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

| | |
|---|---|
| Robert A Vogt<br>3326 E. Washington Ave.<br>Madison WI 53704<br><br>Complainant<br><br>vs.<br><br>Best Buy Stores, L.P<br>P.O. Box 9312<br>Minneapolis MN 55440<br><br>Respondent | HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER<br><br>Case No. 22749 |

This matter came before Hearing Examiner Clifford Blackwell, III on September 29, 1998, for a public hearing on the merits of the complaint. The Complainant, Robert Vogt, appeared in person and by his attorney, Richard Rice of the law firm of Fox and Fox. The Respondent, Best Buy, appeared by its corporate representative, Deb Mohr, Regional Operations Manager, and by its attorney, Charles O. Lentz. Based upon the record of the proceedings in this matter, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order:

## RECOMMENDED FINDINGS OF FACT

1. The Complainant is an individual with various lifting restrictions resulting from injuries suffered in a automobile accident. He also has certain cognitive limitations apparently stemming from the same accident.
2. The Respondent is a retailer of various electronic and home products that operates two stores in Madison, Wisconsin.
3. The Complainant began employment as a Repair Technician with the Respondent on or about January, 1992. Previously, he had been employed by Snyder Organ Service repairing organs and keyboards. The injuries suffered by the Complainant in the 1988 automobile accident limited his ability to repair organs and necessitated his change of employment.
4. From the beginning of his employment with the Respondent, the Respondent knew of the Complainant's physical limitations. The Respondent received some form of governmental credit based upon its hiring the Complainant as a disabled individual. The Complainant also told his supervisors about his limitations and the automobile accident that caused those limitations.
5. The Respondent generally accommodated the Complainant's physical limitations. However, during high volume sales and repair periods such as around the Christmas holiday, the Complainant some times was not able to utilize the accommodation provided for by the Respondent. The Respondent did not assure that the Complainant was able to be accommodated at all times.
6. The Complainant did not inform any supervisor or manager of any cognitive disability that he had or believed he had. Whatever cognitive limitation the Complainant had was not apparent to his supervisors or managers.

7. The Complainant had difficulty completing paperwork throughout his employment with the Respondent. This difficulty was present at the Complainant's previous employment, but the Complainant's previous employer agreed not to disclose the Complainant's limitations in any reference that it gave.
8. In 1996, the Respondent began requiring more precise paperwork as it attempted to make its repair facilities into a profit center. The Complainant had greater difficulty with the new paperwork requirements. What made the paperwork especially difficult for the Complainant was taking information from several sources and synthesizing it into a single report. The Complainant received training provided by the Respondent, but still had difficulty with the paperwork. He was able to provide sufficient information to give the Regional Manager, Deb Mohr, an idea of what the Complainant was doing, though the forms were not correctly completed.
9. In January, 1997, Deb Mohr was performing an audit of the Respondent's store at 2452 East Springs Drive, Madison, WI. When she became aware that the Complainant's paperwork was incomplete, she asked how the Complainant was able to complete the weekly forms if he was not completing the daily forms. The Complainant told Mohr that he "made them up."
10. Mohr understood the Complainant to mean that he fabricated the data used to complete the weekly forms. She was upset and told the Complainant that she would need to discuss that information with others. Mohr determined that the Complainant should be terminated for falsifying information. Before the Complainant could be told of his termination on his next shift, he slipped and fell injuring himself enough to require several weeks off.
11. While on leave, the Complainant made a concerted effort to learn the paperwork system being used by the Respondent. Upon his return to work, Mohr terminated the Complainant's employment before he had an opportunity to demonstrate that he would be able to properly complete his paperwork.
12. The Complainant was terminated for Mohr's perception that he was falsifying data on weekly work forms. Mohr's perception was wrong, however the Complainant's physical disability nor his alleged cognitive disability did not play a role in Mohr's actions.

