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

Kathleen Maxson 2505 Calypso Road Madison, WI 53704 Complainant vs. Means Services, Inc. 1212 Stoughton Road Madison, WI 53704 Respondent	FINAL ORDER Case No. 2783

The Hearing Examiner of the Madison Equal Opportunities Commission (MEOC) issued a "Recommended Decision - Remand" dated March 13, 1984 (pursuant to the Commission's instructions in the "Order From Appeal of Examiner's Recommended Decision" dated June 15, 1983). Timely exceptions were filed by both parties, written arguments were submitted, and oral arguments were heard by eight members of the Commission. Attorney William Smoler of SMOLER, ALBERT AND ROSTAD argued for the Complainant; Attorney James K. Ruhly of MELLI, WALKER, PEASE and RUHLY, S.C. argued for the Respondent.

Based upon a review of the record in its entirety, the MEOC issues the following:

ORDER

1. That the attached RECOMMEND DECISION REMAND be affirmed in its entirety except as follows:

That portion of the Memorandum Opinion Remand beginning after the three asterisks on page 13 ("Assuming arguendo, however . . .") to the end (excluding, of course, the date and signature lines on page 23) is hereby stricken;

2. This FINAL ORDER also reaffirms the "Order From Appeal of Examiner's Recommended Decisions" dated June 15, 1983 (except that Order #2 of said June 15 order which remanded the case to the Examiner is now, obviously, moot).

MEMORANDUM OPINION - FINAL ORDER

Because we affirm the Examiner's Recommended Decision Remand insofar as it was determined that sec. 3.23, Madison General Ordinances did not impose a duty on the employer at the time of the Complainant's discharge (in February, 1981) to accommodate the Complainant's handicap, we need not reach the second issue of whether the Respondent employer breached any such duty of accommodation. Consequently, we have struck that portion of the Examiner's opinion (from the middle of page 13 on) dealing with the breach issue in the hypothetical.

Commissioners Abramson, Amato, Olson, Silvers, Trachtenberg and Ware all join in entering the above FINAL ORDER. Commissioner Kifle joins in striking said portion of the Examiner's "Memorandum Opinion-Remand" beginning in the middle of page 13, but abstains from deciding whether the ordinance imposed a duty on the employer to accommodate the Complainant's handicap (in February of 1981 at the time of the Complainant's discharge); Commissioner Goldstein dissents from striking said portion of the Examiner's "Memorandum Opinion Remand" beginning in the middle of page 13 but also abstains from deciding whether the ordinance imposed a duty on the employer to accommodate the Complainant's handicap (in February of 1981 at the time

of the Complainant's discharge). Goldstein also would have reinstated the Examiner's conclusion finding discrimination in regard to (re)hire vacated by the Commission's June 15, 1983 order. Effectively, six Commissioners join in entering the above Final Order, one Commissioner affirms in part and does not participate as to another part, and one Commissioner dissents in part and does not participate as to another part.

Signed and dated this 14th day of June, 1984.

Le Anna Ware
MEOC President

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Kathleen Maxson 2505 Calypso Road Madison, WI 53704 Complainant vs. Means Services, Inc. 1212 North Stoughton Road Madison, WI 53704 Respondent	RECOMMENDED DECISION - REMAND Case No. 2783

A complaint was filed with the Madison Equal Opportunities Commission (MEOC) alleging discrimination on the basis of handicap in regard to employment. Said complaint was received by the MEOC on March 12, 1981 and was investigated by Human Relations Investigator Mary Pierce. An Initial Determination dated September 11, 1981 was issued concluding that probable cause existed to believe that discrimination had occurred or was occurring as alleged.

Conciliation failed or was waived, and the matter was certified to public hearing. A hearing was held commencing on May 18, 1982. Attorney William Smoler of SMOLER, ALBERT AND ROSTAD appeared on behalf of the Complainant. Attorney James K, Ruhly of MELLI, SHIELS, WALKER AND PEASE, S.C. (now, MELLI, WALKER, PEASE AND RUHLY, S.C.) appeared on behalf of the Respondent who also appeared by employee representatives Donald Norstrom and Dennis Antony. Subsequently, this Examiner issued a Recommended Decision dated November 18, 1982 in which I found no handicap discrimination in regard to the Respondent's discharge of the Complainant but found handicap discrimination in regard to the Respondent's failure (or refusal) to (re)hire the Complainant.

Both parties appealed to the Commission and an "Order From Appeal of Examiner's Recommended Decision" dated June 15, 1983 was issued in which the Commission effectively remanded the finding of no handicap discrimination in regard to discharge (see Conclusion of Law No. 3 in the Recommended Decision dated November 18, 1982) with instructions to (re)consider certain reasonable accommodations questions. Additionally, the Commission reversed and deleted the finding of handicap discrimination in regard to failure (or refusal) to rehire essentially on due process grounds (a lack of some type of notice to the Respondent, formal or otherwise, prior to hearing that rehire was at issue).

Based upon a review of the record in its entirety, including consideration of the briefs submitted by the parties an remand, the Examiner enters the following:

RECOMMENDED FINDINGS OF FACT - REMAND

Recommended Findings of Fact 1 through 23 as they appeared in the Examiner's "Recommended Decision" dated November 18, 1982 are hereby incorporated as the Recommended Findings of Fact Remand in this "Recommended Decision Remand".

RECOMMENDED CONCLUSIONS OF LAW - REMAND

1. The Complainant is a member of the protected class of handicap 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 had no duty at the time of the Complainant's discharge to reasonably accommodate the Complainant's handicap under Section 3.23, Madison General Ordinances.

4. The Complainant was not discriminated against by the Respondent on the basis of handicap in regard to discharge from employment in violation of Section 3.23, Madison General Ordinances.

RECOMMENDED ORDER - REMAND

1. That this case be and hereby is dismissed.

MEMORANDUM OPINION - REMAND

This case has required, on remand, that I reconsider my position (stated in my original Memorandum Opinion) on the reasonable accommodation issues in this case. While some of my positions have ultimately remained the same, others have been modified for the reasons discussed below.

