held to the test of "legitimate nondiscriminatory reasons for Complainant's rejection."

"Mr. Famiglietti was hired for two very significant reasons. One, on his application blank and in his conference with me in my office he stated that he had experience teaching oriental language speaking people . . . It was an experience that we need and we wanted because we had a great influx of Orientals; Vietnamese, and we needed someone who had that kind of background .

. . . Secondly, we have our own affirmative action program under which I was supposed to operate, which states (and which was accepted by the State Vocational Board) that affirmative action for us meant that we world try to equal the balance of men and women and minorities in our school. This particular program had an in ordinate number of women and we wished to hire a man to balance the program." (Testimony of Dr. Sara Sherkow)

As to the first of these asserted reasons, Mr. Famiglietti's experience with "Orientals," according to Dr. Sherkow MATC was expecting an enrollment of as many as 300 Vietnamese in its English as a Second Language courses (Testimony of Dr. Sherkow and Respondent's brief pages 6-7.

Mr. Famiglietti had apparently taught English to Japanese people at the YMCA in Yokahama, Japan for a period of 18 months.

Respondents contend "that Dr. Sherkow was Chairperson of the General Studies Division, and accordingly, was entrusted with the judgment of this type of determination and second guessing by third party experts is of no relevancy to this case." (Respondent's Brief page 7)

Respondent is correct in this assertion. Further the Examiner's function is not to "second guess" the Respondent's decisions on academic qualifications. However, when asserted superior qualifications are given as a reason for hiring a man rather than a woman (or vice versa) we "must be extremely careful at a to determine that the reasons given for selecting a male applicant over a female applicant are not simply a ruse disguising true discrimination." Pond vs. Braniff Airways, Inc. 400 F.2d. 161, ,8 FEP 659 at 662 (USCA 5th

1974) and Respondent must assume the burden of proving this justification by a preponderance of the evidence. Ostapowicz vs. Johnson Bronze Co. 13 FEP 517 at 521 (USCA 3d 1976).

The Examiner finds that Respondents have failed to carry that burden. Specifically the only evidence of the superiority of Mr. Famiglietti's qualifications is Dr. Sherkow's repeated assertion that she felt that Famiglietti's experience teaching English to Japanese people for 18 months gave him knowledge of dealing with orientals and oriental language that would be useful in dealing with the expected influx of Vietnamese students.

The uncontested evidence of two witnesses seriously undermines those assertions. First, Famiglietti was not employed to work with many Vietnamese. Ms. Jean Orellana, who occupied Famiglietti's position immediately prior to him, and who was the Coordinator of the Instructional Learning Center while Famiglietti was employed in it, testified that (1) most oriental students were enrolled in formal English as a Second Language classes; (2) Famiglietti was not assigned to teach any of those classes; (3) Ms. Orellana never worked with any oriental students while she worked as a coach/tutor in the ILC; 4) Very few oriental students made use of the ILC where Famiglietti was employed; (5) During his employment at the ILC, very few oriental students used that facility; and (6) In all probability, Mr. Famiglietti worked with no more than three oriental students while he was employed at MATC (Tape 2, Side 1).

So perhaps the projected influx of Vietnamese students would have made it useful to have persons with oriental backgrounds for some positions involving substantial contact with them. But, for the position in question, it was not.

The job Complainant was rejected for, and that which Famiglietti got, had little or nothing to do with teaching English to any oriental.

Second, the testimony of Dr. John Street, Ph.D., Professor of Linguistics and former chair of the Department of Linguistics at the University of Wisconsin, and a long time student of the Japanese language, with two years experience assisting Vietnamese in learning English, casts serious doubt on whether Famiglietti's Japanese experience was of any use in teaching English to Vietnamese.

He testified that in his opinion, Japanese and Vietnamese are "about as different as any two languages can be," and that all the problems involved in teaching English to Japanese and Vietnamese were extremely dissimilar (Tape 1, Side 2). Professor Street ended his testimony by commenting on "the unfortunate tendency, which we all have, to lump together orientals. We tend to think Japanese, Chinese, Vietnamese, Cambodians -- all the same . . .