## CONCLUSIONS OF LAW

13. The Complainant is a member of the protected class "disability" by virtue of his lifting restrictions arising from an automobile accident in 1988.
14. The Complainant is not a member of the protected class "disability" by virtue of his alleged cognitive disability. The record lacks proof of the disabling condition or that the Complainant had a record of such a disability or that the Complainant was perceived as having such a disability.
15. The Respondent is an employer within the meaning of the Madison Equal Opportunities Ordinance.
16. The Respondent did not violate the Madison Equal Opportunities Ordinance when it terminated the Complainant's employment on February 7, 1997. The Respondent's explanation for its termination of the Complainant's employment, albeit mistaken, is a legitimate, nondiscriminatory explanation for the termination.
17. The Complainant failed to rebut the Respondent's explanation.

## ORDER

The complaint is hereby dismissed. The parties shall bear their own costs and fees.

## MEMORANDUM DECISION

The Commission in cases such as this utilizes the McDonnell Douglas burden shifting paradigm. In this approach to analyzing a record, the Hearing Examiner first determines whether the Complainant has established each of the elements of a prima facie claim of discrimination.

If the record contains sufficient evidence to support a prima facie case, the burden then shifts to the Respondent. The Respondent's burden is to present a legitimate, nondiscriminatory reason for it action. The Respondent's burden is merely one of articulation not of proof.

Presuming that the Respondent carries its limited burden, the burden shifts back to the Complainant to establish that the explanation proffered by the Respondent is either not credible or is otherwise a pretext for discrimination. This places the ultimate burden of proving discrimination on the Complainant.

Under the ordinance, a prima facie case of discrimination requires proof of the following elements: 1) membership in a protected class, 2) an adverse employment action and, 3) demonstration of a motivating link between membership in a protected class and the adverse action. Gardner v. Wal-Mart Vision Center, MEOC Case No. 22637 (Ex. Dec 3/6/01). Unless specifically required by the provision of the ordinance, the Commission does not require more elaborate elements of proof.

In the present case, there is no question that the Complainant suffered an adverse action when he was terminated. Termination of employment is a clear example of an adverse action covered by the ordinance.

The remaining elements are somewhat in doubt however. While there is no doubt that the Complainant had a physical disability stemming from injuries received in an automobile accident, there is a significant question about the existence or at least the Respondent's knowledge of the cognitive disability that the Complainant claims. Also, there are significant questions about the alleged link between the Complainant's disabilities and the Complainant's termination.

As noted above, there is no real question that the Complainant had a physical disability within the meaning of the ordinance. The Complainant's personnel file contains documentation of the Respondent's entitlement to a tax credit or other benefit by virtue of the Complainant's disability. The precise nature of the recognised disability is not clear from the personnel records.

Testimony of several witnesses for the Respondent made it clear that the Respondent was aware of the Complainant's physical disability and limitations on his ability to lift large or heavy objects. The Complainant's direct supervisors and other managers were aware of the Complainant's limitations. It appears that the Respondent generally allowed the Complainant to alter his duties in order to accommodate this physical disability. These accommodations may not have been adhered to as strictly as the law requires.

Around holiday periods, which were particularly busy and hectic for the Respondent, the Complainant may have not felt that he could follow his restrictions in order to keep up with the work assigned to him. The Respondent did nothing to assure that the level of the Complainant's work did not violate the apparently agreed upon restrictions. Despite this apparent violation of the duty to accommodate, this does not form a basis for the allegations of this complaint. The Complainant makes no allegation that these occasional failures to accommodate played any part in the Complainant's termination.

The question of the Complainant's cognitive disability is more of a question. There is nothing in the record from any medical expert detailing the nature, extent or limitations of the cognitive disability.

The testimony of the Respondent's witnesses is uniformly that they were unaware of the Complainant's cognitive disability.