Although it is likely, as in any decided case, that the parties will not be equally satisfied with the results, I would nevertheless like to thank both Atty. Ruhlv and Atty. Smoler for submitting briefs which contained useful discussions of the reasonable accommodations questions at hand.

This case was filed almost three years ago and is still in the administrative stage. This is an unusually long time, as most EOC cases are resolved within four months of filing, and even cases which go through hearing and Commission appeal usually result in a final order within no longer than 15 months after filing.

This ease, however, has presented some very difficult issues. While it will ultimately be useful precedent on these issues when ultimately decided, this fact is likely to be small consolation for the parties directly involved. Nevertheless, I would like to express to Ms. Maxson and Means Services, Inc. my appreciation for their patience.

I. COMPLAINANT'S MOTION

The Complainant's "Motion to Amend Complaint, Amend the Notice of Hearing and Allow Further Testimony" dated June 23, 1983 is DENIED on the grounds that it is controlled by the Commission's "Order From Appeal of Examiner's Recommended Decision" dated June 15, 1983 ruling that the (failure or) refusal to rehire was not properly raised prior to the original hearing in this case. By implication, I find the issue of (failure or) refusal to rehire is now foreclosed to the Complainant and I will address only the discharge issue.

II. WAS THERE A DUTY OF REASONABLE ACCOMMODATION (BY THE EMPLOYER) FOR THE HANDICAPPED IN EMPLOYMENT UNDER SECTION 3.23, MADISON GENERAL ORDINANCES?

In the original "Recommended Decision" (see Page 11), I did not reach the question of whether Section 3.23, Madison General Ordinances imposed a duty of reasonable accommodation on an employer (as I held that even if such a duty were imposed by said Ordinance, the duty did not apply in this ease). On remand, I will now address the question of whether the Ordinance imposed a duty of reasonable accommodation (at the time of the Complainant's discharge in February of 1981) in handicap cases. If I find such a duty exists, I shall also reconsider the question of whether the duty applies in this case.

Among its contentions, the Respondent argues the provision of Sec. 3.23, Madison General Ordinances containing preferential treatment precludes a construction of the Ordinance that implies a duty of reasonable accommodation. Section 3.23(7)(1) of the local Ordinance reads as follows:

> "Nothing contained in this section shall be interpreted to require any employer. . .to grant preferential treatment to any individual. . .because of sex, race, religion, color,. . .handicap. . ." (Emphasis supplied)

As pointed out in the Complainant's brief,[1] however, the duty of reasonable accommodation does not necessarily clash with the prohibition against preferential treatment. Since 1975, the Ordinance already has included an explicit duty of accommodation in religion eases notwithstanding the prohibition against preferential treatment and the social policies underlying both religious[2] and handicap[3] discrimination are cognizant of the fact that identical treatment may be a source of discrimination while differential treatment may eliminate the same. Reasonable accommodation in handicap cases is designed to enable an applicant or employee to perform one an equal footing with other employees[4] and is not designed to give an applicant or employee an advantage over other employees.

I, therefore, reject the Respondent's argument that a duty of reasonable accommodation in handicap cases cannot be implied by the local Ordinance because of the "preferential treatment" provision also contained in that Ordinance.

Next, I will discuss the issue of Ordinance construction in light of the Wisconsin Supreme Court's decision in AMC v. DILHR (Thomas Bartell), 101 Wis.2d 337, 26 EPD par. 31,803 (April 29, 1981).

In AMC v. DILHR, the Wisconsin Supreme Court found that the Wisconsin Fair Employment Act (hereinafter "the WFEA"),[5] which lacked an explicit provision, did not impose a duty (upon employers) of accommodation in creed (religion) discrimination cases.[6] While the WFEA has since been amended to impose such a duty in religion cases,[7] the discussion of the AMC court is pertinent in determining whether or not a duty of accommodation existed under the local Ordinance for handicap cases in the absence of an explicit provision to that effect.

The AMC court found that the Wisconsin Legislature had failed to act over the period of 1945 to 1981 in regard to the duty of accommodation in creed eases, but did not find this failure to act necessarily conclusive of the Legislature's intent. Rather, the AMC court indicated that it is possible by a course of administrative interpretation to modify or supplement statutory provisions adopted by the Wisconsin Legislature, "and under proper circumstances, this court will give weight to such administrative construction of a statute. This may be so even though, as we have often stated, upon review of actions of administrative agencies, questions of law such as statutory construction are reviewable ab initio by this court."[8]

The court then looked at whether DILHR[9] (the state agency) had promulgated any administrative rules in regard to the creed accommodation issue, which DILHR had not.[10]

The AMC court also looked at what construction DILHR's administrative decisional processes (other than rulemaking) had placed on the statute. The court stated that "in order to be given substantial weight or deference by a court, an administrative agency's construction or interpretation of the Legislature's intent in enacting a statute must be reasonably contemporaneous with its passage."[11] The AMC court determined that DILHR's interpretation was neither long-standing nor reasonably contemporaneous with the creed discrimination statute.[12] Similarly, a Wisconsin Circuit Court has found that DILHR'S interpretation of the WFEA's handicap discrimination statute regarding the imposition of a duty of accommodation on an employer was neither long-standing[13] nor substantially[14] contemporaneous with the enactment of the State's handicap discrimination statute. In Mittlestadt v. LIRC,[15] No. 82 CV 1412 (Outagamie County Circuit Court, Hon. Harold Froehlich, November 28, 1983), the court dealt with a state statute similar to the local Ordinance (although the state law contained no explicit provision for reasonable accommodation of the handicapped at the time the Mittlestadt case was filed, that statute was later amended by the Legislature effective in mid 1981 to impose a duty of accommodation).

Because of its finding that the construction of the statute was neither long-standing nor substantially contemporaneous under the facts presented, the Mittlestadt court determined that the state statute (absent an explicit provision at the time of filing) did not impose a duty to accommodate despite acknowledging that the social policies underlying both religious and handicap discrimination law are cognizant that identical treatment may be a source of discrimination while differential treatment may eliminate the same.