There is no linguistic basis for putting together oriental languages, none whatever." (Tape 1, Side 2)

Further, no evidence was presented by Respondents of any cultural or other similarities between Vietnam and Japan that might justify a belief that experience with Japanese would be of any value in dealing with Vietnamese students. Dr. Sherkow stated that she was aware of the linguistic differences between Vietnamese and Japanese (Tape 5, Side 2).

Because uncontradicted evidence shows clearly that Mr. Famiglietti was not hired into a position to deal with the large influx of Vietnamese students, and that his experience did not specially fit him to deal with such student's language learning problems, the Examiner is unconvinced that Famiglietti's experience in Japan was in fact a basis for choosing him instead of Ms. Newton for the position filled on January 20, 1976.[1] Respondent has failed to prove that Mr. Famiglietti's superior qualifications were the basis for its employment decision.

Respondent's admit that sex was a significant factor in the decision to reject Ms. Newton and hire Mr. Famiglietti.

However, they attempt to defend that on the grounds that the Affirmative Action Plan for MATC mandated hiring males to balance the faculty in those departments where instructors were predominantly female, as was the case with the General Studies Division. Dr. Sherkow (see above), Norman Mitby, District Director of MATC (Tape 3, Sides 1 and 2) and Richard Harris, MATC's Affirmative Action Officer (Tape 4, Side 1) agree that the college had an informal, unwritten goal to, balance faculty, by hiring white males (as well as males of other races). These white male goals were not written into the formal Affirmative Action Plans for 1975, 1976 and 1977 because white males "were and could not be considered the group affected by discrimination." (Richard Harris Tape 4, Side 2) Some goals for hiring of males were included in the 1974 Affirmative Action Plan (Complainant's exhibit 42).

However, no such goals for General Studies Division faculty were included. So, it appears that no such goals for hiring males to balance females in ,the faculty of the General Studies Division were submitted to any State or Federal agency requiring, reviewing or approving MATC's Affirmative Action Program.

Nor was there a belief by the Affirmative Action Officer that such hiring goals for white males were required by any agency that mandated Affirmative Action by MATC. In response to the Examiner's question: "Did you think at some point that . . . increasing the proportion of white males in a given department was required by some mandated Affirmative Action program having to do with receipt of federal funds or some . . ." Richard Harris responded: "No. No." (Tape 4, Side 2)

Messrs. Mitby and Harris were also questioned about the reasons for this informal male hiring goal. Mitby testified that the reasons for the small number of males in the faculty of certain MATC programs was not related to any past practice of excluding them, but rather to the low availability of males in some areas. As an example he mentioned health care programs (Tape 3, Side 1)

Mr. Harris also agreed that the reasons for these male hiring goals were not related to redressing past discrimination. (Tape 4, Side 2)

Affirmative Action Plans granting employment preference to women and minority group members have been upheld under both Constitutional equal protection, and Title VII challenges. Associated General Contractors of Massachussetts vs. Altschuler 990 F.2d F.2d 9, 6 FEP 1013 (USCA 1st 1973) cert. den. 416 US 957. 7 FEP 1160 (1970); Contractors Association of Eastern Pennsylvania vs. Secretary of Labor 442 F.2d 159, 3 FEP 395, (USCA 3d 1971) cert. den. 404 US 854, 3 FEP 1030 (1971); Southern Illinois Builders Association vs. Ogilvie 471 F.2d 680, 5 FEP 229 (USCA 7th 1972); Taterka vs. Wisconsin Telephone Co. 395 F.Supp. 862, 10 FEP 966 (USDC EDWis 1975); McAleer vs. American Telephone and Telegraph Co. 12 FEP 1473, (USDC DC 1976); German vs. Kipp 429 F.Supp. 1323, 14 FEP 1197 (1977) and have been accepted as a defense to charges of "reverse discrimination" McAleer vs. AT&T (supra). To the best of Examiner's knowledge, this is the first case in which such an Affirmative Action Plan involving preferences for white males has been urged as a defense against a complaint of sex discrimination filed by a female.

