EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE, ROOM 500
MADISON, WISCONSIN

Harper Donahue 511 Bayview Madison, Wisconsin 53703 Complainant vs. Madison Gas & Electric Company 100 North Fairchild Street Madison, Wisconsin 57303 Respondent	NOTICE TO COMPLAINANT OF COMMISSION DECISION ON COMPLAINANT'S APPEAL Case No. 2560

After public hearing on your appeal from the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law, and Order, the Equal Opportunities Commission has voted to uphold the Examiner's decision. Consequently, they become the Commission's Final Findings of Fact, Conclusions of Law, and Order pursuant to Madison General Ordinances 3.23(9)(c)(3)(a-c).

Thus, your above captioned complaint is hereby dismissed. This decision is appealable as may be provided by law.

Dated at Madison, Wisconsin this 10th day of September, 1981.

A. Gridley Hall
President

J.C. Wright
Executive Director

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Harper Donahue 511 Bayview Madison, Wisconsin 53703 Complainant vs. Madison Gas & Electric Company 100 North Fairchild Street Madison, Wisconsin 57303 Respondent	FINAL ORDER Case No. 2560

The Examiner issued the Recommended Findings of Fact, Conclusions of Law, and Order, dated October 2, 1981 in the above entitled matter. Timely exceptions were filed, written arguments were submitted, and oral arguments were heard by eleven Commissioners.

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

ORDER

That the attached Recommended Findings of Fact, Conclusions of Law, and Order of the Examiner is adopted in its entirety and shall stand as the final order herein.

Commissioners Abrahamson, Amato, Baerwolf, Conrad, Galanter, Hall, Hisgen, McShan, Perkins, Swamp and Thome all joined in affirming the Examiner's decision in its entirety. No Commissioners dissented or abstained.

Signed and dated this 10th day of September, 1981.

A. Gridley Hall
President, EOC

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Harper Donahue 511 Bayview Madison, Wisconsin 53703 Complainant vs. Madison Gas & Electric Company 100 North Fairchild Street Madison, Wisconsin 57303 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 2560

A complaint was filed in the above entitled matter with the Madison Equal Opportunities Commission (MEOC) alleging discrimination on the basis of Section 3.23, Madison General Ordinances. The MEOC conducted an investigation of said complaint resulting in an Initial Determination by Human Relations Investigator Mary Pierce finding Probable Cause to believe discrimination had occurred in this matter. Said Initial Determination was dated April 3, 1980. Further, an Amended Initial Determination dated September 19, 1980 was issued finding Probable Cause regarding additional issues in this matter.

Conciliation was waived or unsuccessful in all instances, and the matter was certified to public hearing. A public hearing was held December 2, 1980 at 9 a.m. The Hearing Examiner proposes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant is an adult, black male who resides in the State of Wisconsin.

2. The Respondent is a utility company doing business in the City of Madison.

3. The Complainant worked fore the Respondent at one of Respondent's facilities in the City of Madison. He began working as a temporary laborer in September of 1978 in Respondent's Electric Production Department. At approximately the same time, Respondent also hired Barbara Cook, a white female, in the Electric Production Department.

4. In February of 1979, the Complainant and Cook both applied for a permanent position entitled Laborer (Turbine and Switchboard), hereinafter referred to as L (T&S).

5. Cook was hired for the position as an L (T&S); Complainant was not. Complainant was not specifically informed of his rejection or the reasons therefor.

6. Both Cook and Donahue were considered above-average temporary workers and had what Respondent considered to be good absenteeism and tardiness records. Both were extended as temporary employees in March of 1979, prior to the hiring decision having been made for the L (T&S) job.

7. The qualifications for the L (T&S) job were as follows: No prior company work experience is required. Must be a high school graduate or its equivalent with mechanical aptitude and have sufficient potential for this type of work. Must have the ability to communicate clearly and understandably in person or by telephone when handicapped by noisy surroundings. Must have the stamina to spend a large part of his time moving about in areas of high ambient temperature. Must be able to adapt to shift work. Must remain on duty as needed until relieved or excused and must be reasonably available for emergency work.