However, in the ease at hand, I do not need to reach the issues of long-standing and/or reasonably contemporaneous administrative (MEOC) construction as the City Council's own actions prior to February, 1981 support the conclusion that the Ordinance then in effect could not be read to imply a duty of reasonable accommodation in handicap cases and the McFadyen decision must now be overruled.

The local Ordinance was amended in 1975 to include a prohibition against handicap discrimination in employment. Further, at that time, a general provision was added to the local Ordinance which read as follows:

> In any action on a complaint of employment discrimination, the Equal Opportunities Commission will follow the current relevant guidelines of the U.S. Equal Opportunities Commission and the U.S. Department of Labor, Office of Contract Compliance and the U.S. Department of Health, Education and Welfare. (Madison General Ordinances 3.23(7)(j) (1975))

I find that the general provision, by its language, was intended to apply to "any action on a complaint of employment discrimination", and certainly included but was not limited to employment discrimination based on handicap. It is argued in the "Complainant's Brief on Remand to the Examiner"[16] that the Department of Labor had adopted, prior to the 1975 Ordinance amendments, a guideline requiring reasonable accommodation in handicap discrimination cases,[17] and that the Madison Common Council therefore intended to impose a duty of reasonable accommodation on employers in handicap cases. It is noted that the general provision 3.23(7)(j), Madison General Ordinances making reference to federal guidelines was added to the Ordinance in the same year that discrimination on the basis of handicap was made a prohibited basis of discrimination by the Ordinance. No handicap accommodation cases appear to have been decided by the MEOC relying on the general provision, however.

In 1979, the general provision[18] making reference to following the guidelines of certain federal agencies was deleted. There does not appear to be any available history as to why the provision was deleted from the Ordinance. At least none was submitted by the parties in making legal arguments on remand and there could have been any of a multitude of reasons for the deletion.

The EOC shortly thereafter construed the Ordinance to impose an accommodation duty upon the employer in handicap cases in McFadyen v. University Bookstore, MEOC No. 2539 (case originally filed November 29, 1979 and decided by the examiner on February 3, 1981 and affirmed by the Commission on June 29, 1981).[19] On appeal, as McFadyen v. MEOC, Case No. 81 CV 3744 (Dane County Circuit Court, Hon. Angela B. Bartell, November 15, 1981), Judge Bartell affirmed the Commission holding that the Ordinance imposed a duty of reasonable accommodation on an employer in handicap cases. It was pointed out by the Respondent, however, in its brief on remand (see pp. 5) that the Circuit Court's decision omitted any discussion of the AMC decision and the Examiner's Decision had initially been rendered prior to AMC.

I find the local Ordinance history to be somewhat distinguishable from the situations in AMC and Mittlestadt,[20] but I nevertheless come to the same conclusion. The Ordinance contained, at the inception of the handicap discrimination prohibition in 1975, a general provision making reference to federal regulations, at least one of which made reference to a duty of reasonable accommodation for employers (federal contractors) in handicap cases. In 1979, when the general reference to federal regulations was dropped, the analogous and similar provision of the state handicap law had been construed to imply a duty of reasonable accommodation[2l] and the EOC shortly thereafter interpreted the local Ordinance similarly in McFadyen.

The bottom line of the present inquiry is to determine the Council's intent relating to the handicap discrimination provisions of the Ordinance. This intent may ultimately be determined by examining the actions or inactions of the Council even without examining the actions or inactions of the administrative agency via its rulemaking and decisional processes.

In the 1975 amendments to the Ordinance, the Council passed the previously discussed general interpretation provision - Sec. 3.23(7)(j), Madison General Ordinances, (1975) - making reference to federal guidelines.[22] At the time, federal guidelines existed regarding both handicap and religious discrimination.[23]

Notwithstanding the existence of the federal religious discrimination guideline, the Council included a provision explicitly requiring accommodation in religious discrimination cases; the Council did not include any explicit provision regarding accommodation in handicap discrimination cases. In light of this history, I find it unnecessary to reach the issue of long-standing and reasonably contemporaneous administrative (MEOC) construction.

I find the reference to federal guidelines cannot be construed to have created a separate duty of accommodation in handicap cases, but was intended as a guide for interpreting the substantive provisions of the Ordinance, including the duty of accommodation that was explicitly provided for in religious discrimination cases.

In conclusion, I am persuaded that the Council, by its actions of including an explicit provision for religious accommodation but remaining silent on the issue of handicap accommodation, evinced an intent to include accommodation in religious discrimination cases but not in handicap discrimination cases.

I therefore find that no duty existed on the part of the employer - Means Services, Inc. - to accommodate Maxson in regard to her handicap at the time of her discharge in February of 1981.

* * *

Assuming arguendo, however, that the Commission or further appellate levels find that such a duty existed, I would have concluded that Respondent had breached that duty.

III. IF THE ORDINANCE DID IMPLY A DUTY TO ACCOMMODATE, DID THE RESPONDENT-EMPLOYER BREACH SAID DUTY OF REASONABLE ACCOMMODATIONS UNDER THE FACTUAL CIRCUMSTANCES OF THIS CASE?

