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

George Jones 306 North Brooks Street Madison, WI 53715 Complainant vs. Madison Service Corporation 1101 East Washington Avenue Madison, WI 53704 Respondent	RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER Case No. 2574

A complaint was filed with the Madison Equal Opportunities Commission (MEOC) on November 1, 1979 alleging race discrimination in regard to employment. The complaint was investigated by MEOC Human Relations Investigator Mary Pierce and an Initial Determination dated April 20, 1980 was issued finding probable cause to believe discrimination had occurred as alleged.

Conciliation failed or was waived, and the matter was certified to public hearing. A hearing was held beginning on March 30, 1981. Attorney Jeff Scott Olson of JULIAN AND OLSON, S.C. appeared on behalf of the Complainant who also appeared in person. Attorney Thomas Kennedy of BRYNELSON, HERRICK, GEHL AND BUCAIDA appeared on behalf of the Respondent who also appeared by employee-representative Warren E. Robertson. Based upon the record of the hearing and after consideration of the post-hearing briefs submitted by the parties, the Examiner proposes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, George Rozelle Jones, is an adult black male.
2. The Respondent, Madison Service Corporation, is an employer doing business in the City of Madison, State of Wisconsin.
3. In 1969-70, the Complainant worked as a school bus driver in Liberty, Missouri. Subsequently, he drove a milk truck on a prescribed route for the E. R. Foremost Milk Company in Kansas City. During the summer of 1979, he worked as a bus driver for Neighborhood Special Service in Madison.
4. In February, 1979, the Complainant applied for a position as a bus driver. He was required to first take a written test, which he did take and failed. He failed the two map reading sections and one time telling section of the test. Failure of any one of these sections alone constituted failure of the test.
5. The test which the Complainant had to take was devised entirely by the Respondent and first used as a screening device in January, 1978. Of the 227 bus drivers employed at the time of the hearing, at least 109 were hired before this written test was required by the Respondent. Those 109 were performing their jobs effectively as of the time of the nearing.
6. Between mid-1978 through December, 1980, sixty-eight percent (68%) of the black applicants failed said written test while forty-four and two-tenths percent (44.2%) of the white applicants failed the written test for bus drivers; i.e., the success rate of blacks was 52.7% that of whites.
7. The Respondent's written test had a statistically significant disparate impact on black applicants; i.e., black applicants failed the written test at a statistically significant higher rate than whites.
8. The number of blacks hired, however, was not at a statistically significant lower rate than that of whites. This is because a higher percentage of blacks approved for hire were actually hired as compared to whites. Altogether, 24% of the black test takers were actually hired versus 28.2% of the whites. However, only 16% to 20% of the first-time black test takers were hired compared to 27.6% to 27.8% of the first-time white test takers.
9. A validated test, National Validation of a Selection Test Battery for Male Transit Bus Operators, commonly known as the "Chicago battery" was available at the time the Complainant was required to take the Respondent's written test. Said Chicago battery test had been shown to have no disparate impact on minority - including black - applicants. The Chicago test head not been validated for female applicants at the time.
10. The Respondent's written test was never professionally validated for minorities or females.

11. Beginning sometime in 1981, subsequent to the hearing date, the Respondent plans to use a variation of the "Chicago battery" test which has been validated for minority and female applicants.
12. An applicant who passed the written test had to also pass a physical exam, undergo an oral interview, and had to possess a valid driver's license with a good driving record in order to qualify as a bus driver. Even if an applicant met all of the aforesaid requirements, said applicant could have been placed on the waiting list. Thirty-six (36) applicants were on the waiting list at the end of 1980, thirty-five whites and one black.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class of race 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 discriminated against the Complainant on the basis of race in regard to hire in violation of Section 3.23(7)(a), Madison General Ordinances.

RECOMMENDED ORDER

1. That the Complainant be permitted to take the validated "Chicago battery" test presently intended to be used by the Respondent, and that the Complainant be allowed to take said test within fifteen (15) days of the date this order becomes final.
2. That said test be scored within five (5) days of the Complainant having taken it.
3. That should the Complainant pass said "Chicago battery" test, the Respondent shall within two weeks administer the physical and oral exams as well as a driver's record verification of the Complainant.
4. That contingent on the Complainant passing all of the requirements in Nos. I through 3 above, the Respondent shall instate the Complainant into the next available position as a bus driver.
5. That the Complainant and Respondent shall agree on all persons to conduct and score the written, oral and physical exams, as well as the driver's record check. In the event an agreement cannot be reached, the parties shall apply to the Hearing Examiner for a determination as to the details of administering the tests or examinations and record checks.
6. This order is specifically intended to exclude backpay. However, in the event that the Complainant passes all portions of the test and is approved for hire, the Complainant shall receive all wages, rights, benefits, and privileges of employment he would have received had he been hired from the date this Recommended Findings of Fact, Conclusions of Law and Order is issued until the date he is instated.