8. At the time of hire for the L (T&S) position, Complainant possessed the following educational and job experience:

a. 48 college credits earned at the University of Wisconsin-LaCrosse as a communications major.
b. 12 credits earned at Madison Area Technical College (MATC) as a communications major.
c. high school graduate.
d. up to 2 months experience as a full-time laborer-testman at Republic Steel in the Chicago area.
e. up to 3 months experience as full-time material handler at Industrial Intercraft in Chicago.

9. At the time of hire for the L (T&S) position, Barbara Cook possessed the following educational job qualifications:

a. up to 6 months as a student at the Air National Guard in Denver, Colorado.
b. graduation from Lodi High School in Lodi, Wisconsin
c. up to 7 months as full-time clerk, stock-person and general cleaner at Southland Corporation in Denver, Colorado.
d. up to 8 months as a full-time bartender at Fisk's Tavern in Lodi, Wisconsin.
e. up to 7 months as a part-time waitress and cook at the Rustic Inn in Lodi, Wisconsin.

10. At the time of hire for the L (T&S) position, Respondent employed two women in non-clerical positions out of approximately 100 employees in the Electric Production Department. Respondent employed 4 blacks in the Electric Production Department, three of whom were permanent employees.

11. In 1978, Respondent employed 7 blacks out of a total of 517n employees in all departments. In 1979, Respondent employed 9 blacks out of a total of 549 employees. Also in 1979, 16 to 20% of Respondent's employees were women, and between 10 and 20 of the women performed non-clerical jobs. Black persons in 1979 constituted 0.8% of Respondent's labor pool population and women constituted 46% of Respondent's labor pool.

12. Respondent had received positive evaluations from all of Cook's former employers, but had received no evaluations from Complainant's former employers. Respondent could not find the address of one of the Complainant's former employers - Industrial Intercraft - in the Chicago Directory, and Republic Steel required Complainant's signed release prior to sending his evaluation(s). Respondent did not make any further effort to gain Complainant's evaluations.

13. The L (T&S) job required shift work (i.e., rotating shifts). Cook had experience doing shift work; Complainant did not.

14. Complainant applied for a permanent position as a laborer (crane operation) in June, 1979. Complainant was the only in-house applicant for the position. Respondent chose not to advertise further and open the job to the public as well as Complainant, but instead hired Complainant effective July 16, 1979. Due to an ankle injury, Complainant did not report to work until mid-September. Respondent held the job open for Complainant, and awarded Complainant a 12-month pay increase although he had actually worked with the company only 10 months (because of the time missed due to the ankle injury). Complainant was required to pass a six-month probationary period.

15. Complainant was terminated on or about February 15, 1980 after being given two weeks notice of termination on February 1, 1980. Such termination was prior to the expiration of Complainant's probationary period.

16. Respondent told Complainant that he was being discharged because his work had not been satisfactory, he was not able to keep up with the work, he had been uncooperative and careless, he had violated safety rules, and he had failed willingly to follow instructions.

17. On September 28, 1979, Complainant was cited by Respondent for failing to replace a rope on a pulley at the request of supervisor Chapman because he (Complainant) said he was afraid of heights and not interested in operating a crane.

18. Respondent anticipated that laborers in the crane operation would eventually, with experience, progress to crane operator positions.

19. On October 9, 1979, Complainant failed to raise a car shaker high enough to clear the top of a coal car, resulting in damage to the shaker and loss of operation for approximately one day.

20. On October 21, 1979, Complainant had failed to clean up an area as requested by supervisor Gorder and had failed to respond to a page to help unload a coal car for 30 minutes.

21. On October 22, 1979, Complainant responded to supervisor French in abusive language after being told to do some work by French. Although initially refusing to do the work, Complainant did complete the job before he went home.

22. On October 23, 1979, Complainant was cited for failure to wear his safety glasses. He was cited on October 26 and October 31 for failure to turn in his broken pair of safety glasses and again for working without safety glasses.