A. Scope of the Duty - The Employer Would Have Had to Show Undue Hardship to be Relieved of the Duty

In all previous references to reasonable accommodations and the scope of the duty under the Ordinance, the duty imposed on the employer had been to require those accommodations which did not create an "undue hardship" on the employer. The Respondent argues, however, that if the Ordinance is construed as imposing a duty of reasonable accommodations, it should be relieved of that duty if it can show only that an accommodation would pose a "hardship" to the employer. This argument is based on the language of the WFEA.[24]

However, in light of the history of the handicap discrimination provision in the Ordinance primarily on the reference to federal regulations that appeared from 1975 to 1979 in the previously discussed general provision[25] and the McFadyen decision[26] - I find that the Ordinance would impose a duty of accommodation that could be relieved only by the employer's showing of "undue hardship." Although this standard would be more restrictive on the employer than the present state law standard, the Wisconsin Courts have permitted municipalities to enforce Ordinances with more restrictive prohibitions than are contained in the state fair employment laws.[27]

B. Burden of Proof

The burden of proof to show that a specific accommodation creates an undue hardship (i.e., a hardship that is not reasonable) would clearly be on the employer.[28] The primary dispute here, however, is whether the employer would be required to show - as is asserted in the Complainant's brief[29] - that it:

(a) made good faith efforts to accommodate the individual;

(b) establish that such efforts were unsuccessful because of the undue hardship placed upon the employer.[30]

While some case law would appear to state the burden in this manner, I do not find that the burden was generally applied in this manner nor should it have been. Rather, the burden on the employer - under the Ordinance - would be to show that a particular accommodation would create an undue hardship on the employer, and the employer may reach the undue hardship issue even where it had not first attempted that particular accommodation or any other accommodation.[31]

While it would be desirable and within the spirit of the Ordinance to attempt accommodations where possible, there are also circumstances where it would not be practical or possible to attempt accommodations that would likely create an undue hardship.[32]

In order to balance these two issues - the desirability of attempting accommodations where possible versus the undesirability of requiring employers to attempt accommodations that would likely result in undue hardship - I find that evidence of actual attempts (and failures) of accommodations (prior to an adverse employment action being taken) would generally be more persuasive than speculative evidence of undue hardship (i.e., evidence of projected undue hardship for accommodations that were never tried, or tried fully would be viewed with greater scrutiny and skepticism than evidence arising from actual experience).[33]

Nevertheless, it is possible for an employer to prove that a particular accommodation would create an undue hardship without first showing that it made good faith efforts to accommodate the individual by trying that particular accommodation or by trying any other accommodation(s).

C. Could the Respondent Have Reasonably Accommodated the Complainant Without Undue Hardship Under the Facts and Circumstances of this Case

Section 3.23(7)(h)2., Madison General Ordinances sets forth a defense to a handicap discrimination allegation where an employer can show that the handicap is "reasonably related to the individual's ability to adequately undertake the Job-related responsibilities of that individual's employment." (Emphasis supplies)

When construed in light of a duty of reasonable accommodation, this section would be modified as follows to account for the duty:

> The employer must show that the handicap is reasonably related to the individual's ability to adequately undertake, with or without reasonable accommodation, the job-related responsibilities of that individual's employment.[34]

1. Reasonable Relationship to Employment Without Accommodation

The first level of inquiry would be whether the Complainant's migraine headaches were reasonably related to her ability to adequately undertake, without accommodation, the job-related responsibilities of her employment. (The defense will first be analyzed without addressing the accommodation issue, because if the employer could not show the reasonable relationship between her handicap and her job-related responsibilities, there would be no need to inquire any further and the Complainant would prevail.)

It is fundamental, in this Examiner's view, that an individual must be in attendance at a job[35] in order to adequately undertake the job-related responsibilities of the employment. If an individual's handicap prevents such attendance (i.e., by causing an individual to be absent, tardy, have to leave early and so on in violation of the employer's attendance policy), that handicap is reasonably related to the ability to adequately undertake the job-related responsibilities of the employment. This is not a case where the Complainant could have been accommodated to prevent her from missing work; in this case, she needed to miss work despite any other possible accommodations.[36]

The particular absenteeism policy in question allowed the Complainant to have five infractions in a three month period[37], or to be absent from work a minimum of 7.69%[38] of the time without fear of discharge. While not all of these absences were due to migraine headaches (3 of 6 were found to be in this ease), the Complainant could have had a minimum of twenty such headaches in a year without having been discharged.

2. Reasonable Accommodation

The next level of inquiry, then, would be to determine whether the employer could have reasonably accommodated the Complainant (i.e., accommodated her without creating undue hardship on the employer) so that she would have been able to undertake the job-related responsibilities of her employment. The possible accommodations available in this case were as follows:

(1) excusing the Complainant's absences due to migraine headaches by not counting such absences as "occurrences" under the company's absenteeism policy and granting her unpaid leaves of absence (including medical leave or otherwise);

(2) allowing the Complainant to apply unused vacation time to absences due to migraine headaches.

a. Excusing Absences

While it may be reasonable to grant unpaid leaves to employees for absences due to handicap which would otherwise have violated the employer's absence policy, such an accommodation would have created an undue hardship on the employer under the facts and circumstances of this case.

One example of a situation in which an employer might be required to accommodate an individual's absence due to handicap where such absence otherwise would have resulted in discipline and/or discharge is as follows:

(a) An individual became ill at or prior to work on a particular day and shortly thereafter was diagnosed as suffering from a handicap previously unknown to the individual. The case at hand does not present this issue. The Complainant had been diagnosed and was receiving treatment for her migraine headaches. She was sometimes absent on an essentially unannounced and sporadic basis due to migraine headaches (although not all her absences were due to migraine headaches). There is no dispute that she violated the employer's absenteeism policy. While the Complainant argues that somehow this policy had a disparate impact (presumably on the class of persons who experience migraine headaches), the Complainant did not present one scintilla of evidence to support such a disparate impact argument. Rather, this is a disparate treatment case which would have the additional dimension of reasonable accommodations.[39]

The Complainant additionally argues that her absences due to handicap - migraine headaches - should have been accommodated by excusing her when certain circumstances existed. She argues that substitutes were often available (either on call or by transfer from another department when needed), and she further argues that employees were often released from work early due to lack of work.

Notwithstanding the Complainant's arguments about available substitutes and light workload, a balance must be struck between an employee's need to be absent - involuntarily due to handicap - and the employer's need to enforce its absenteeism policy because attendance is reasonably related to an individual's ability to undertake the job-related responsibilities of employment.

In this case, where absences are sporadic, and unannounced, to allow all handicap-related absences to be excused (via some form of medical or other leave) would have operated to effectively give the Complainant a "blank check" for absenteeism, especially when she was the primary source of knowing whether or not she is experiencing a migraine headache severe enough to warrant her absence from work. Essentially, she could have claimed almost any absence was due to a migraine headache and violate the employer's absenteeism policy without consequence. (I do not imply that this Complainant necessarily would have so claimed.)

