

Case # 2676

**AFFIDAVIT OF MAILING**

STATE OF  
WISCONSIN

SS.

COUNTY OF  
DANE

Tana M. Baldwin 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 28th day of August, 1981, at approximately 3:30 P.M., place in envelope(s) addressed:

Autumn Pham  
219 Bay View  
Madison, Wisconsin 53715  
Respite Emergency Crisis Center and  
Susan Schuster  
906 Williamson Street  
Madison, Wisconsin 53703  
Jody Melms  
4606 Burma Road  
McFarland, Wisconsin 53558

John W. Markson, Jr.  
P.O. Box 1784  
Madison, Wisconsin 53701

a true and correct copy of the RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER attached hereto.

2. That on or about said time, the said 4 envelope(s) was/were deposited at the City County Building Mail Room at 210 Monona Avenue in the City of Madison, Dane County, Wisconsin.

Tana M. Baldwin  
Subscribed and sworn to before me this  
28th day of August, 1981.

Allen T. Lawent  
Notary Public, State of Wisconsin  
My Commission is permanent.

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**EQUAL OPPORTUNITIES COMMISSION  
CITY OF MADISON  
210 MONONA DRIVE  
MADISON, WISCONSIN**

<p>Autumn Pham 219 Bay View Madison, Wisconsin 53715</p> <p>Complainant</p> <p>vs.</p>	<p>RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p>Case No. 2676</p>
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Respite Emergency Crisis Center and Susan Schuster 906 Williamson Street Madison, Wisconsin 53703	
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Respondent

A complaint was filed with the Madison Equal Opportunities Commission (MEOC) on September 15, 1980 alleging discrimination on the basis of handicap and physical appearance in regard to the Respondent's failure to hire the Complainant for a position as a part-time child care worker.

Pursuant to an investigation by MEOC Human Relations Investigator Renee Payne (formerly Renee Caldwell), an Initial Determination dated March 10, 1981 was issued finding probable cause to believe that discrimination had occurred in regard to both handicap and physical appearance.

Conciliation failed or was waived, and the matter was certified to public hearing. On July 22, 1981, a hearing was held. Ms. Jodi Melms and Ms. Janice Bensky represented the Complainant as lay advocates on her behalf. The Complainant also appeared in person. Attorney John Markson, of Stafford, Rosenbaum, Rieser and Hansen, appeared on behalf of the Respondents who also appeared by Ms. Susan Schuster (in person) and W. Allen Everhart. Based on the record of the hearing (no post-hearing briefs were submitted in this matter per mutual agreement of the parties and approval by the Examiner), the Examiner proposes the following Recommended Findings of Fact, Conclusions of Law and Order:

#### **RECOMMENDED FINDINGS OF FACT**

1. The Complainant, Autumn Pham, is an adult female residing in the State of Wisconsin.
2. The Respondent, Respite Emergency Crisis Center, is a facility with offices in the City of Madison that cares for children on an emergency basis.
3. The Complainant applied for a job in August, 1980 as a part-time child care worker with the Respondent.
4. The Complainant is 4 feet tall, weighs 65 pounds, and is 26 years old. She was approximately the same height, weight and age at the time of her application.
5. After a paper screening process whereby selected Respondent's employees examined the resumes submitted by applicants, five applicants were chosen to be given oral interviews prior to the anticipated hiring of two individuals.
6. The Complainant ranked fifth out of five candidates on the oral interview. She scored 106 compared to 231 and 239 for the persons hired.
7. The oral interview was conducted by four of the Respondent's employees: Susan Schuster, Joan Cheek, Cheri Miller, and Deb Noltner.
8. Two of the four interviewers, Cheri Miller and Joan Cheek, had questioned the Complainant's qualifications during the paper screening process and did not believe she was properly qualified to advance to the interview stage.
9. The written qualifications for the vacant child care worker positions were as follows:
  - a. Minimum of 40 hours formal training in child development;
  - b. One year experience working with children under stress;
  - c. Knowledge of family dynamics/families stress helpful;
  - d. Transportation may be necessary; and
  - e. Individuals had to be at least 21 years old and had to be willing to work evenings or weekends.
10. The Complainant met the written qualifications for the position.

11. Following the oral interview and subsequent to all interviewers having scored the interview, the Complainant initiated a conversation with two of the interviewers about her physical size. During this conversation, the Complainant expressed reservations about being able to perform the job in regard to restraining children, particularly those bigger than she.