23. Complainant was subsequently informed on two other days (January 9 and 120, 1980) by two different supervisors that he was unloading coal cars too slowly.

24. Complainant left some lit torches on the grounds one day during a lunch break. Leaving the torches lit was against company safety regulations, but for expedience's sake other employees left them on occasionally, but adjusted them to a low flame as Complainant had done.

25. Between January 16 and 17, 1980, all six of Complainant's first line supervisors submitted formal evaluations. Five of the six supervisors reported that Complainant was performing the duties of the classification poorer than normally expected and each of the following reasons were cited on one or more evaluations:

(a) was slow
(b) showed lack of interest in work
(c) needed too much supervision
(d) was uncooperative
(e) made a lot of mistakes
(f) was careless

The sixth supervisor, Supervisor Perry, indicated that the Complainant was progressing as expected.

26. Three of the six supervisors felt that Complainant was making normal progress in acquiring knowledge and skills to progress to the next classification, while three other supervisors felt he was having difficulty.

RECOMMENDED CONCLUSIONS OF LAW

1. Complainant is a member of a protected class, race, within the meaning of Section 3.23 of the Madison General Ordinances.

2. Respondent is an employer within the meaning of Section 3.23, Madison General Ordinances.

3. Respondent did not discriminate against the Complainant in violation of Section 3.23, Madison General Ordinances by failing to hire him for the permanent position of Laborer (Turbine and Switchboard).

4. Respondent did not discriminate against the Complainant in violation of Section 3.23, Madison General Ordinances by discharging him as a Laborer (Crane Operator).

RECOMMENDED ORDER

That this case be and hereby is DISMISSED.

MEMORANDUM OPINION

The Complainant has failed to carry his burden of proof to show that the reasons for Respondent's failure to hire him as a Laborer (Turbine & Switchboard) were pretextual. The Complainant has also failed to establish that his discharge as a Laborer (Crane Operation) was unlawful.

I. LABORER (TURBINE & SWITCHBOARD)

The Complainant, a black male, applied for a permanent position with the Respondent as a Laborer (Turbine & Switchboard). His competitor for the job was a white female, Barbara Cook. Cook and the Complainant had both been temporary laborers for the Respondent for approximately the same period of time. Cook and the Complainant were both considered above-average temporary laborers with what the Respondent viewed as good absenteeism and tardiness records. Cook had 22 months of work experience, including having been a waitress, bartender, and clerk-stockperson. She also spent 6 months as a student with the Air National Guard and had graduated from high school. The Complainant, in contrast, had earned 60 college credits and had 5 months of work experience, including time as a laborer and as a material handler. The L (T&S) job required no prior work experience with Respondent, and both candidates were at least minimally qualified for the job.

Complainant established a prima facie case[1] of discrimination by showing that:

(1) he applied for the job in question.
(2) he was qualified for the job.
(3) he was a member of a protected class (race).
(4) he was not hired for the job.
(5) a person outside of the protected class was hired for the job.

The Respondent articulated the following reasons for failing to hire the Complainant and preferring Cook:

(1) Cook had a history of physical labor.
(2) Respondent was underutilizing women in non-clerical positions in the Electric Production Department, but was not underutilizing blacks in similar positions in that department (under-utilization means that the percentage of employees of a particular class in the department was less than the percentage of that class in the labor pool).
(3) Cook had experience on rotating shifts; Complainant did not.
(4) Cook had previously expressed an interest in full-time employment; Complainant's interest was less clear.
(5) Cook had very encouraging recommendations from prior employers.

The burden of proof now shifts to the Complainant to show by a preponderance of the evidence that the Respondent's proffered reasons, allegedly legitimate and non discriminatory, were in fact pretextual and a window dressing disguising discrimination.[2] While Respondent's reasons for failing to hire Complainant are generally weak in their articulation, the Complainant nevertheless failed to overcome them and carry his burden.