The Complainant does have an obligation to make herself available for work. In order to meet this obligation, the Complainant must make adequate effort to control her handicapping condition (presumably via medical or other treatment or care). Unfortunately, not all handicapping conditions can be controlled (even with an employer's reasonable accommodation) sufficiently to meet a (or any) particular employer's absenteeism policy. This does not, however, abrogate the Complainant's duty to be available for work, although the Complainant would have to be reasonably accommodated in such manners as to help her meet the requirements of the employer's absenteeism policy. But, accommodations for handicap-related absences that create exceptions to absenteeism policies are generally unreasonable and create an undue hardship on the

employer except under special circumstances (such as the circumstance described on page 19). Those special circumstances are not present in this case where the Complainant had been previously diagnosed and was receiving treatment for her handicap. Further, the employer's absenteeism policy allowed the Complainant to be absent at least five times in a three month period or a minimum of 7.69% of the time via absences of any sort. The Respondent effectively showed that to excuse the Complainant's sporadic and unannounced absences due to migraine headaches would have given her a "blank check" for absenteeism and would have created an undue hardship on the employer.

b. Application of Vacation Time to Absence

The employer did not show, however, that applying the Complainant's vacation time to absence due to migraine headaches would create an undue hardship.

To do so would permit the employer to accommodate the Complainant's handicap without causing the Complainant to violate the employer's absenteeism policy. While such an accommodation might create some additional administrative work on the employer's part, the employer did not show that this extra work would pose an undue hardship.

Further, substitutes were available - albeit this may sometimes have required them to be available on last minute notice. However, any hardship created by having to call substitutes is balanced against the facts that the employer often let employees go home early on given days (the Complainant, for example, appears to have been permitted to leave early on no less than twenty-one separate occasions in her final seven months of work), that the employer often used another department's employees to cover load make up duties and vice versa in order to complete work on days where there were personnel shortages, and that the employer and the union had agreed to no less than seven exceptions to the absenteeism policy including:

> "acts of God that have a sufficient impact on the total work force," doctor and dentist appointments with three days notice, jury duty, court appearances, audits, recuperation from minor surgery, counseling appointments with advance notice.[40]

Essentially, the employer had agreed to excuse certain absences for primarily non-handicapped-related reasons for which the Complainant was also entitled to be excused, some of which were conceivably sporadic and unannounced or nearly so.[41]

Also, the absence of any employee on a given day could be sporadic and unannounced, requiring the employer to make adjustments with employees.

In any event, this employer was able to operate without undue hardship despite various exceptions to its absenteeism policy, and did not carry its burden of showing that allowing the Complainant to apply her vacation time to her absences due to migraine headaches would have created (or did create) an undue hardship. Unlike the "blank check" situation that would occur if the Complainant were given unpaid leaves for absences due to migraine headaches, any adjustment of her vacation time would be for a limited maximum number of days in a given year and would still have protected the integrity of the employer's absenteeism policy.

CONCLUSION

In summary, had I found the Ordinance to imply a duty of reasonable accommodation in handicap cases, I would have found that, (1) to be relieved of that duty, an employer would have had to show that a particular accommodation would have created or did create an undue hardship on the employer; (2) that the employer could have shown undue hardship without showing that it first made good-faith efforts to accommodate the individual (although speculative evidence that an accommodation would create an undue hardship would have been looked at with greater skepticism than evidence of actual attempts to accommodate); and (3) that under the facts and circumstances of this case, the Complainant could have been reasonably accommodated by the employer without undue hardship by allowing her to apply any unused vacation time (in addition to her otherwise allowable absences) to her absences due to migraine headaches.

However, because I find - pursuant to an analysis of the legislative and administrative history of the Ordinance - that a duty of reasonable accommodation is not implied by the Ordinance as it stood in February, 1981 at the time of the Complainant's discharge, I am entering an order dismissing this case.

Signed and dated this 13th day of March, 1984.

Allen T. Lawent
Hearing Examiner

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[1]. See Complainant's Reply Brief on Remand, beginning at p. 2.

[2]. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 14 EPD par. 7620 (1977).

[3]. Holland v. Boeing Company, 583 P.3d 621, 90 Wash. 2d 384 (1978)

[4]. In Fischer v. DILHR, (Alma Schools), No. 154-381 (Dane County Circuit Court, Hon P. Charles Jones, 2/9/79), the court discussed the issue of what was required if more than one reasonable accommodation were possible. The Fischer court found that an accommodation which enabled the handicapped employee to perform in a mere passable manner might be unreasonable if a different accommodation which enabled a person to perform on a par with non-handicapped employees was available.

[5]. Sec. 111.31 et. seq., Wis. Stats.

[6]. It is again noted that the Madison Ordinance did include a provision for religious accommodations in 1981 (and still does). See See. 3.23(2)(f), Madison General Ordinances adopted in 1975.
However, the discussion in AMC is still an important guide as the Madison ordinance did not include an explicit provision for handicap accommodations in 1981 and still does not, although such an ordinance amendment is presently being considered by the Common Council.

[7]. See Sec. 111.337, Wis. Stats. (created by Ch. 334, Laws of 1981).

[8]. See AMC p. 353. (Cite in text above.)

[9]. DILHR is the (Wisconsin) Department of Industry, Labor and Human Relations. A complaint filed with the State agency was initially filed with the Equal Rights Division (a division of DILHR) and could be appealed to the DILHR Commission (at the time relevant to the AMC case) prior to any review by the courts. Today, the appeal from the Equal Rights Division of DILHR would go to the Labor and Industry Review Commission (LIRC) prior to any review by the courts.