It seems clear on this record that the Complainant had difficulty completing some forms of paperwork relating to his job. The Complainant did not inform anyone at the Respondent that his difficulties in completing paperwork were a result of a cognitive or any other disability. The fact that several managers of the Respondent were aware that the Complainant was having difficulty completing paperwork does not place the Respondent on notice that the Complainant has a disability or require the Respondent to make any inquiries into the reasons for the Complainant's difficulties. A reasonable employer with a good employee might take the initiative to determine why that employee was having a problem, but the ordinance does not require such investigation by the employer.

On this record, the Hearing Examiner concludes that the Respondent did not know of the Complainant's cognitive disability. Despite the Complainant's apparently obvious scarring and his accounts of the automobile accident that injured him so gravely, the Complainant did not specifically inform any of his supervisors or any other manager of the specifics of his cognitive limitations. As noted above, the problems experienced by the Complainant and observed by supervisors are insufficient to give notice of a disability. Nothing in the record supports a conclusion that the Respondent perceived the Complainant to have a cognitive disability. The problems experienced by the Complainant in completing paperwork are not so unusual so as to give rise to an inescapable conclusion that the Complainant must have an undisclosed disability. There was no discussion in the work place indicating that the Complainant had a cognitive disability. In short, it appears that the Complainant struggled in silence with this problem.

If the Respondent did not know of the Complainant's disability, then any action it took could not have resulted from the Complainant's membership in a protected class. Rhone v. Marquip, MEOC Case No. 20967 (Ex. Dec. 7/31/89). Knowledge of one's membership in a protected class is a prerequisite to a finding of discrimination. One cannot be motivated by a condition unless one is aware of the existence of that condition. In Rhone, a person who was never seen in person by the individual making a hiring decision and where the application contained no information about the applicant's race, the Complainant could not make out a claim for discrimination. Even though the applicant spoke on the telephone to the hiring official, the quality and texture of the Complainant's voice did not give rise to a finding of knowledge of the Complainant's race.

The Respondent's lack of knowledge of the Complainant's cognitive disability makes a finding of discrimination under the ordinance impossible. Not knowing of the cognitive disability means that the Respondent could not have acted on the basis of that disability. The Complainant fails to establish one of the most important elements in his prima facie claim.

In reaching this conclusion, the Hearing Examiner does not find that the Complainant does not have a cognitive disability. Certainly, the Complainant may well have a condition that rises to the level of a disability. However, the fact and extent of a cognitive disability that would trigger the provisions of the ordinance have not been established.

Equally, even if the Complainant had established the existence of such a cognitive disability, the record fails to demonstrate that the Respondent had knowledge of the disability. Without that knowledge, the Respondent cannot have acted in any part because of the disability. The statement by the Complainant to Deb Mohr that he made up the information necessary to complete the weekly activity form in no way implicates the Complainant's alleged cognitive disability.

Terminating the Complainant because the Respondent believed that he was falsifying data in order to complete his paperwork represents a legitimate, nondiscriminatory explanation for the Respondent's conduct. While the Complainant's statement might be read to indicate that he completed his paperwork after the fact, the Respondent's interpretation is at least as plausible, if not more so.

Accepting that the Respondent's explanation represents a legitimate, nondiscriminatory one, the Complainant can still prevail if he demonstrates that the Respondent's explanation is either not credible or is otherwise a pretext for another discriminatory reason. However, nothing in this record indicates that the Respondent's proffered reason is either not credible nor a pretext for discrimination. While the Respondent's explanation may demonstrate a misunderstanding of the Complainant's statement about making up the results at the end of the week, the Respondent's understanding is not unreasonable or irrational. There is no indication on this record that the Respondent had any particular interest in ending the Complainant's employment or had otherwise targeted individuals with disabilities for termination or harsh treatment. The Respondent may well have acted quickly and harshly in terminating the Complainant without first exploring the Complainant's statement or the underlying documents, but it does not demonstrate a discriminatory intent.

The ordinance and other civil rights laws cannot and do not protect employees from ill-considered decisions or ones that reveal a lack of imagination or humanity on the part of a Respondent. It only protects an employee from acts based upon the employee's membership in enumerated protected classes.

Signed and dated this 26th day of March, 2001.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner