

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

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| <p>Gordon Robbins<br/>2117 Linden Avenue<br/>Madison, Wisconsin 53704</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Walsh Clinic<br/>2018 North Sherman Avenue<br/>Madison, Wisconsin 53704</p> <p style="text-align: center;">Respondent</p> | <p>FINAL ORDER</p> <p>Case No. 2512</p> |
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The examiner issued his Recommended Findings of Fact, Conclusions of Law and Order on October 10, 1980. Timely exceptions were filed, written arguments were submitted, and oral arguments were heard.

Based upon a review of the record in its entirety, the Madison Equal Opportunities Commission issues the following:

**ORDER**

That the examiner's decision is reversed and modified as follows:

- a. Conclusion of Law 3 is vacated and the following is substituted therefor:

Respondent did not discriminate against Complainant on the basis of sex in violation of sec. 3.23 of the Madison General Ordinances by failing to hire the Complainant as a medical technologist because sex was a bona fide occupational qualification for the job.

- b. Conclusion of Law 4 is deleted.

- c. Recommended Order 1 is deleted and the following is substituted therefor:

That this matter be and hereby is dismissed.

- d. Recommended Order 2 and 3 are each deleted. That as modified the decision of the examiner shall stand as the FINAL ORDER herein.

Commissioners Basurto, Bell, Gassman, Perkins and Swamp join in reversing the examiner's decision in the manner stated above.

Commissioners Goldstein and Ware dissented from the majority. Commissioners Brown, Fineman, Hall and McShan did not participate.

Signed and dated this 20th day of February, 1981.

Roberta Gassman  
President of the Equal Opportunities Commission

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Attached are the Recommended Findings of Fact, Conclusions of Law, and Order of the Equal Opportunities Commission's Hearing Examiner. The Rules of the EOC provide for appeal of this decision in the following terms:

10.1 "Either party may appeal the recommended findings of fact, conclusions of law and order of the Commission's designee within ten (10) days after receiving them by filing written exceptions to such findings, conclusions, or order.

10.2 "If neither party appeals the recommended findings of fact, conclusions of law, or order within ten (10) days, they become final findings, conclusions and order of the Commission."

This Notice, Findings, Conclusions of Law and Order have been sent to both parties by certified mail, with a dated receipt. Any appeal from these Findings, Conclusions and Order must be postmarked or delivered at the offices of the EOC within ten (10) days of the date of receipt.

Dated at Madison, Wisconsin this 10th day of October, 1980

Allen T. Lawent  
 Hearing Examiner

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| Gordon Robbins<br>2117 Linden Avenue<br>Madison, Wisconsin 53704<br><br>Complainant<br><br>vs.<br><br>Walsh Clinic<br>2018 North Sherman Avenue<br>Madison, Wisconsin 53704<br><br>Respondent | RECOMMENDED FINDINGS OF FACT,<br>CONCLUSIONS OF LAW AND ORDER<br><br>Case No. 2512 |
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A complaint in this matter was filed on June 18, 1979 with the Equal Opportunities Commission alleging discrimination on the basis of sex in regard to employment--due to failure by Respondent to hire Complainant as a medical technologist--in violation of Section 3.23 of the Madison General Ordinances.

An Initial Determination of Probable Cause was issued on December 28, 1979 by Renee Caldwell who had been assigned to investigate this matter.

Conciliation was waived or unsuccessful, and the case was certified to public hearing on March 4, 1980.

A hearing was held in this matter on August 7, 1980. Present were the Complainant in person, Dr. Eugene Walsh as a representative employed by or with Respondent, and Attorney Jeffrey J. Grady of Kuemmel and Beilke, S.C., on behalf of Respondent.

Based on the record of the hearing, the following Recommended Findings of Fact, Conclusions of Law and Order are proposed:

### RECOMMENDED FINDINGS OF FACT

1. Gordon Robbins is an adult male who was supporting one child in May 1979.
2. Walsh Clinic, Inc., is a clinic doing business in the City of Madison.
3. Walsh Clinic employs two male doctors, Dr. Eugene Walsh and Dr. Leroy Walsh. They are the only two doctors at the clinic.
4. On March 22, 1979, the Complainant applied for a job as a medical/laboratory technologist for the Walsh Clinic. Such application was in response to an ad placed with Wisconsin Job Service.
5. Later that Spring, but prior to May 1, 1979, a Barb McCarrier applied for a job with Walsh Clinic in response to the same job announcement that Complainant had answered. Ms. McCarrier was the only other job applicant besides Complainant.
6. Dr. Eugene Walsh interviewed Complainant for the position, and discussed the hiring decision with his brother, Dr. Leroy Walsh.
7. The announcement at Job Service contained no preference as to the sex of the applicant, and indicated that employment was available on either a full-time or part-time basis for a person to perform primarily laboratory work.
8. The position was vacant because of Respondent's belief that one Bev Crary, a "full-time" employee, and one Lori Gassman, a "half-time" employee, would be leaving Walsh Clinic.
9. Prior to the time the hiring decision was made, Respondent became aware that Bev Crary would not be leaving.
10. Lori Gassman did leave Respondent's employ.
11. Respondent hired Barb McCarrier to replace Lori Gassman.
12. Ms. McCarrier was hired to perform primarily laboratory work and to assist elsewhere in the Clinic on a fill-in basis for approximately 20 to 30 hours per week.
13. Dr. Leroy Walsh stated to Complainant that the reason for not hiring Complainant for the position was that some Walsh Clinic female patients stated they would be reluctant to be served by a male technologist.
14. Barb McCarrier had attended Marquette University but did not have a degree and had three years of work experience as a medical technologist.
15. Barb McCarrier began work on May 7, 1979 and was fired after two weeks of employment for inability to perform the job adequately.
16. Respondent filled the hours that Barb McCarrier would have worked by using existing female employees, and Complainant was not considered to replace Barb McCarrier.
17. Respondent trained the existing female employees to perform surgical procedures needed after Barb McCarrier was terminated.
18. The Complainant had a Bachelor of Science degree in Medical Technology from the University of Wisconsin-Madison, had four summers of laboratory experience and was a member of the American Society for Clinical Pathologists.
19. The Complainant could have easily been trained to perform or assist in certain procedures such as pelvic surgery, vaginal cultures, rectal cultures and urinary catheterizations as required by Respondent.
20. The Complainant would have worked on a part-time basis.
21. It was Respondent's policy not to have females work on male genitals and not to have males work on female genitals, except that the two male doctors would work on the genitals of patients of the opposite sex when necessary.
22. Had Complainant been employed, a male doctor and the male Complainant would have been alone at the Clinic for 1-1/2 hours per day at the end of each day's shift.
23. Walsh Clinic serves more female than male patients.
24. Complainant was qualified to do all the the duties of the position available at Walsh Clinic.
25. Complainant would have worked part-time at Walsh Clinic had he been offered such position.
26. Complainant's desired salary was five dollars per hour, but Complainant would have accepted \$3.20/hour.
27. Barb McCarrier earned gross wages of \$234 in salary during her two weeks of employment.
28. Complainant has earned the following sums of money between May 6, 1979 and July 7, 1980.

\$570.68 at a job in Fort Atkinson: 31.6 hours per week total for the period May 6 through June 10, 1979  
\$101.75 at a job in Stoughton on weekends: 18.5 hours of work total through May 19, 1979

\$160.00 at Nutrition World: 50 hours of work total through May 26, 1979  
 \$3,992.62 at University Hospitals: 593.5 hours of work from October 29, 1979 through February 9, 1980  
 \$718.00 at the U. S. Bureau of Census: 184 hours from March 26, 1980 to April 25, 1980

29. On June 7, 1980, Complainant began employment in the lab at Jackson Clinic.
30. Complainant voluntarily terminated his job with University Hospitals.

### **RECOMMENDED CONCLUSIONS OF LAW**

1. Complainant is a member of a protected class, sex, under Madison General Ordinances, Section 3.23.
2. Respondent is an employer as defined by Section 3.23 of the Madison General Ordinances.
3. Respondent discriminated against Complainant on the basis of sex by failing to hire Complainant as a medical technologist.
4. Complainant used due diligence in seeking other employment.

### **RECOMMENDED ORDER**

1. That Respondent shall cease and desist from discriminating against Complainant on the basis of sex.
2. That Complainant receive the sum of \$2,093 backpay plus 6% annual interest accruing from May 7, 1979 until the date this Order becomes final.

\$2,925 (pay that would have been received if Complainant had been hired on May 7, 1979, and worked until October 29, 1979)  
 minus \$832.43 (earnings between May 7, 1979, and October 29, 1979)  
 equals \$2,093

Such total reflects the amount Mr. Robbins would have earned if employed by Walsh Clinic from May 7, 1979 to October 29, 1979.

3. That proof of payment of the \$2,093 be sent to the Executive Director of the Commission within 30 days of the date this Order becomes final.