[10]. The AMC court notes that DILHR had, since 1945, been granted the authority by the legislature to "make, amend and rescind such rules as were necessary to carry out the applicable law, subject to the strictures of Ch. 227, Wis. State. (the Administrative Procedure Act).
The AMC Court went on to say that had the duty of accommodations been incorporated in such a rule, "it would have been subject to the legislature's oversight of an agency's rulemaking power; had such a rule been promulgated and not been suspended or set aside on legislative review pursuant to See. 13.56, Stats., the rule would be some evidence that the legislature had acquiesced in DILHR's interpretation of the statute." (Emphasis supplied).
While the EOC has had the authority to "adopt such rules and regulations as may be necessary to carry out the purposes and provisions of this ordinance" since 1963 (although the rulemaking provision has been renumbered, it originally appeared as Sec. 3.23(8)(b)5. and now appears as Sec. 3.23(9)(e)6., Madison General Ordinances), it is unclear whether the adoption of a substantive rule such as an accommodations provision by the EOC would be given the same weight by the courts as a rule adopted by a state agency. This is because of the apparent absence of a formalized (ordinance) oversight of the EOC rulemaking power (analogous to See. 13.56, Wis. Stats.) by the Madison Common Council. Consequently, it would be more difficult to argue that a substantive rule (as opposed to a procedural rule) adopted by the EOC were as strong evidence of Council acquiescence to the EOC's interpretation.

[11]. See AMC, p. 357. (Cite in text above.)

[12]. In deriding the issue of whether DILHR's interpretation was long-standing and/or reasonably contemporaneous with the statute, the AMC court noted that DILHR did not dispute that AMC, filed with DILHR in 1972, was the first case in which DILHR had interpreted the state statute to impose a reasonable accommodation duty in creed cases. The court seemed to be especially troubled by the reasonable contemporaneity issue; the finding that DILHR's interpretation (which it did later follow) had not come until 27 years (or more) after the 1945 passage of the creed discrimination statute.
The AMC court, however, does not seem to have considered (and perhaps the issue was not raised) that DILHR does not appear to have had any significant statutory authority to render enforceable administrative decisions until the early 1970's, and it would appear that any significant DILHR activity in rendering case decisions did not occur until the early 1970's.

[13]. In Mittelstadt (see cite in text above), Judge Froehlich found that the state agency's interpretation regarding handicap accommodation had only been in existence for two of the thirteen years that the handicap discrimination law had been in effect (since 1965) up to the time of the Complainant's discharge (1978) and had then only appeared in three agency cases (Note: Judge Froehlich, like the AMC court, does not seem to take into account that DILHR or LIRC appears not to have been in a position to engage in significant decision-rendering activity until the early 1970's).
Judge Froehlich, accordingly also determined that administrative construction of the state statute was not "substantially" contemporaneous with the handicap discrimination statute. (Also, see Footnote [11].)

[14]. Judge Froehlich, although citing AMC, uses the words "substantially contemporaneous." The AMC majority opinion uses the words "reasonably contemoraneous." In this Examiner's view, the standard applied by the AMC court ("reasonably contemporaneous") is less rigid than that applied in the Mittelstadt case, and the AMC case standard being part of a Wisconsin Supreme Court decision - would control here.

[15]. Mittelstadt is a case which was issued after the briefing schedule in this case expired. Consequently, it was not cited in the briefs of either party, but I find it important to reference and distinguish the case in this discussion.

[16]. See "Complainant's Brief on Remand to the Examiner" to which an excerpt of the "Complainant's Reply Brief" (prior to the remand) is attached which originally raised this point starting on p. 33.

[17]. The Department of Labor promulgated regulations (pertaining to federal contractors) in 1974 pursuant to Sec. 503 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 793. The regulations were originally published in 1974 (20 C.F.R. Sec. 741.40 Fed. Reg. 20566) and were later renumbered, without changes, to 41 C.F.R. Sec. 60-741.1 et seq:

> Accommodation to physical and mental limitations of employees. A contractor must make a reasonable accommodation to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business. In determining the extent of the contractor's

> accommodation obligations, the following factors may be considered: (1) business necessity and (2) financial cost and expenses. 41 C.F.R. Sec. 60-741.6(d).

This regulation is cited by the Complainant in support of the Complainant's contention that the Common Council, via the Sec. 3.23 provision, intended to impose upon employers a duty of reasonable accommodation in handicap eases. The Complaint also argued that an HEW guideline adopted in 1977 was additional support. It is not as persuasive, however, because the 1975 ordinance amendment (Sec. 3.23(7)(j)) refers to "current relevant guidelines" of the federal agencies. It is not clear whether "current relevant guidelines" referred to only those federal guidelines in existence at the time of the adoption of the ordinance provision or included subsequent amendments as well. In any case, it is not necessary to dwell on this point as the Department of Labor guideline was in existence in 1974.

[18]. Sec. 3.23(7)(_j), Madison General Ordinances was renumbered to Sec. 3.23(7)(1), Madison General Ordinances in 1977 prior to being deleted in 1979.

[19]. While the EOC decision in McFadyen was issued on June 29, 1981 and not quite five months after Maxson's discharge (February 6, 1981), the Examiner's decision in McFadyen was issued three days prior to Maxson's discharge. Besides McFadyen, no other cases had apparently reached the Commission level addressing the reasonable accommodations issue.
Also, as the Respondent in this case notes, the parties in McFadyen (who were the Complainant, who had appealed a finding of no discrimination by the Commission, and the Commission) agreed that a duty existed under the ordinance and were at odds only about whether the Complainant could be accommodated. Consequently, the issue of whether the ordinance implied a duty of accommodation was not fully litigated in the McFadyen court.

[20]. AMC v. DHLR, 101 Wis. 2d 337, 26 EPD 31,803 (1981); Mittelstadt v. LIRC, No. 82 CV1412 (Outagamie County Circuit Court, Hon. Harold Froehlich, November 29, 1983).

[21]. See Teggatz v. LIRC (Dept. of Health and Social Services), No. 159-497 (Dane County Circuit Court, Hon. Michael B. Torphy, 10/3/77) and Fischer v. DILHR (Alma Schools), No. 154-381 (Dane County Circuit Court, Hon. P. Charles Jones, 2/9/79).

