

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

<p>Duane Bodle 344 Sixth Avenue South South St. Paul , MN 55075</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Midwest Fashions, Inc. d/b/a Clothes Encounters West Gate Mall Madison , WI 53711</p> <p style="text-align: center;">Respondent</p>	<p>RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p>Case No. 2781</p>
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A complaint was filed on March 10, 1981 with the Madison Equal Opportunities Commission (MEOC) alleging discrimination on the basis of sex in regard to employment, specifically, hire. Said complaint was investigated by MEOC Human Relations Investigator Mary Pierce and an Initial Determination dated May 22, 1981 was issued finding probable cause to believe discrimination had occurred as alleged. Conciliation failed or was waived and this matter was subsequently certified to public hearing. A hearing was held on December 10, 1981. The Complainant appeared in person but without other representation. The Respondent appeared by Attorney R. Clay Bennett of SEYFARTH, SHAW, FAIRWEATHER AND GERALDSON of Chicago, Illinois. Based upon the record of the hearing and after consideration of any written arguments 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, Duane Bodle, is an adult male attending college in the State of Wisconsin.
2. The Respondent, Midwest Fashions, Inc., is a corporation doing business and employing people in the City of Madison at a clothing store called "Clothes Encounters."
3. The Complainant applied for a position at Clothes Encounters as a part-time salesperson on January 21, 1981, shortly prior to the store's opening for business.
4. In his written application, the Complainant checked a box indicating that he was interested in a "part-time sales" job but failed to check a box indicating any interest in full-time employment.
5. The Complainant listed no women's apparel sales experience on his application, and he listed his work history as being three summer jobs in St. Paul, Minnesota during the summers of 1978, 1979 and 1980.
6. Keith Johnson, one of the owners and the President of Midwest Fashions, Inc., interviewed the Complainant subsequent to the filing of the January written application.
7. The Respondent's store opened for business on February 7, 1981, and the Complainant was not hired as a part-time salesperson.
8. Sometime in March, 1981, the Complainant visited the Respondent's store and sought an explanation from Johnson as to why he (the Complainant) had not been hired. Johnson told Bodle that one of the reasons was that as a male he (Bodle) could not perform the part-time sales job which included entering into the change room area occupied by women trying on clothes. Bodle and Johnson engaged in a brief argument, and Johnson terminated the conversation due to concern that the argument was going to get out of hand.

9. Clothes Encounters is a women's ready-to-wear apparel store specializing in women's outerwear such as blouses, sweaters, tops, jeans, pants, skirts and shorts. The store, which is some 6,200 square feet in area, is divided into four major rooms or areas: the sales floor, the change room area, the stockroom and the office.
10. The change room area, which is entered through an open doorway from the sales floor area, contains thirty individual change booths for the exclusive use of female customers in trying on merchandise. Each change booth has double cafe doors extending from approximately two feet above the floor to approximately five feet above the floor and each booth is equipped with a mirror and hooks upon which garments may be hung.
11. The duties which a part-time sales employee performed included, but were not limited to, cashiering, assisting customers to select clothes on the sales floor, standing outside the change room and monitoring the doorway including counting the merchandise of the customers entering and exiting the change room, cleaning the change room (fitting room), flowing through the change room while customers were present for security purposes, assisting customers in the change room by bringing requested items of clothing to them.
12. The only duties of a part-time sales clerk which the Complainant could not perform because of his sex (although he could actually perform the duties physically) were those duties that had to be performed inside the change room while female customers were present.
13. The vast majority of the Respondent's customers were females, 18 to 50 years of age. No males used the change room areas.
14. Part time sales employees have generally been employed by the Respondent only from 5:00 p.m. to 9:00 p.m. (the night shift) and have generally worked no more than 20 hours per week since the opening of Respondent's store.
15. The Respondent had received approximately 150 applications for part-time sales positions prior to the February, 1981 store opening. All applicants were females except for the Complainant.
16. Initially, the Respondent generally employed two supervisors and two part-time sales people on the night shift. After a couple of months, the Respondent reduced the number to one supervisor and two part-time employees on the night shift.
17. Part-time sales employees customarily rotated their duties at least once each shift, requiring each part-time salesperson to perform duties inside the change room at some time during each shift when only two part-time sales employees were present.
18. On occasion, the Respondent employs more than two part-time sales people on a shift.

#### **RECOMMENDED CONCLUSIONS OF LAW**

1. The Complainant is a member of the protected class of sex 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 did not discriminate against the Complainant on the basis of sex in regard to failure to employ the complainant as a part-time salesperson when two or fewer part-time salesperson were scheduled to work a shift, within the meaning of Section 3.23, Madison General Ordinance.
4. The Respondent discriminated against the Complainant on the basis of sex in regard to failure to hire him and employ him as a part-time salesperson when more than two part-time salespersons were employed on a shift, within the meaning of Section 3.23, Madison General Ordinances.

#### **RECOMMENDED ORDER**

1. That the Respondent cease and desist from discriminating against the Complainant on the basis of sex.

2. That the Respondent immediately instate the Complainant to a position as a part-time salesperson and employ him on all occasions when more than two part-time salespersons are employed on a shift. The Complainant shall also be given, for a period of one year, the first right of refusal to work on all shifts where more than two salespersons are scheduled to work.
3. This Order is intended to exclude any award of backpay. However, the Respondent shall be liable to the Complainant for front pay from the time this Order is issued until the time he is instated by the Respondent.
4. The Respondent shall report to the Madison Equal Opportunities Commission in writing every 90 days from the date this Order becomes final to verify the Complainant's employment status and the dates and number of hours worked by the Complainant. Said reports shall be made for a period of one year.

