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

Glenn N. Rogers 2329 Allied Drive Madison, Wisconsin 53711 Complainant vs. Stop-N-Go of Madison, Inc. 2934 Fish Hatchery Road Madison, Wisconsin 53713 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 2437

A complaint in the above-entitled matter was filed with the Madison Equal Opportunities Commission (MEOC) on May 15, 1978 alleging discrimination on the basis of age and handicap in regard to discharge in violation of Section 3.23, Madison General Ordinances.

Pursuant to an investigation of the complaint by MEOC Investigations Supervisor Frederick A. Petters, an Initial Determination dated September 7, 1979 was issued finding No Probable Cause to believe that unlawful discrimination had occurred on the basis of either age or handicap in regard to discharge. The Complainant appealed the Initial Determination and subsequent to a review by the Hearing Examiner, an Examiner's Review of Initial Determination dated July 3, 1980 was issued. The Examiner's Review affirmed the finding of No Probable Cause on the basis of age and reversed the finding of No Probable Cause on the basis of handicap.

The age issue was not appealed within ten (10) days and was consequently dismissed.

Conciliation was waived or unsuccessful regarding the handicap issue, and the matter was certified to public hearing. A hearing was held on October 15, 1980. Appearing on behalf of the Complainant was Attorney Jeff Scott Olson of Julian and Olson, S.C., and the Complainant also appeared in person. Appearing on behalf of the Respondent was Attorney John M. Capron of Fisher and Phillips (Atlanta, Georgia) who was moved for admission to practice before the MEOC by a local attorney, Attorney Donald F. Mitchell.

Based upon consideration of the record of the hearing and the briefs filed by the parties (including a posthearing brief and reply brief filed by each party), the Examiner proposes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Glenn N. Rogers, is an adult male residing in the State of Wisconsin.
2. The Respondent, Stop-N-Go of Madison, Inc., is a corporation doing business in the City of Madison.
3. Rogers was hired by the Respondent in February, 1972 as a manager trainee.
4. Rogers was later promoted to a store manager position and operated Respondent's Store 257 which is located within the City of Madison.
5. Sometime prior to the winter of 1976-77, Rogers began suffering from gout, high blood pressure and high cholesterol. He was overweight when hired.
6. Rogers saw a Dr. William Rock for treatment of all the conditions described in Findings of Fact 5 above.
7. During the winter of 1976-77, the Complainant began to experience episodes of faintness and dizziness. He sought treatment from Dr. Rock for these episodes and Dr. Rock prescribed medications which the Complainant began to take.
8. In January of 1977, one of the episodes of faintness and dizziness occurred at work and caused Roger Holmes, the Respondent's supervisor, to relieve the Complainant of his duties and send him home.
9. Rogers was told by Dr. Rock that the January incident (described in Findings of Fact 8) was caused by his (Rogers) working too many hours at the store.
10. The Complainant discussed the January incident with company officer Roy Johnson.

11. The Respondent instructed the Complainant not to take his medications (referred to in Findings of Fact 7) prior to work or while on duty. Rock had prescribed he take a dosage once in the morning and once at night.
12. The Respondent requested and received permission to inspect Dr. Rock's medical records.
13. On May 24, 1977, the Complainant again suffered a fainting and dizziness episode. He appeared glassy-eyed, had slurred speech, had trouble walking and was not able to communicate with his superiors. He was sent home pursuant to Holmes instructions, and Holmes told Rogers to stay home until May 27 when he was discharged.
14. The next time Rogers saw Dr. Rock was on May 31. Rock was out of town on May 24, 1977 and his partner, Dr. Armstrong, advised Rogers' wife to let him sleep unless an emergency arose.
15. Rogers was never diagnosed as having hypoglycenia by Dr. Rock. Dr. Alan S. Levine examined Rogers on June 8, 1979 and believed Rogers probably had hypoglycenia in October, 1977.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of a protected class, handicap, within the meaning of Section 3.23, Madison General Ordinances.
2. The Respondent is an employer within the meaning of Section 3.23, Madison General Ordinances.
3. The Respondent did not discriminate against the Complainant on the basis of handicap by discharging him in May of 1977.

RECOMMENDED ORDER

That this case be and hereby is dismissed.

OPINION

Prior to rendering my opinion on the merits, I will address the Respondent's motion to dismiss on the grounds that the Complainant filed an untimely charge. Said motion is first raised in the Respondent's brief. Briefly, at the time the Complainant's charge was filed on May 15, 1978, there was no time limit expressly stated in the ordinance for filing charges.[1] The Complainant filed his charge 355 days after his discharge, the alleged discriminatory act. Although Section 3.23, Madison General Ordinances was amended in June, 1979 to include a 300-day time limitation, the effective filing limitation in May, 1978 would have been two (2) years.[2] Further, the "two-year" processing rule[3] in effect in 1978 was advisory and not mandatory[4] (this rule was eliminated in the June, 1979 ordinance revision). The motion to dismiss on the grounds of untimely filing is DENIED.