[22]. See page 9 of this Memorandum Opinion - Remand. Also see Footnote 17, above.

[23]. The U.S. Equal Employment Opportunities Commission had promulgated a guideline in 1967 - see 29 C.F.R. Sec. 1605.1, 32 Fed. Reg. 10298 - which was relied on by the U.S. Supreme Court in TWA v. Hardison, 432 U.S. 63, 14 EPD par. 7620 (1977) which ruled that an employer, under Title VII of the Civil Rights Act of 1964 (as amended), had a duty of accommodation in religious discrimination cases.

[24]. See page 13 of Respondent's Brief on Remand from the Commission.

[25]. See page 9 of this "Memorandum Opinion - Remand" discussing former Sec. 3.23(7)(j) (1975), Madison General Ordinances.

[26]. McFadyen v. MEOC (University Bookstore), Case No. 81CV3744 (Dane County Circuit Court, Hon. Angela 13. Bartell, November 15, 1981).

[27]. See Federated Rural Electric Insurance Company v. MEOC, 26 EPD 32,077 (Wisconsin Court of Appeals, District IV), affirmed by an evenly divided Wisconsin Supreme Court on March 26, 1982 in Case No. 79-538). See also Wisconsin Environmental Decade, Inc. v. DNR 85 Wis. 2d 518, 271 N.W. 2d 69 (1978).

[28]. While the bulk of the precedent is derived from religious accommodation cases, there does not seem to be any real dispute in this matter that, if a duty to accommodate exists under the ordinance and that duty is for the employer to accommodate in the absence of undue hardship, the burden of proving undue hardship is on the employer.

[29]. See "Complainant's Brief on Remand to the Examiner" beginning at p. 2.

[30]. The Complainant relies on Burns v. Southern Pacific Transportation Co., 589 F.2d 403, 17 FEP Cases 1648 9th Ct. 1978), McGinnis v. U.S. Postal Service, 512 F. Supp. 517, 24 FEP Cases 999 (N.D. Cal., 1980), McDaniel v. Essex International, Inc., 509 F. Supp. 1055, 25 FEP Cases 574 (W.D. Mich, 1981, Wangsness v. Watertown School District, 541 F. Supp. 332, 29 FEP Cases 375 (D.S.D. 1982) and Schweizer Aircraft Corp. v. State Division of Human Rights 397 N.E. 2d 1323 (1979). Some o these cases are further discussed in footnote 33, below.

[31]. It is unclear whether the Complainant is contending that the Respondent must first have made good-faith efforts to try a particular accommodation in question or whether the Respondent must first have made good faith efforts to try some form of accommodation (in general) before reaching the undue hardship issue.

[32]. To impose upon the employer the duty to make good faith efforts to accommodate the individual before reaching the undue hardship issue could place the employer in a position of having to spend futile time, cost and energy on accommodations that were quite unlikely to succeed.

[33]. The cases cited by the Complainant such as Burns (see Footnote 30, above) and McGinnis (see Footnote 30, above), stating the "good faith efforts to accommodate" prerequisite to reaching the undue hardship issue do not appear to really rely on the test in their analyses. The cases go on to discuss the undue hardship issue despite having found that no good faith-effort to accommodate was shown by the employer involved.
Even more important to this Examiner is that these cases seem to rely on Footnote 9, TWA v, Hardison, 431 U.S. 63 (1977) as authority for the "good faith effort to accommodate" prerequisite test. I believe, however, that the TWA footnote was not intended to set up a prerequisite test to reaching the undue hardship issue, but was intended to underscore the point that no duty to accommodate (or even to make an effort to accommodate) had been previously required in religious discrimination cases under Title VII.

[34]. See also McFaden v. MEOC, No. 81-CV-3744 (Dane County Circuit Court, Hon. Angela B. Bartell, Nov. 15, 1981).

[35]. Being "in attendance" does not necessarily mean being in the same job location at a given time; it is instead a function of the job (it might be different for a sales job, for example). In this case, however, being "in attendance" clearly meant that the Complainant was to be present at the work site during the scheduled hours.

[36]. Such accommodations might include permitting an employee to take medication during work hours, moving the employee's work location to an area less likely to exacerbate the individual's handicap, rescheduling an employee's work hours, or similar accommodations (provided, of course, those accommodations did not create undue hardship on the employer).

[37]. See Finding of Fact No. 7 which is incorporated into the Recommended Decision - Remand.

[38]. The Respondent's absenteeism policy permitted any individual to have five absences prior to discharge. Assuming a five day work week and a ninety (90) day work period, the maximum number of work days would be sixty five (65) days. Five absences in sixty five work days would be 7.69%. This Examiner acknowledges that coming late or leaving work early without permission were counted equivalent to an absence. At the same time, the Examiner also acknowledges that the 7.69% figure is a minimum, because the assumption is made that all possible work days were scheduled, and does not include holidays, vacation, exceptions to the absence policy and consecutive days taken as part of "one occurrence."

[39]. A disparate impact case generally involves a statistical presentation by the Complainant sufficient to establish that an employer's policy or practice, though neutral on its face, has a disparate (or adverse) impact on a particular group. No such statistical presentation was made by the Complainant to show that the class of persons who suffer from migraine headaches are or would somehow be adversely affected by the absenteeism policy of Means Services, Inc.
Rather, this is a case where Maxson is attempting to show that she was treated differently than employees who did not suffer from migraine headaches were or would have been treated, with the added dimension that even if Maxson were not treated differently than employees who did not suffer from migraine headaches, she would be entitled to reasonable accommodation in order to put her on an equal footing in regard to meeting her job-related responsibilities with employees who did not suffer from migraine headaches.

[40]. See Finding of Fact 22 which is incorporated into this Recommended Decision - Remand.

[41]. Although two of the exceptions discuss "three days notice (doctor and dentist appointments) and "advance notice" (counseling appointments), the other exceptions do not, nor was there evidence presented as to how these exceptions were applied.