### **MEMORANDUM OPINION**

The Respondent articulated three reasons for failure to hire the Respondent:

(1) As a male, Bodle could not perform the duties of a part time sales employee which included entering the change area occupied by undressed women;

(2) Bodle's employment application demonstrated a history of returning to Minnesota each summer; and

(3) Bodle possessed neither sales experience in the women's apparel line nor a promising sales personality.

#### **I. SUMMER WORK**

I reject the Respondent's second reason as being purely speculative. Not only did the Respondent not know whether or not Bodle would return to Minnesota in the summer, but the Respondent employed primarily high school students as part-time salespersons who had a high rate of turnover (three of eight had left by June, 1981 and at least three more had left by December, 1981).

#### **II. EXPERIENCE AND PERSONALITY**

I reject the Respondent's third reason regarding Bodle's alleged lack of women's apparel sales experience and his lack of a promising sales personality as self-serving and suspect, also in light of the fact that the Respondent employed primarily high school students as part-time sales clerks.<sup>1</sup>

#### **III. BONA FIDA OCCUPATIONAL QUALIFICATION**

The only job duty which legitimately can be considered a bona fida occupational qualification is that of entering the dressing room while women were dressing due to the mirrors in each dressing space which would subject customers to a possible invasion of privacy. However, bona fida occupational qualifications are to be granted only in rare circumstances and the burden of proof is on the Respondent to establish that a bona fida occupational qualification exists or is necessary.<sup>2</sup> (Read particularly last three paragraphs of Footnote 2.)

Consequently, I find that the Complainant shall be immediately employed by the Respondent in situations where more than two part-time salespersons are required to be present in the store, as the Complainant would not be required to perform the dressing room tasks during the busy periods. Further, I am requiring a monitoring of the Respondent's employment practices for one year. I find it rather ironic that Mr. Johnson, essentially the operator of this store, objects to employing males. Had his previous employers been so disposed perhaps he would not be in the women's apparel business at all.

Signed and dated this 5th day of April, 1982.

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Allen T. Lawrent  
Hearing Examiner

1. I do not preclude the possibility that the high school students hired may have had women's apparel experience and promising sales personalities. However, the fact that the Respondent employed high school students in part-time jobs casts doubt on the credibility of the experience requirement reason (for non-hire of Bodle). Further, the "promising sales personality" reason is so subjective that on these facts I reject it as being outright pretextual where the Respondent has admitted that sex was a factor in Bodle's non-hire

2. Section 3.23(h) of the Madison General Ordinances reads in pertinent part:

Notwithstanding any other provision of this section, it shall not be an unlawful employment practice for an employer to hire and employ employees. . . in those certain instances where. . . sex. . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

This language is virtually identical to that found in Section 703(e) of Title VII, 42 U.S.C. Section 2000e-2(e) (Title VII of the Civil Rights Act of 1964, as amended). Consequently, I construe the Madison Ordinance in accordance with the federal law.

Borrowing from Fesel v. Masonic Home, 17 FEP 330, 332 (1978), I find that the bona fide occupational qualification exception was meant to be narrowly construed, a position also supported by the holding in Dothard v. Rawlinson, 433 U.S. 321, 15 FEP Cases 10 (1977).

Further, I construe the Madison Ordinances to place a heavy burden on the Respondent to establish a bfoq exception See Fesel, supra and Weeks v. Southern Bell Telephone and Telegraph Co., 408 F. 2d 228, 1 FEP 656 (1969).

Not only must the bfoq exception be "reasonably necessary to the normal operation of that particular business," but the employer must also prove that "the essence of the business operation would be undermined by not hiring members on one sex exclusively." See Diaz v. Pan American World Airways, 442 F. 2d 385, 3 FEP 337 (5th Cir.). (The standard appears to have been accepted in Dothard, supra, although the U.S. Supreme Court ruled in the employer's favor because the employer apparently met the standard.)

The Fesel court next distinguishes bfoq cases on the bases of (1) employer's perception of physical inability to perform on account of sex, and (2) employer's perception of customer privacy interests.

The Fesel court further goes on to say that "in the cases when the bfoq defense is based on privacy interests of the customers there is an additional showing required by the employer. The case law requires that in order or the employer to successfully interpose the bfoq defense, he must show that due to the nature of the operation of the business, it would not be feasible to assign job responsibilities in a selective manner so as to avoid collision with the privacy rights of the customer." Emphasis added) See 17 FEP 334. Essentially, a sort of reasonable accommodation is called for where a bfoq exception will be valid in a case such as the one at hand only where it is not feasible to selectively assign duties. This amounts to a determination that it is more desirable to reasonably accommodate employees of one sex in order to employ them than it is to absolutely bar them because of customer privacy concerns. In this case, the Respondent has shown (carried its burden of proof) that it is not feasible to assign duties where only two part-time salespersons are in the store. However, the Respondent has not carried its burden of proof where more than two part-time salespersons are involved, as it then would be possible to selectively assign duties so that Bodle would not have to physically enter the change room while women customers were present.