Cook's history of "physical" labor is certainly not a distinguishing qualification between her and the Complainant and is a weak reason for preferring her. Cook had 22 months of work experience and the Complainant 5 months. Complainant, in contrast had somewhat more schooling than Cook, and that schooling was in the area of mass communications. Both had performed essentially the same physical labor for the Respondent as temporary laborers and both had performed with similar ability. The fact that Cook had seventeen additional months of non-job-related work experience is clearly nonessential.

Complainant attempts to argue that he had greater mechanical aptitude than Complainant. He had perhaps 2 months of experience at Republic Steel that may have been job-related, and he had some college courses that may have been job related. In contrast, Cook had no job experience directly related to the mechanical aptitude portion of L (T&S). However, the fact that Complainant had 2 months of job experience and some college courses do not necessarily indicate greater mechanical aptitude. Two months is a very brief period, and there is no showing regarding how well Complainant performed on his related college courses. While he has shown a mechanical interest, he has not demonstrated that his mechanical aptitude significantly exceeded that of Cook's who has been performing the L (T&S) job adequately since the time of her hire. Further, educationally the job required only a high school diploma which both candidates possessed.

Respondent's second reason for preferring Cook over the Complainant had to do with affirmative action. Respondent contends that it underutilized women in non-clerical positions in the Electric Production Department while it did not underutilize blacks. Respondent employed 2 women as non-clericals out of 100 employees in the Electric Production Department and 5 women overall. The percentage of women in the available labor force was 46%. Meanwhile, the Respondent employed 4 blacks out of 100 in the

Electric Production Department while the available black labor force was 0.8%. On the other hand, the Respondent employed somewhere between 10 and 20 women in non-clerical positions out of 549 employees in its overall operation in 1979. Including clericals, women constituted 16-20% of its employees. Meanwhile, Respondent employed 9 blacks out of 549 employees (1.6%) in 1979.

Respondent's argument regarding underutilization of women is anything but well taken, however. In the first place, absolute preferences are inpermissible bases for hiring decisions.[3] To hire a person solely on the basis of an affirmative action plan is akin to an inpermissible quota system. However, where applicants are of similar qualifications, it certainly is commendable to consider affirmative action goals. The problem with Respondent's argument in this case is that it is inconceivable to the Examiner that the underutilization of women in its employ has any relationship to the slight overutilization of blacks in its labor force. Where the Respondent employs 549 employees and only 9 of them are black, it is clear Respondent's underutilization of women (constituting 46% of the available labor force) was not at all connected to the number of black employees (9) it hired. The Respondent's attempt to justify the hiring of a member of one protected class (women) over another (blacks) in the name of affirmative action is clearly unacceptable in light of the facts of this case.

Cook's past experience on rotating shifts is perhaps a small factor in her favor where the Complainant had no such experience. But the Examiner emphasizes that this could be no more than a minor distinction where the Complainant had no adverse experience and in fact had no experience at all on rotating shifts.

Cook's alleged greater interest in full-time employment is dismissed by the Examiner as pure speculation.

Finally, Cook's positive recommendations from past employers, turned into a point against the Respondent. Respondent checked into both Cook's and the Complainant's past employment immediately after their hire and prior to the L (T&S) opening. While Cook's past employers did respond, Complainant's did not. Respondent could not find one of the Complainant's past employers listed in the Chicago directory, and did not follow up on the request of the other, Republic Steel, for a written release from Complainant. Respondent's failure to take additional reasonable efforts to track down Complainant's past employers and the Complainant's evaluations does raise some inference of discrimination. But the inference raised is not sufficient to enable the Complainant to prevail.