Affirmative Action Plans have also been found to violate Title VII. Anderson vs. San Francisco Unified School District 357 F.Supp 248, 5 PEP 362 (USDC ND Cal. 1972), Hiatt vs. City of Berkely 12 FEP 937 (USDC ND Cal. 1975)

On its face, granting employment preference to members of any race or sex group is a violation of Madison General Ordinances s 3.23(7) (a) (b) which states:

> "(7) Employment Practices. It shall be an unfair discrimination practice and unlawful and hereby prohibited:
>
> > (a) For any person or employer individually or in concert with others to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

> employment, because of such individual's sex, race, religion, color, national origin or ancestry, age, handicap, marital status, source on income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, political beliefs or the fact that such person is a student as defined herein. Provided, that an employer who is discriminating with respect to compensation in violation of this subsection, shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.
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> (b) For any person or employer individually or in concert with others to limit, segregate, or classify his or her employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his or her status as an employee, because of such individual's sex, race, religion, color, national origin or ancestry, age, handicap, marital status, source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, political beliefs or the fact that such person is a student as defined herein."

However, in the cases cited above, certain circumstances have been found to justify the use of such preferences. In a Constitutional context:

> "The first Justice Harlan's much quoted observation that 'the Constitution (is colorblind) . . . (and) does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights'. Plesse vs. Ferguson 163 U.S. 537, 554, 16 S.Ct. 1138, 1145, 41 L.Ed. 256 (1896) (dissenting opinion) has come to represent a long-term goal. It is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities." Associated General Contractors of Massachusetts, Inc. vs. Altschuler supra at 490 F.2d 16
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> "There are good reasons why the use of racial criteria should be strictly scrutinized and given legal sanction only where a compelling need for remedial action can be shown. Norwalk Core vs. Norwalk Redevelopment Agency 395 F.2d 920, 931-32 (2d Circuit 1969)" Associated General Contractors of Massachusetts vs. Atschuleb supra at 17

Such strict scrutinizing of Affirmative Action programs granting some employment preference is as appropriate under the Equal Opportunities Ordinance (Madison General ordinances 3.23) and other nondiscrimination laws as in above context. And it is clear that without some showing of the need to remedy past discrimination (not necessarily an admission of past discrimination) such preferences are impermissible.

> "It is true that a voluntary program of affirmative action runs the risk of infringing unnecessarily the rights of nonminority individuals. As the Supreme Court of California stated in Bakke vs. Regents of University of California, 553 P.2d 1152, 1171 (Cal. 1976), now pending before the United Stated Supreme Court on writ of certiorari, "Originated as a means of exclusion of racial and religious minorities . . . a quota becomes no less offensive when it serves to exclude a racial majority.' In the absence of a finding of specific past discrimination requiring specific relief, there can be no doubt that an employer must make a clear and convincing showing of an acceptable basis for the affirmative action plan which is temporarily imposed and reasonable drawn to meet the demonstrated need. While such a showing admittedly places a difficult burden of justification upon an employer, this Court believes that an employer who meets that burden

> may establish the valifity of a plan which grants a preference to minorities even if it necessarily results in detriment to the majority. Whenever there is a limited pool of resources from which minorities have been disproportionately excluded, equalization of opportunity can only be accomplished by reallocation of those resources. In that process, detriment to nonminorities is inevitable. Nevertheless, the effects of discrimination in this country run deep and wise, see e.g., Oregon vs. Mitchell, 400 U.S. 112 (1970), and upon an appropriate showing, by means carefully-drawn, and temporarily-imposed to meet the requirements of Executive Order No. 11246, in attempting to remedy that discrimination, a voluntary affirmative action plan may withstand a challenge that it discriminates invidiously against members of nonminority groups. While fraught with particularly sensitive social and constitutional considerations, this conclusion appears the one most consistent with the fundamental interests of all races and with the design of the Constitution itself. Recent decisions by the United States Supreme Court support this conclusion." Germann vs. Kipp 429 F.Supp. 1323, 14 FEP 1197 at 1205 (USDC Mo 1977)
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> "Thus, any classification based on race is suspect. Such classifications have been allowed by the courts, but only to correct past discriminatory practices. In the instant case there has been no showing that the classifications and discriminations on the basis of race to be put into effect by the defendant school district, are to be undertaken to correct past discrimination.
>
> "No authority presently exists to uphold a practice which discriminates on racial or ethnic lines which is not being implemented to correct prior discriminatory situation." Anderson vs. San Francisco School District 5 FEP 362 (USDC ND Cal. 1972)

In the instant case, no such showing has been made. In fact, Respondent's Affirmative Action Officer clearly stated that white males were not discriminated against. Mr. Mitby's testimony as to the reasons why males were under-represented in some areas of MATC's faculty resolves itself to the fact that women filled most jobs, in certain areas of employment because men didn't want that kind of position.

In summary, under laws prohibiting sex discrimination in employment, an affirmative action hiring preference for one sex may only be sanctioned if a showing is made that some type of past discrimination[2] calls out for remedy.

Respondent's preference for males in the position for a which Complainant applied is not based on a desire to remedy a past inequity. Respondent has made no showing of such an inequity. Testimony of MATC's officers contradicts the existence of such a historic problem.

It appears that these unwritten, informal goals were based on a misunderstanding of affirmative action. Affirmative action is not a mechanistic balancing of ratios of employees to population, or student body, or anything else. It is a complex and extraordinary measure that is justified only by a need to overcome major historic patterns of discrimination and injustice.

Numerical tallies play a part, as a measure of progress. But they do not by themselves justify the classification of employees or applicants on the basis of race or sex. The fact that the goals for hiring of males to balance females clerical staff were removed from affirmative action plans of 1975, 1976 and 1977 and that the male hiring goals for other departments were only informal and not committed to writing, suggests that Respondents were aware of some of the problems involved in such goals.

Respondents testified to two reasons for their male hiring goals. First, students relate better to teachers of their own sex, and therefore, more male teachers were needed because the proportion of male students to female students was much greater than the proportion of male to female teachers. (Testimony of Mr. Mitby, Tape 3)

First, Respondent has not carried its burden of proving that male students would relate better to male teachers, or what significance that would have for successful teaching of English to non-English speaking adults. The only evidence is insubstantiated opinion of Respondents. That is not sufficient.

Second, such a balancing of student/staff ratios was the asserted basis for the affirmative action plan challenged in Anderson vs. San Francisco School District supra at 363. The Court rejected that basis, stating that such programs "have been allowed by the courts only to correct past discriminatory practices." supra (emphasis in the original)

Another rationale advanced (by Mr. Harris) is that increasing the number of males as both students and teachers in predominantly female professions (such as health care) would tend to increase the status and perhaps the salaries of persons in those professions. While this may be true for nursing or secretarial careers, the case here involves teaching adults to speak English, and more or less male teachers will not increase the status or pay of speaking English.

**II**

As to the charges of retaliation against Ms. Newton by Respondents, there are four separate situations discussed in the record which Complainant could have been considered for employment after she filed her original complaint of sex discrimination: (1) March of 1976 when Dr. Sherkow hired at least one part time employee (Testimony of Jean Orellana, Tape 1). Dr. Sherkow and Ms. Orellana are in agreement that Dr. Sherkow stated at that time that Complainant would not be hired because of her pending EOC complaint. The Examiner finds that Respondents excluded Complainant from consideration for employment because of her filing a charge with the EOC, and that such exclusion violates Madison General ordinances 3.23 (7) (e).

"The record indicates that Sara Sherkow by her own acknowledgement in early 1976 was under the impression that Judith Newton should not be hired at the College. Her testimony further indicates that her position was based upon advice of counsel that the status quo should not be changed, because Judith Newton had filed a complaint with various agencies. She believed that because Judith Newton was not on the staff at the time of the complaint, that putting her on the staff would be changing the status quo." (Respondent's Brief, page 11) That Respondent's actions were taken at the advice of counsel, or the misunderstood advise of counsel is not a defense against the charge of retaliation. Respondents admit that they refused to consider Complainant for part time employment in the spring of 1976, and that that refusal was based upon the filing of charges of discrimination with various agencies, among them the Madison Equal Opportunities Commission.