I. Merits

The Complainant's essential contention is that he was handicapped at the time of his discharge on May 27, 1977, and that the employer was in violation of the Madison anti-discrimination ordinance by discharging him prior to his being properly diagnosed and treated for his handicap, the source of his employment problems. The Complainant allegedly suffered from hypoglycenia.[5]

The Complainant suffered two major spells at work, one in January and one in May. Each spell or incident of fainting and dizziness incapacitated the Complainant and prevented him from working. He had to be sent home after each. Between January and May, the Respondent obtained a release of Roger's medical records and questioned the Complainant regarding the nature of his problems. The Complainant reported that he was tired and was working too many hours, an explanation he had received from his doctor. The Respondent did instruct the Complainant to alter the times he took his diet pills.

After the May 24, 1977 incident, the Respondent discharged the Complainant on May 27, 1977, four days prior to his going to see Dr. Rock. Even had the Respondent accommodated Rogers and waited for him to see a doctor, the Respondent would have known nothing more on May 31 than he knew on May 27.

While it was improper for the Respondent to instruct Mr. Rogers to take his pills at a particular time (certainly, the Respondent's employees do not hold themselves out as practitioners of medicine), there has been no adequate showing that the diet pill instructions had anything to do with Rogers' problems in May (indeed, he had the same problem in January prior to the instructions). The Respondent, while knowing about Rogers' high blood pressure, high cholesterol and his weight problem[6] had no reason to believe these were the causes of his fainting and dizziness. Rogers' own doctor felt that the cause of the problems were tiredness and overwork. And it is unreasonable to have expected the Respondent to have waited until 1979 to find out that Rogers had hypoglycenia in 1977.[7] Also, there are problems with the evidence regarding Levine's diagnosis: he saw Rogers for only 70 minutes 2 years after his episodes and than not appearing at the hearing (although his secretary appeared to authenticate the documents).[8]

The Respondent's motion for costs and attorney's fees is denied, as there is no express ordinance authority to make such awards, and this case is hereby dismissed.

Signed and dated this 16th day of July, 1981.

Allen T. Lawent
Hearing Examiner

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[1]See amended version of Section 3.23, Madison General Ordinances adopted October 18, 1977.

[2]See Section 893.21(4), Wis. Stats. 1977 prescribing a two-year filing limitation for "an action to recover a penalty . . . imposed by ordinance . . . when no other limitation is prescribed by law."

[3]See Section 3.23(10)(c)2., Madison General Ordinances (same version as referred to in Footnote 1).

[4]See Northport Apartments v. EOC, et. al., No. 80 CV 2680 (Dane County Circuit Court, Hon. P. Charles Jones, March 20, 1981) and State ex rel Badger Produce Co., Inc. v. EOC, No. 79 CV 4405 (Dane County Circuit Court, Hon. George R. Currie, September 2, 1980). Both cases contravene City of Madison v. CAC, No. 161-291 (Dane County Circuit Court, Hon. Richard Bardwell, August 31, 1979) which held the two year provision to be mandatory. I adopt the reasoning in Northport and Badger Produce that the "2-year" rule was in fact advisory.

[5]There is no need to make a finding as to whether hypoglycemia is a handicap within the meaning of Section 3.23, Madison General Ordinances, as such a finding has no bearing on the outcome of this case.

[6]There is no need to reach the issue of whether either high cholesterol or a weight problem constituted a handicap. High blood pressure is a handicap. Milwaukee County (Civil Service Commission) v. LIRC (Lade), No. 154-498 (Dane County Circuit Court, Hon. George R. Currie, September 7, 1978) and Milwaukee County (Civil Service Commission) v. DiLHR (Janssen), No. 154-498 (Dane County Circuit Court, Sachtjen, October 20, 1977).

[7]Although the facts in Colovic v. Wisconsin Electric (LIRC, 8/30/78) are somewhat different, that case supports the proposition that an employer who lawfully terminates an employee is not obligated to rehire or hold a job open for a handicapped person who later makes a complete recovery.

[8]Levine's diagnosis, while admissible as a hearsay exception, is not as critical to the findings in this matter as Rock's. The Respondent could have only been expected to know Rock's diagnosis and was not obligated to hold the job open for two years (see Footnote 7). Even if Levine's diagnosis was correct, and even if the Complainant is now cured and healthy (which I hope so), it came too late.