Construing all facts in favor of the Complainant, it can be said at best that the Complainant and Cook were equally qualified for the L (T&S) opening. Further, even if Respondent had received very positive and encouraging evaluations from the Complainant's past employers, it could still only be said at best that Complainant and Cook were equally qualified. It is permissible for Respondent to use subjective factors so long as those factors are not discriminatory. Also, minor factors such as past shift work experience come into play in "equally qualified" situations. The Complainant tries to argue that L (T&S) job was more desirable than the permanent Laborer (Crane Operations) job that the Complainant was later hired for. The Examiner agrees with Respondent that it is a matter of individual taste. The L (T&S) job has rotating shifts and high ambient temperatures to contend with. The Laborer (Crane Operation) is an outside job which can be very pleasant in summer, but brutal in winter. Both jobs pay the same, but the Laborer (Crane Operation) job had regular first shift hours as opposed to rotating shifts for the L (T&S) position.

In conclusion, the employees were essentially equally qualified and the Complainant has failed to show by a preponderance of the evidence that the failure to hire him for the L (T&S) job was racially discriminatory. While a slight inference of discrimination was raised by Respondent's failure to reasonably follow up in trying to obtain evaluations from Complainant's past employers, such failure did not likely affect the ultimate hiring decision favoring Cook (as even with highly positive evaluzations from past employers, Complainant at best was equally qualified but could not be said to be more qualified).

II. DISCHARGE FROM LABORER (CRANE OPERATION)

Complainant was discharged for allegedly being a slow worker, for being uncooperative and careless, for violating safety rules, and for failing willingly to follow instructions. Several incidents are discussed in the Findings of Fact. Complainant tries by his own testimony to minimize the importance of the various incidents, but his problems are documented to some extent in five of six supervisor's evaluations The Examiner, in fact, finds some of the Complainant's testimony credible without additional support, and, believes that other employees likely did not wear safety glasses on occasions and that others left torches burning on a low flame although unattended. However, Complainant's own testimony is insufficient to rebut the coal shaker incident and the incidences of failure to follow instructions.

Perhaps the most compelling evidence on the Complainant's behalf is the petition allegedly signed by his co- workers stating as follows:

We, crane operators and coal handlers in the coal yard, feel that a fellow worker, Harper Donahue, is being unjustly fired and we support the demand for his reinstatement. Further, we feel that Harper is sufficiently completing his share of the workload.

Unfortunately for the Complainant, this petition is blatant hearsay to which the Examiner gives absolutely no weight. The petition is undated. The statement recited above is printed neatly in blue pen on an 8-1/2 X 11 inch piece of yellow paper with seven apparently distinctive signatures, allegedly signed by co-workers, written in pencil below. One of these signatures is "Charlie Bartels", an individual with whom the Complainant concedes he did not get along with.

Yet, none of these seven co-workers appeared at the hearing. Certainly, it would have been no great effort to subpoena them. Their failure to appear and authenticate the petition, and the consequent lack of Complainant's examination and denial to the Respondent of cross-examination regarding the context and other specifics relating to the petition raise a strong aura of doubt as to the petition's validity. Further, just as the Respondent's earlier failure to follow up on past employers raised somewhat of an inference of discriminatory conduct, the employer's treatment of Complainant in regard to the Laborer (Crane Operation) position raises somewhat of an inference of good faith. Respondent held the job open for Complainant for more than one and one half months (July to September) in order that Complainant could recover from an ankle injury. Further, Complainant was not penalized for his absence due to injury, and received a pay increase although he had not actually worked a full year, which was the customary minimum length of service to qualify for an increase.

Given the overwhelmingly negative job evaluations by supervisors in regard to Complainant's actual performance, and given Complainant's failure to produce witnesses to support his most compelling piece of evidence, the Complainant has failed to adequately prove Respondent's dismissal reasons were pretextual and racially discriminatory. Consequently, as Complainant has failed on both the hire and discharge issues, I have recommended dismissal of this Complaint in its entirety.

Signed and dated this day of February, 1981

Allen T. Lawent
Hearing Examiner

[1] McDonnell Douglas v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973)

[2] Furnco Construction Co. vs. Waters, 438 U.S. 567, 17FEP 1062 (1978)

[3] Patzer v. Wisc. Dept. of Administration (DILHR, 10/31/74), aff'd on other grounds, State v. DILIIR, 77 Wis. 2d 126, 252 U.W. 2d 353 (1976)