A different situation existed for filling two full time vacancies as Coordinator Teacher and Teacher in the Adult Basic Education Program. Complainant's exhibits 14, 16 and 17 and Testimony of Mary Celnicker (Tape 5, Side 1) Dr. Sherkow did not attempt to exclude Ms. Newton from consideration for that position. Rather, the Committee that reviewed applicants did not recommend Complainant for employment, and Dr. Sherkow did not attempt to influence that Committee. The Examiner found no retaliation involved in the selection for this position.

There is also testimony by Ms. Newton that she spoke with Dr. Sherkow during the week of August 1-7, 1976, and that during that conversation Dr. Sherkow asked Complainant whether she would drop her complaint if she were offered a full-time position. Tape 1, Side 1. This testimony is to some degree substantiated by Mr. Harris (Tape 4, Side 2), and is not denied by Respondents. However, since Dr. Sherkow was not involved in the rejection of Ms. Newton for these positions no retaliatory action can be ascribed to Respondents as a result of this conversation.

Finally, while Dr. Sherkow was on leave from MATC, Ms. Newton was hired by Herman Freymiller, Assistant Chair of the General Studies Division, who was at that time acting chair. There was no evidence of

retaliation in Mr. Freymiller's hiring of Ms. Newton. Nor was evidence presented that showed any retaliation since Ms. Newton's employment.

However, this does not rebut the evidence that retaliation occurred in March of 1976, ten months earlier.[3]

## III

In summary, the Examiner finds that the Respondents discriminated against Complainant on the basis of sex in its employment decision of January 20, 1976. Respondents failed to prove by a prependerance of the evidence that experience teaching Japanese people to speak English was a legitimate nondiscriminatory reason for the rejection of Ms. Newton and the hiring of Mr. Famiglietti.

Respondents admit that sex was a significant factor in their decision in that they gave preference to male applicants for the position in question, as part of an unwritten, informal affirmative action goal. Such preferences may be justified in order to remedy historic patterns of discrimination. However, Respondents have shown no evidence of such patterns, and in fact attribute the deficiency of males in some positions to non-discriminatory causes. Nor have Respondents provided sufficient evidence to justify their other reasons for such preferences, if indeed it is possible to justify them on any basis other than past discrimination. This constitutes sex discrimination, and is prohibited by Madison General Ordinances 3.23(7)(a)(b).

During March of 1976, Respondents excluded Complainant from consideration for employment because she had complained of sex discrimination to the Equal Opportunities Commission, as well as other agencies. This is retaliation and is prohibited by Madison General Ordinances 3.23(7)(e).

Complainant has failed to prove that her failure to be hired to fill either of the full time positions filled in August, 1976 was a result of retaliation by Respondents.

It remains to establish the appropriate actions by Respondent to bring itself into conformity with the terms of the Madison Equal Opportunities Ordinance.

Complainant in a letter to the Examiner dated September 21, 1977 stated that she seeks $7,322.64.

Leaving aside for the moment, the question of back pay and interest, the Equal Opportunities Ordinance makes no provision for payments for "child care, subpoena fees, zeroxing (sic), expert witness compensation, consulting fees and expenses, or travel, telephone, postage, notary fees, etc.," all of which Complainant requested. No such amounts shall be required of Respondent.

As to back pay, Respondent contends that Madison General Ordinances 3.23(10) (c) (3): "interim earnings or amounts earnable with reasonable diligence by the person discriminated against shall operate to reduce back pay otherwise allowable." requires that Ms. Newton's earnings as a part time teacher at Omega School be deducted from any back pay amount.

Title VII of the Civil Rights Act of 1964 contains almost identical language. "Interim earnings or amounts earnable with reasonable diligency by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 USC s2000 e-5 (g) .

The U. S. Court of Appeals for the 5th Circuit addressed the question of deduction of part time wages from back pay awards (moonlighting) in Bing vs. Roadway Express, Inc. 485 F.2d 441, 6 FEP 677 (1973).

"We are left with the problem of deciding whether Bing's moonlight earnings are interim earnings. We will not attempt a definitive construction of the term 'interim earnings.' 'Interim' is synonymous with temporary or provisional. See Webster's Third New International Dictionary (1964). If a supplemental or moonlight job is one that the discriminatee cannot perform when he wins his new position, the supplemental job is necessarily temporary, provisional or 'interim.' By contrast, if one can hold his supplemental job and his desired full time job simultaneously and there is reason to believe he will do so, the supplemental job assumes a

permanent rather than interim nature. Those earnings would be independent of the position sought and should not be taken into account in back pay calculations. Since the trial court found that it would be impossible for Bing to moonlight while working sixty to one hundred hours a week as a road driver, it correctly concluded that his moonlight earnings were interim and deductible from his back pay award. They were earnable that could continue only until he won his new position." 6 FEP at 687

Circumstances in the instant case differ from those in Bing. The job Ms. Newton applied for was only part time. Her job at Omega School was also part time. The testimony of Mr. Jerry Pockar shows that Ms. Newton could have performed both jobs simultaneously. (Tape 6, side 2) Consequently, her earnings at Omega School should not be deducted from the back pay calculated as due Complainant.

Consequently, the amount of back pay due Ms. Newton should be calculated on the following basis:

1. Complainant should be paid for twenty (20) hours per week for every week the staff was employed in the ILC from January 20, 1976 through December 31, 1976.
2. That pay should be calculated at the rate paid to an employee classified IV, I on Respondent's pay scale, the classification that she was hired in in 1977. Evidence of Mr. Mitby (Tape 6, Side 2) indicates that Ms. Newton would have been hired at that rate in 1976.
3. Back pay shall include an increase of $0.50 per hour for the time between July 12 and December 31, 1976 inclusive.
4. In addition, any additional longevity or experience pay at Complainant would have been eligible for after her hiring in 1977, had she had an additional one year of experience teaching at MATC, shall be paid for the hours worked by Complainant from January 1977 to the present.
5. Complainant shall be credited with an additional one year part time teaching experience at MATC for all purposes of benefits, salary, and competitive status, for which experience or seniority is considered. (See Franks vs. Bowman Transportation Inc.; 2 FEP 549 (US 1976)
6. Interest at the rate of 6 percent per annum shall be paid on all back pay.

[1]Complainant also introduced evidence that teaching English to non-English speakers in their own country (English as a Foreign Language) presents different problems than teaching it to non-English speakers in an English speaking country (English as a Second Language). Mr. Famiglietti's experience was with English as a Foreign Language. Whether or not the differences are so great as to render Famiglietti's experience irrelevant to English as a Second Language program is not so clear as to support a finding to that effect.

[2] This does not imply that an employer need admit individual violation of the law in order to engage in affirmative action. But as Germann vs. Kipp supra points out, it must be able to make a showing of such past practices and their current effects, as will justify use of an employment preference that would otherwise be illegal. Such past actions need not even be attributable to the employer. In Associated General Contractors supra the court found discrimination y the building trades unions sufficient to justify affirmative action by the State of Massachusetts and its construction contractors.

[3]Respondents manifest some concern and consternation that Dr. Sherkow is being labeled a misogynist by this complaint. That is not the case. There is absolutely no proof of such an attitude on the part of Dr. Sherkow. Nor is there any need to find such attitudes on the part of Respondents (Rowe vs. General Motors 457 F.2d 348, 4 FEP 445, USCA 5th 1972). Evidence in this case proves two specific policies that violate the Equal Opportunities ordinance: One, an unwritten and unjustified affirmative action preference for white men; and two, a policy of refusing to consider for employment, persons who have pending complaints with the EOC. These specific policies are all that is involved here.

Respondents in their brief (page 13) refer to an ex parte communication from Complainant to the Examiner concerning damages. It appears that they refer to this letter. To refer to it as an ex parte communication seems inaccurate. A copy of the letter was sent to Respondent's attorney (see letter of Judith Newton, September 21, 1977). In addition, Mr. Johnson received a letter from Examiner (see letters of Robert L. Greene dated September 29, 1977) stating that "I will not consider Ms. Newton's September 21, 1977 letter as evidence of any sums involved. However, I will accept the letter as Complainant's argument as to what evidence at hearing proved were proper sums. In other words, it will be considered as would a brief. If Respondent wishes to submit its calculations it may do so." Respondents were fully aware of the letter, and have had every chance to respond. Examiner is unaware of any definition of ex parte communication that would embrace such circumstances.

