

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

<p>Donald Siebert 700 South Monroe Stoughton, Wisconsin 53589</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Backey and Associates Engineering 2305 Daniels Road Madison, Wisconsin 53704</p> <p style="text-align: center;">Respondent</p>	<p>RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p>Case No. 2694</p>
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On October 6, 1980, a complaint was received by the Madison Equal Opportunities Commission (MEOC) alleging discrimination on the basis of handicap in regard to discharge from employment (or, more specifically, in regard to Respondent's failure to permit the Complainant to return to work after a period of absence for medical reasons). Said complaint was investigated by Human Relations Investigator Renee Caldwell (presently, Renee Payne) and an Initial Determination was dated December 5, 1980 was issued finding Probable Cause to believe that discrimination had occurred and/or was occurring.

Conciliation was waived and/or unsuccessful, and the matter was certified to public hearing. A hearing has held on May 9, 1981. Attorney Sam Brugger of the Ken Hur Law Offices appeared on behalf of the Complainant, Donald Siebert, who also appeared in person. Attorney Derek McDermott of Bonk, Lutz, Hertel, Burnett and McDermott appeared on behalf of the Respondent and Attorney Robert Lutz of the same firm acted as co-counsel; John Backey appeared as the Respondent's employee-representative. Based on the record of the hearing and any post-hearing arguments submitted in this matter, the Examiner proposes the following Recommended Findings of Fact, Conclusions of Law and Order:

### **RECOMMENDED FINDINGS OF FACT**

1. The Complainant, Donald Siebert, is an adult male residing in the State of Wisconsin.
2. Backey and Associates Engineering, Inc. is a company doing business at 2305 Daniels Road which is located in the City of Madison, State of Wisconsin.
3. The Complainant was hired by the Respondent on February 11, 1980 to perform various job duties including welding, painting, cutting scrap, unloading metal and janitor work. Welding and painting were the Complainant's two primary job duties; welding comprised about one-third of the Complainant's work and painting comprised slightly more than one-third of the Complainant's duties.
4. The Complainant did not report to work on May 16, 1980 on account of a neck or back injury incurred while he was lifting stock on the job one day earlier. Although he was injured on May 15, 1980 in the late morning, he continued to work the remainder of that day and did not go to see a doctor until May 16, 1980.
5. The Complainant received Worker's Compensation for a temporary total disability at the rate of \$199.77 per week through January 12, 1981, except for two weeks where he was in a hospital and not entitled to receive benefits. He had not applied for permanent partial disability benefits at the time of the hearing.
6. The Complainant was an excellent painter.
7. The Complainant had not learned to weld adequately for the Respondent's needs up to the time of his May injury. He also had difficulty reading blueprints used for the welding process.
8. In September, 1980, the Complainant was certified by his doctor as able to return to work with lifting restrictions. The Respondent refused to reemploy him.
9. The Respondent's employees included engineers, office people, and persons who work in the shop. The Complainant worked in the shop.

10. In the twelve (12) months preceeding the hearing, five (5) part-time employees were hired and fired (all Madison Area Technical College students), another employee was fired in October, 1980, another employee was fired in February, 1981, and another employee quit voluntarily.
11. The Respondent did not employ a full time janitor.
12. The Respondent, following the Complainant's May injury, hired an individual who welded 80% of the time and painted 20% of the time. Except for the occasional painting of lights by Grant Backey, no other employee of the Respondent does painting.
13. The Complainant was earning \$7.10/hour prior to his May injury.

### **RECOMMENDED CONCLUSIONS OF LAW**

1. The Complainant was handicapped within the meaning of Section 3.23(7)(a), 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 in violation of Section 3.23, Madison General Ordinances by refusing to reemploy him in September of 1980.

### **RECOMMENDED ORDER**

That this case be and hereby is dismissed.

### **OPINION**

Essentially, I find that the Respondent discharged the Complainant for a legitimate, non-discriminatory reason: his unsatisfactory job performance as a welder.

#### **I. Handicap**

If the Complainant has failed to prove that he is handicapped under Section 3.23, Madison General Ordinance, the case must be dismissed as the Complainant then cannot prove he was discriminated against because of his handicap. While the Wisconsin Supreme Court initially defined handicap as "a disadvantage that makes achievement unusually difficult, especially a physical disability that limits capacity to work,"<sup>1</sup> the Court in a later case<sup>2</sup> acknowledged the Federal definition that handicapped individuals may also be persons who are regarded as having an impairment:

" . . . any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such impairment, or (C) is regarded as having such an impairment." (Emphasis supplied) (Rehabilitation Act of 1973 7/ 29 U.S.C., Section 706(6) 1976.)

The Complainant presented no competent medical testimony to support his contention that he was physically disabled at the time he asked the Respondent to be reemployed in September, 1980. A layperson's testimony by itself will not support a conclusion of law that an individual is handicapped, per se.<sup>3</sup>

However, the issue in this case is whether the Complainant was denied employment because he was perceived or regarded as handicapped. In this respect, the Complainant showed that he left work in May, 1980 with a neck or back injury of some kind sufficient to warrant his receiving Worker's Compensation benefits for a temporary total disability. Clearly, the Complainant presented sufficient evidence to show a set of circumstances that would make it reasonably possible for the Respondent to have perceived him as being handicapped and to shift the burden to the Respondent to articulate a legitimate and non-discriminatory reason for the refusal to reemploy the Complainant (effectively, the Complainant's discharge).

#### **II. Legitimate, Non-Discriminatory Reason**

The Respondent offers essentially two reasons for refusing to reemploy the Complainant:

1. The Complainant was not an adequate welder, and there was no painting or janitorial work available in September, 1980; and
2. The Complainant received Worker's Compensation under false pretenses because he was not actually injured on the job.

There is no need to discuss the second reason at length. The Respondent tries to relitigate the Worker's Compensation claim by presenting evidence that the Complainant had a pre-existing injury and attempting to connect it with a prior auto accident. The fact is, however, that the Complainant did receive Worker's Compensation. In any event, the Respondent's belief that the Complainant had been deceptive has no bearing on the outcome of this case.

What is important, however, is that the Respondent did present credible evidence that the Complainant's work performance as a welder was unsatisfactory, and that no jobs were available as a painter and/or janitor in September of 1980. Further, the fact that the Respondent employs or has employed other handicapped individuals,<sup>4</sup> while insufficient to establish the absence of discrimination in this case, lended credibility to the Respondent's argument that it had not intentionally discriminated against the Complainant by refusing to reemploy him.

The Complainant failed to show that the Respondent's reasons were pretextual and this matter is hereby dismissed.<sup>5</sup>

Signed and dated this 8th of July, 1981.

Allen T. Lawent  
Hearing Examiner

<sup>1</sup>Chicago, Milwaukee, St. Paul and Pacific Railroad v. DILHR (Goodwin), 62 Wis. 2d 392, 215 N.W. 2d 443 (1974).

<sup>2</sup>Dairy Equipment Co. v. DILHR, 22 EPD par. 30, 809. 290 N.W. 2d 330 (1980).

<sup>3</sup>Connect General Life Insurance v. DILHR (Bachard), 86 Wis. 2d 393, 273 N.W. 2d 206 (1979); Bauman v. Specialties, Inc. (DILHR, 10/3/75).

<sup>4</sup>The Respondent produced two handicapped persons at the hearing, Ed Weiler and Dale Schuldheis. Weiler is an engineer and long-time employee who is obviously severely handicapped, and Schuldheis is a left-hand amputee who worked in the shop and is effectively on a "leave of absence" to build his own home. John Backey, the company president, also testified that at least three other employees were handicapped. However, based on the citations in Footnote 3, it is clear that Backey's testimony is insufficient to establish that the other employees were in fact handicapped. However, the production of Weiler and Schuldheis as witnesses at the hearing was sufficient to lend credibility to the Respondent's position that it did not intentionally discriminate against the Complainant.

<sup>5</sup>I will point out that this was a hearing on a violation of Section 3.23, Madison General Ordinances and not a hearing on the violation of the Wisconsin Fair Employment Act (which the Respondent's brief addressed itself to). However, the ordinance handicap discrimination provisions, because of their similarity in language to the state law, are generally construed in accordance with the state law.

**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 8th day of July, 1981, at approximately 3:30 P.M., place in envelope(s) addressed:

Donald Siebert  
700 South Monroe  
Stoughton, WI 53589

Derek McDermott, Esq.  
50 East Main Street  
Chilton, Wisconsin 53014

Backey and Assoc. Engineering  
2305 Daniels Road  
Madison, Wisconsin 53704

Attorney Sam Brugger  
119 Monona Avenue  
Madison, Wisconsin 53703

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

2. That on or about said time, the said 4 envelopes 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 8th day of July, 1981.

Notary Public, State of Wisconsin  
My Commission is permanent.

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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 the 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. 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.

Signed and dated at Madison, Wisconsin this 8th day of July, 1981.

Allen T. Lawent  
Hearing Examiner

cc: Sam Brugger, Attorney for Complainant  
Derek McDermott, Attorney for Respondent