12. At the time of the Complainant's rejection, it was the Respondent's policy to notify applicants by telephone of whether or not they would be hired. A reason for non-hire was customarily not given to the applicant.

13. Susan Schuster, Respondent's Project Coordinator, attempted to contact the Complainant by telephone. Failing to do so, Ms. Schuster wrote a letter to the Urban League dated September 2, 1980 (and marked as Complainant's Exhibit 1-B through 1-E).

14. Schuster's letter to the Urban League indicated that Pham was not hired because of the point that the Complainant brought up about her (the Complainant's) size and strength, and because the Respondent was not certain about the Complainant's commitment to the job.

15. Schuster and the Complainant talked by telephone on September 5, 1980. During the course of the telephone conversation, the Complainant expressed concerns that she had not been hired because of her size.

16. The Complainant applied for at least ten (10) other part-time jobs since not being hired for child care work by the Respondent.

17. The Complainant would have earned \$3.95 per hour for 15 hours per week beginning September 1, 1980 and she had been hired for the position of child care worker. The position would have ceased by January 1, 1981.

18. The two persons hired as child care workers, Mary Daigneault and Jeannette Hintz, were both qualified for the job.

### **RECOMMENDED CONCLUSIONS OF LAW**

1. The Complainant is handicapped within the meaning of Section 3.23, Madison General Ordinances.
2. The Respondent, Susan Schuster, is a person within the meaning of Section 3.23, Madison General Ordinances.
3. The Respondent, Respite Emergency Crisis Center, is an employer within the meaning of Section 3.23, Madison General Ordinances.
4. The Respondents did not discriminate against the Complainant on the basis of handicap and/or physical appearance in violation of Section 3.23, Madison General Ordinances, by failing to hire the Complainant for the position as a child care worker.

### **RECOMMENDED ORDER**

That this case be and hereby is dismissed.

### **MEMORANDUM OPINION**

The essential issues in this case depend on credibility of the witnesses. Before resolving these issues, I will outline the basic positions of the Complainant and Respondent.

#### I. Complainant's Position

The Complainant essentially alleges that she was referred by the Urban League to apply for a job as a child care worker. She submitted a resume and was subsequently interviewed for the job by a panel of four persons. Prior to the interview, she received a questionnaire and was under the impression that she should answer the

questions in writing (see Complainant's Exhibit 2 and 7). She did answer the questionnaire in writing and brought it to the interview. The questionnaire was passed around among the interview panelists who briefly glanced at it and returned it to her. She was also interviewed in the same manner as the other candidates.

Following the interview, she saw a letter written by Susan Schuster to the Urban League indicating that the Complainant was not hired because of her size and strength, and also because the Respondent was not certain about her commitment to the job. A few days later, she and Susan Schuster had a telephone conversation where they discussed mainly the issue of her size and strength.

## II. Respondent's Position

The Respondent essentially argues that the Complainant submitted a resume which was reviewed by various of their employees. Two of their employees expressed reservations about granting Ms. Pham an interview. These two employees felt that she lacked sufficient "hands-on" (i.e., practical) experience to qualify her for the position. Neither of these employees knew Ms. Pham, nor had any other indication of her size and strength. Nevertheless, she was one of five candidates granted an interview. Both of these employees, Cheri Miller and Joan Cheek, as well as Susan Schuster (the Project Coordinator) and Deb Noltner made up the four member interview panel that interviewed Ms. Pham and the other candidates. While the panel briefly passed around and glanced at the written answers Ms. Pham had prepared in response to a questionnaire, written answers were not required and none of the other candidates submitted any. The questionnaire was returned to Ms. Pham. The purpose of distributing the questionnaire, according to the Respondent, was to permit the candidates to better prepare themselves for the oral interview.

During the interview, no reference was made to the Complainant's size and strength, nor were any questions asked in that regard. The Complainant had listed only limited "hands-on" experience on the resume, and may have supplemented the list during the oral interview. (The Complainant states that all of her practical experience was listed on the written answers to the questionnaire.)

The interviewers marked their scoresheets during the course of the interview, and had completed marking their sheets when Ms. Pham struck up a conversation with two of the panelists that included concerns about whether children would have to be restrained as part of the job.

The next day, Schuster attempted to contact the Complainant to inform her that she had not been hired. Unable to reach the Complainant, she wrote a letter to the Urban League which she claims was to recommend to them ways in which they could coach Ms. Pham in future interviews: That Ms. Pham should not project her size and strength as a detriment, and that Ms. Pham should express a stronger desire as to why she wants a job (rather than as just a diversion for her Ph.D. work).

A few days later, Schuster and Pham engaged in a telephone conversation in which Schuster claims she did not have a chance to explain about the interview scores because Ms. Pham insisted on discussing whether her size and strength were a factor in the failure to hire.

## ANALYSIS OF THE CASE

Under a McDonnell-Douglas<sup>1</sup> analysis, it is clear that the Complainant has established a prima-facie case of discrimination.<sup>2</sup> Under a Boynnton Cab<sup>3</sup> analysis, the Complainant has established the first two elements of proof and has shifted the burden to the Respondent.<sup>4</sup>

The key issue that I am deciding this case on is the issue of who brought up the concerns about size and strength. While I believe that the Complainant may have thought she had only asked informational questions about the problems of restraining children, the evidence shows that she made statements that caused the Respondent to reasonably believe that she (the Complainant) was concerned about her own ability to perform the job.

Further, prior to the Complainant raising the issue of her size and strength, the Respondent had evaluated her qualifications during the interview in a non-discriminatory manner. The fact that two employees had expressed doubts about her qualifications during the paper screening is largely irrelevant as she was in fact granted an interview. However, the interview panel (or at least two members of it) surely had concerns about Ms. Pham's

practical, or "hands on" experience. While she did refer to some additional "hands on" experience at the interview, the most thorough recitation of her practical experience was in her written response to the questionnaire which the interview panel glanced at briefly and returned to her.

While Ms. Pham's education was clearly undervalued by the panel (answer to Question 1), and her ability to handle stress was probably undervalued by at least one panelist, the evidence shows that her low scores had to do with concerns about her practical experience and not with concerns about her size.<sup>5</sup>

Overall, the problem here was one of communication. Pham believed she had communicated all of her practical experience to the panel. She had not. And she further made statements after the interview causing the panelists to believe she felt her size and strength were a detriment to her ability to perform the job. Schuster's letter, not artfully written, further muddled the misunderstanding about why Pham was rejected.<sup>6</sup>

It is a rare situation that a Respondent can overcome a letter with implications that are raised in Schuster's letter. However, I find the Respondent's witnesses to be very credible. It is nevertheless regrettable that a person of Ms. Pham's magnificent qualifications was rejected for a job based on what appears to be a problem with what Ms. Pham believed she had conveyed to the panel and what the panel believed she had conveyed. However, I do not find any unlawful bias in the form of disparate treatment on the basis of her handicap and/or physical appearance.

Signed and dated this 26th of August, 1981.

Allen T. Lawent  
Hearing Examiner

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#### FOOTNOTES

<sup>1</sup> McDonnell Douglas v. Green, 411 U.S. 792, 5FEP 965(1973).

<sup>2</sup> Using a McDonnell-Douglas analysis (supra).

(a) the Complainant is a member of a protected class (handicap and/or physical appearance).

(b) The Complainant applied for the position of child care worker and was not hired.

(c) The Complainant was qualified to perform the job.

(d) A person(s) not a member of the protected class was (were) hired. (Note: This evidence is not clear on the record but is not an absolute requirement in all fact situations.)

<sup>3</sup> Boynton Cab Co. v. DILHR, 23 EPD 30, 925 (1980).

<sup>4</sup> Pertaining to the handicap allegation, Boynton (supra) ruled:

(a) The Complainant must be handicapped within the meaning of the ordinance.

(b) The Complainant must establish that the employer's discrimination was on the basis of handicap.

The third element is that "it must appear that the employer cannot justify its alleged discrimination under the ordinance exception (pertaining to the handicapped individual's ability to perform the job)." The employer's justification that it was the Complainant who cast the doubts on her own ability is persuasive in this case, however.

<sup>5</sup> Interviewer Joan Cheek wrote in the rationale section of the scoresheet that "she (Pham) mentioned her size may be a problem in holding down high strung children or to keep a child from hurting himself and others." It is likely this comment was added to the form after the interview had been completed.

<sup>6</sup> Pham was probably not hired because of the panel's concerns about her "hands-on" or practical experience. However, I have written this decision by construing the facts in the Complainant's favor and assuming that her

size and strength were a factor in her non-hire as stated by Schuster's letter. However, I find there was no discrimination because the Complainant raised the doubts about her own ability, whether she realized it or not.