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## FINDINGS OF FACT

1. Complainant is a female.
2. At the time of and subsequent to the events complained of, Complainant resided in Madison, Wisconsin.
3. Respondent Madison Area Technical College employs persons at 211 North Carroll Street and other locations within the city of Madison.
4. Respondent Sherkow is an employee of MATC, and was acting in that capacity in connection with the events complained of.
5. On December 12, 1975 Complainant Judith Ann Newton received an application for employment in the MATC General Studies Division from Dr. Sara Sherkow.
6. By December 16, 1976 Dr. Sherkow, Chairperson of the General Studies Division, received that application along with a letter and resume from Complainant.
7. Dr. Sherkow sent a letter to Ms. Newton dated January 9, 1976 stating inter alia "at this time we do not anticipate a need for either new or replacement staff in your area for the next school year."
8. On January 30, 1976, Mr. Nicolo Famiglietti was hired as a part time Coach/Tutor for the Instructional Learning Center (ILC) in the General Studies Division. At least a portion of the function of the Center is to assist persons learning the English language.
9. Parties have stipulated that Complainant was qualified for this position.
10. In January, 1976, MATC had a formal, written affirmative action plan which did not include goals or timetables for hiring males as faculty members in divisions in which females make up the bulk of the faculty.
11. Respondents admit that MATC did have a "philosophy of affirmative action that aimed at hiring males in order to balance the faculty in divisions where the faculty was predominantly female."
12. Respondents admit that sex was a major factor in hiring Mr. Famiglietti for the Coach/Tutor position. They wished to employ a male in order to "balance the faculty" as a consequence of the informal, unwritten affirmative action program discussed in Finding 11.

13. The great majority of Vietnamese and other oriental students learning English at MATC in 1976 were enrolled in formal English as a Second Language classes.
14. Nicolo Famiglietti at no time was assigned to teach English as a Second Language classes at MATC.
15. The number of oriental students that Mr. Famiglietti came in contact with in his job at the ILC was very small. Perhaps as low as two or three oriental students during his entire employment.
16. The Vietnamese and Japanese languages are linguistically very dissimilar, belonging to completely different categories of languages with regard to crucial elements of the entire structure of language.
17. The problems involved in teaching English to Vietnamese speakers and Japanese speakers are entirely different.
18. Prior to his employment at MATC, Nicolo Famiglietti had spent eighteen (18) months teaching English to Japanese at a YMCA in Yokohama, Japan.
19. On the basis of Findings 13, 14, 15, 16 and 17, the Examiner finds: (1) that the ILC Coach/Tutor position which Complainant applied for and Famiglietti received, did not involve significant contact with Vietnamese refugees; (2) that Respondents have not shown any evidence that experience teaching English to Japanese persons is particularly useful in teaching English to Vietnamese persons.
20. Sometime during the week of March 15, 1977, Sherkow requested Ms. Jean Orellana, Coordinator of the ILC, to recommend persons to fill a vacancy as Coach/Tutor in the ILC.
21. Ms. Orellana recommended, among others, Complainant.
22. Dr. Sherkow informed Orellana that Ms. Newton could not be considered for employment while her complaint with the Madison Equal Opportunities Commission was pending.
23. Complainant was not hired by Respondents at that time.
24. During the summer of 1976, Complainant applied for three full time positions (Coordinator/Teacher and two teacher jobs) in Adult Basic Education in the General Studies Division of MATC.
25. A committee consisting of Anh H. La, Felipe Banuelos, Robert Brien, Mary B. Celnicker, Mike Chosa, and Dolores Greene recommended that Respondents offer the available jobs to: Jean Orellana, Jan Bigalke and Ella Strother. (Complainant's exhibit 17.) It appears that those persons were subsequently employed.
26. There is no evidence that Respondent Sherkow attempted to influence the members of the committee named in Finding 25 with respect to the employment of Ms. Newton.
27. In January 1977 while Dr. Sherkow was on leave from MATC, Mr. Herman Freimiller, acting Chair of General Studies Division, hired Ms. Newton.