MEMORANDUM OPINION

Essentially, the heart of this case is that the Complainant made out a prima facie[1] case of discrimination, and the Respondent offered virtually no evidence that its business practice was job-related. What little evidence that was offered did not even approach the Respondent's burden of proof, particularly in light of the fact that the Respondent had 109 (of 227) able bus drivers employed at the time of the hearing who were hired prior to the testing requirement being placed on applicants.[2] Respondent's burden to show job-relatedness or business necessity in a disparate impact case is far greater than the burden on the Respondent that is applied in a disparate treatment case.[3]

Respondent did, however, posit the "bottom-line" approach defense[4] and established this argument by statistical testimony. Essentially, while the Complainant established that the Respondent's test had a discriminatory effect on black applicants, the Respondent's actual hiring process did not. That is possible because although a statistically significant lower percentage of blacks passed the test (32% blacks vs. 55.8% whites passed), most of the blacks who did pass were hired while a higher percentage of the whites were kept on the waiting list.

In a disparate treatment case, Furnco v. Waters[5] holds that an employer's actual workforce statistics are probative of whether or not discrimination has occurred in an individual instance, though such statistics are not normally conclusive of disparate treatment (or the lack thereof).

The question here is whether an employer's workforce statistics can be an absolute defense in a disparate impact case where a phase of the employer's hiring policy is shown to have a discriminatory effect on blacks but where the Respondent's overall hiring policy does not. I hold that such workforce statistics are not an absolute defense. To hold otherwise would encourage Respondents to devise tests and procedures that have the effect of limiting the number of black and other protected class individuals that eventually qualify for hire.

Essentially, the Respondent's test screened out at least two to six more black individuals than it should have.[6] At this time, rather than having one black on its waiting list, the Respondent would be expected to have at least three to seven

blacks on that list in addition to the six blacks already employed. Based on the abilities of those excluded individuals, there are times when the Respondent should have more than six blacks employed. However, by applying a "bottom-line" approach, it would be possible for an employer to manipulate its hiring process by the use of non-job-related testing devices to disproportionately screen out blacks and consequently limit the number of blacks actually employed to the minimum number necessary to avoid legal liability. While there is no showing that this Respondent specifically intended to do that, the practical effect of the Respondent's actions are exactly that. Consequently, there are at least two to six black individuals who ought to have passed the test and have been considered for hire around the time Jones took the test. Even if not hired, at least they should have been moving up on the Respondent's waiting list. And, equal opportunity to be hired is exactly one right that the ordinance protects.

REMEDY

While the Respondent's test clearly had a disparate impact on blacks, there is no showing that the Respondent would have hired him had he passed the test; he might just as likely been placed on the waiting list. And given that the Respondent's ("bottom-line") overall hiring practices were not discriminatory, this is a mitigating circumstance (absent actual intent on the part of the Respondent to limit the hire of blacks to a minimum number) for remedy although I have ruled it does not preclude liability.

Signed and dated this 24th day of November, 1981.

Allen T. Lawent
Hearing Examiner

cc: Attorney Jeff Scott Olson
Attorney Barbara J. Swan

FOOTNOTES

[1]See Griggs v. Duke Power, 401 U.S. 424, 91 S.Ct. 849 (1971). In this case, the Complainant showed by a preponderance of the evidence, including agreement by the Respondent's own expert witness, that the Respondent's written test had a statistically significant disparate impact in that blacks failed it at a much higher rate (68%) than whites (44.2%).

[2]It was not improper for the Respondent to attempt to find the most qualified applicants; however, when the Respondent uses a test that does not measure minimal job qualifications, such test requires very close scrutiny where it is established that it has a disparate impact.

[3]See Griggs, supra. Also see Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir., 1971). The combination of lack of validation and the fact that 109 of 227 bus drivers were hired without the test refuted the Respondent's business necessity argument.

[3]The Respondent points chiefly to Washington v. Davis, 426 U.S. 229 (1976). Washington was decided on constitutional grounds and was not a Title VII case. In fact, the Supreme Court indicates that the outcome under Title VII might have been different. The Court stated specifically:

> "Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that is an insufficient response to demonstrate some rational basis for the challenged practices."

The court goes on to discuss the validation requirement and to indicate that a Title VII inquiry is a more probing and rigorous one of the Respondent than the Fifth Amendment inquiry applied in Washington (which required a showing of intent).

In construing the Madison Equal Opportunities Ordinance, Title VII presedents are considered. In this case therefore, Washington v. Davis does not specifically apply. The Complainant's brief at pp. 15-22 also adequately distinguishes Espinoza v. Farrah Mfg., 414 U.S. 86 (1973), New York City Transit Authority v. Beazer, 440 U.S. 568, n.25 (1979), and Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) as well as Federal Court decisions cited by the Respondent.

[5]Furnco Construction Corp. v. Waters 438 U.S. 567 (1978).

[6]By screening out minority applicants by virtue of a written test, the effect is to limit the number of employees that eventually qualify for hire to the minimum number necessary to avoid legal liability In this case, six blacks were hired (five after the first time they took the test) and one was placed on the waiting list. At least two to six more blacks would have been expected to have passed the written test. Consequently, up to 50% of the black applicants were denied the opportunity to at least make the waiting list. This is exactly what the law protects: equal opportunity.