### **MEMORANDUM OPINION**

#### **I . Merits**

Respondent attempted to infer that Complainant was not qualified to perform the available job. Complainant had a Bachelor of Science degree in Medical Technology from the University of Wisconsin, Madison and had more education than the woman hired, Barb McCarrier. While Ms. McCarrier did have more prior work experience than Complainant, Ms. McCarrier was dismissed after two weeks for inadequate job performance. Complainant, in contrast, was later employed by University Hospitals, a job from which he voluntarily terminated, and presently is employed at Jackson Clinic. Further, Respondent presently trains inexperienced employees to perform some of the job duties at Walsh Clinic.

A second reason offered by Respondent at hearing was that Complainant desired only full-time employment and had too high a salary demand. Complainant's testimony was that he would have accepted part-time employment for as little as \$3.20 per hour. Complainant's testimony was deemed more credible by the Examiner partly because at the time in question he was working weekends only at two out-of-town hospitals, and it is reasonable to believe that a 20-30 hour per week job in Madison would have been more desirable to Complainant, who had a small child to care for.

This leaves the issue of customer preference. Respondent contends that 15 out of 15 female patients stated they would not want to be treated by a male technologist, and some threatened never to return to the clinic again rather than be treated by one. However, Respondent has approximately 4,000 female patients per year, and a sample of 15 out of 4,000 seems rather statistically insignificant (.00375%) and there is no showing that the sample was even sufficiently random.

Relying on Diaz v. Pan American Airlines, 3 EPD 8166, 442 F. 2d 385 (C.A., 5th Cir., 1971), it would also seem the customer preference issue could be easily disposed of. It is clear that customer preference generally is not a legitimate non-discriminatory reason to justify a hiring decision where sex was a factor unless Respondent can show that it would prevent performance of its primary function. Respondent has failed in the "primary function" test for the reasons stated in 2. below.

But, unlike in Diaz, this case raises the right to privacy questions often used to excuse prisons with male inmate populations from having to hire female guards. Any such analogy is rejected here for two reasons:

1. The male doctors perform the delicate clinical procedures on female patients when female assistants are not available or where certain procedures require a licensed physician. Therefore, there is no reason to believe a male assistant with a four-year degree who is a member of a national professional organization could not have also performed or assisted in performing these delicate procedures on female patients. Respondent's clinic rule prohibiting such persons of one sex to treat patients of the opposite sex is also rejected as discriminatory on its face.
2. A male doctor and male technologist, had he been hired, according to Respondent's own testimony would have worked no more than 1-1/2 hours per day without a female assistant being present. Because Respondent filled Ms. McCarrier's hours with presently employed females, and because the job is primarily laboratory work, Respondent could have easily arranged schedules to accommodate all patients who absolutely insisted on having a female technologist.

Complainant established that he was a male, was qualified for the job, was not hired and that females were hired or given extra hours instead. Furthermore, Complainant demonstrated that all reasons articulated by Respondent for his non-hire were, in fact, pretextual.

## II. Jurisdictional Challenges

Various jurisdictional challenges were raised on the record by Respondent. The Examiner stated that he believed the Commission had jurisdiction over this matter, and that any jurisdictional objections could be dealt with on appeal by the Circuit Court, should the case get that far.

Signed and dated at Madison, Wisconsin this 10th day of October.

Allen T. Lawent  
Hearing Examiner

## AFFIDAVIT OF MAILING

STATE OF  
WISCONSIN            )  
                                  )    SS.  
COUNTY OF DANE    )

Cordia Taylor-Robinson, being first duly sworn on oath deposes and says:

1. That she is a secretary in the office of the Equal Opportunities Commission, City of Madison, Dane County, Wisconsin and as such secretary did on the 10th day of October, 1980, at approximately 3:00 p.m., place in envelope(s) addressed:

Gordon L. Robbins  
2117 Linden Avenue  
Madison, Wisconsin 53704

Attorney Jeff Grady  
P. O. Box 1528  
Madison, Wisconsin 53701

Walsh Clinic  
2018 North Sherman Avenue  
Madison, Wisconsin 53704

a true and correct copy of the RECOMMENDED FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER AND NOTICE OF RIGHT TO APPEAL attached hereto.

2. That she did seal said envelope(s) addressed as aforesaid and caused said envelope(s) to have affixed thereto sufficient and adequate postage.
3. That on or about said time, the said 3 envelope(s) was/were deposited at the City-County Building Mail Room at 210 Monona Avenue in the City of Madison, Dane County, Wisconsin.

Subscribed and sworn to before me this 10th day of October, 1980.

Allen T. Lawent

Notary Public State of Wisconsin

My Commission is permanent.