## CONCLUSIONS OF LAW

1. The Complainant is a person within the definition of Section 3.23 Madison General Ordinances.
2. Respondent is a person and employer within the definition of Section 3.23 Madison General Ordinances.
3. As to the initial charge of sex discrimination in hiring, Complainant has established a prima facie case of sex discrimination: that case consisting of her sex; her qualifications for an available job with Respondent; her application for that job; her rejection; and the employment of a person of the opposite sex.
4. Respondent has failed to prove by a preponderance of the evidence that Nicolo Famiglietti's experiences in Japan amounted to a superior qualification for the position available, or that his qualifications were a legitimate nondiscriminatory reason for his selection rather than Ms. Newton.
5. Affirmative action employment preferences for persons of a given race or sex may only be justified in order to remedy past discriminatory patterns. Respondents have failed to show any such justification for its affirmative action preference for white males.
6. Respondents have not justified such a preference in programs teaching English to foreigners on the basis of student faculty ratio or improving status or salary of female dominated professions.
7. Respondents have not carried their burden of establishing any legitimate nondiscriminatory reason for the hiring decision complained of.

8. Respondents then have engaged in sex discrimination prohibited by Section 3.23(7)(a)(b) of the Madison General Ordinances.
9. Respondents excluded Complainant from any consideration for employment in the General Studies Division in March 1976. This constitutes retaliation for filing a complaint with the EOC in violation of Section 3.23(7)(e) of the Madison General Ordinances.
10. Complainant has failed to prove any negative actions taken by Respondents in regard to her application for full time employment in the summer of 1976 related to her charges of discrimination. No violation of Section 3.23(7)(e) is found in regard to those employment decisions made by Respondents during that time.
11. Back pay should be calculated on the basis of what the Complainant would have made had she been employed.
12. Sums earned by Complainant from her job at Omega School should not operate to reduce back pay in the circumstances of this case.

ORDER

It is hereby ordered that within fifteen (15) days after this order becomes final:

1. Respondent MATC shall pay to Complainant back pay calculated as follows:
   A. Complainant should be paid for twenty (20) hours per week for every week the staff was employed in the ILC from January 20, 1976 through December 31, 1976.
   B. That pay should be calculated at the rate paid to an employee classified (IV, I) on Respondent's pay scale, as of January 20, 1976.
   C. Back pay shall include an increase of $0.50 per hour for the time between July 12 and December 31, 1976 inclusive.
   D. In addition, any additional longevity or experience pay that Complainant would have been eligible for after her hiring in 1977, had she had an additional one year of experience teaching at MATC, shall be paid for the hours worked by Complainant from January 1977 to the present.
   E. Interest at the rate of 6 percent per annum shall be paid on all back pay.
2. Respondent MATC shall credit Complainant with an additional one year part time teaching experience at MATC for all purposes of benefits, salary, and competitive status, for which experience or seniority is considered.
3. Respondents shall cease and desist from granting employment preferences to males in those positions that are predominantly filled by females. This does not prohibit the employment of males in any position. However, no affirmative action preference for males on the basis of their sex is permitted.
4. Proof of compliance with the above order shall be submitted to the Equal Opportunities Commission within twenty (20) days after this order becomes final.

It is so ordered. BY COMMISSIONERS: Baum, Crawford, Dunham, Gassman, Goldstein, Hall, Kelly, Litvak, Sperstad, and Yeadon. DISSENTING: none. ABSTAINING: none.

Respondents exceptions to the Recommended Findings of Fact, Conclusions of Law and Order denied. BY COMMISSIONERS: Baum, Crawford, Dunham, Gassman, Hall, Kelly, Litvak, Sperstad, and Yeadon. DISSENTING: none. ABSTAINING: Goldstein.

Complainant's additional exceptions to the Recommended Findings of Fact, Conclusions of Law and Order denied. BY COMMISSIONERS: Baum, Crawford, Dunham, Gassman, Goldstein, Hall, Kelly, Litvak, Sperstad, and Yeadon. DISSENTING: none. ABSTAINING: none

Dated at Madison, Wisconsin this 20th day of February, 1978.

John J. Kelley, President
EqualOpportunities Commission