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

Kathleen Maxson 2505 Calypso Road Madison, WI 53704 Complainant vs. Means Services, Inc. 1212 Stoughton Road Madison, WI 53704 Respondent	ORDER FROM APPEAL OF EXAMINER'S RECOMMENDED DECISION Case No. 2783

The Hearing Examiner of Madison Equal Opportunities Commission (MEOC) issued the Recommended Decision dated November 18, 1982. Timely exceptions were filed by both parties, written arguments were submitted and oral arguments were heard by nine (9) members of the MEOC.

Based upon a review of the record in its entirety, the MEOC issues the following:

ORDER

1. That Recommended Conclusion of Law #4 of the attached Recommended Decision is hereby reversed and deleted;

2. That this matter be remanded to the Examiner to determine the following issues:

a. Is there a duty of reasonable accommodation (by the employer) for the handicapped in employment under Sec. 3.23, Madison General Ordinances?

b. If so, did the Respondent-employer breach said duty of reasonable accommodation under the factual circumstances of this case (given that if there is a duty of reasonable accommodation under the ordinance, the Commission would determine as a matter of law that, in certain instances, said duty of reasonable accommodation may apply to absenteeism)?

Commissioners Abramson, Amato, Bowser, Cobb, Cox, Fineman, Kifle, Trachtenberg and Ware all join in entering the Order above (both 1, 2.a. and 2.b.), except that Commissioner Bowser dissented from entering Order 2.b.

OPINION

The Commission agrees with the Respondent's contention that the Complainant's failure to allege prior to hearing that the failure (or refusal) to rehire her was at issue precludes the Examiner from entering a conclusion of law as to whether or not discrimination occurred in that regard (and it follows that no order may be entered pertaining to the rehire issue, as well). The failure to allege, either by formal notice (via the Notice of Hearing) or actual notice (via the complaint or by some other mechanism), is crucial to the Commission's ruling.[1]

As stated in Hazel Maertz v. DILHR, No. 154-168 (Dane County Circuit Court, Hon. P. Charles Jones, 1977):

(1) The case law and due process do not require an administrative hearing to be limited to issues formally noticed where there is actual notice, full hearing and no prejudice; (emphasis added)

(2) Neither due process nor the statutory notice requirement mandate formal notice of the damages resulting from the employer's discriminatory acts (unlike in a civil court complaint under Section 802.02(1), Wis. Stats.).

We find that the refusal to rehire issue is not an issue which goes only to the damages question (and, therefore, would not have to be specifically noticed). Further, we find that there was neither formal notice (via the Notice of Hearing) nor actual notice (see discussion, Footnote 1) such that the Respondent had an opportunity to prepare and defend on the rehire issue, an opportunity essential to guarantee the "rudiments of fair play" required in an administrative hearing.[2] See also Rau v. DILHR, No. 157-422 (Dane County Circuit Court, Hon. William Eich, 2/21/79).

The Commission reserves its judgment in regard to the discharge issue until after the Examiner has ruled on the reasonable accommodation questions which have been remanded.

Signed and dated this 15th day of June, 1983.

EQUAL OPPORTUNITIES COMMISSION
LeAnna Ware
EOC President

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[1]. The only issue stated in the original Notice of Hearing in this matter was as follows:

Whether or not the Complainant was discriminated against by the Respondent on the basis of handicap in regard to discharge (termination) from employment?

The original hearing in this matter was scheduled for March 11, 1982, then rescheduled to May 18, 1982 (pursuant to the Complainant's request). The original Notice of Hearing was mailed to the parties on December 14, 1981 and was received by the Complainant on December 16, 1981.

At no time in the approximately five months after the Notice of Hearing was received by the Complainant (and her attorney did the Complainant (by her attorney) attempt to amend the Notice of Hearing. Nor does the rehire issue appear to have been raised prior to the Notice of Hearing being sent (such that the Respondent could be imputed to have notice that the rehire was at issue, notwithstanding its omission from the Notice of Hearing).

MEOC Rule 6.13 permits a complaint to be "amended or supplemented at the request of the Complainant, at any time prior to the issuance of a Notice of Hearing." Despite the fact that Kinnear was rehired in March of 1981 and Holmes was rehired in May of 1981 (the two employees who had violated the same rule as the Complainant and were also terminated but subsequently rehired), the rehire issue does not even appear to have been brought to the attention of the investigator who issued an Initial Determination dated September 11, 1981.

We consequently find that the Complainant had ample opportunity to raise the issue, prior to hearing, of discrimination in regard to rehire. By failing to raise the issue prior to hearing, the Complainant has now lost any "relation back" rights she may have had, and the Commission is deprived of any independent subject matter jurisdiction regarding that issue (although it was not improper to admit evidence regarding the rehire issue insofar as it was probative of the properly noticed discharge issue).

[2]. See MEOC Rule 6.13 discussed in Footnote 1 above. While Rule 6.13 refers only to the complaint, Rule 15.32 allows motions to be made to the Examiner, and it goes without saying that either party may make motions to attempt to modify a defective or incomplete Notice of Hearing.

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

Kathleen Maxson 2505 Calypso Road Madison, WI 53704 Complainant vs.	RECOMMENDED DECISION Case No. 2783

Means Services, Inc. 1212 North Stoughton Road Madison, WI 53704 Respondent	

A complaint was filed with the Madison Equal Opportunities Commission (MEOC) alleging discrimination on the basis of handicap in regard to employment. Said complaint was received by the MEOC on March 12, 1981 and was investigated by Human Relations Investigator Mary Pierce. An Initial Determination dated September 11, 1981 was issued concluding that probable cause existed to believe that discrmination had occurred or was occurring as alleged.

Conciliation failed or was waived, and the matter was certified to public hearing. A hearing was held commencing on May 18, 1982. Attorney William Smoler of SMOLER, ALBERT AND ROSTAD appeared on behalf of the Complainant. Attorney James K. Ruhly of MELLI, SHIELS, WALKER AND PEASE, S.C. appeared on behalf of the Respondent who also appeared by employee representatives Donald Nordstrom and Dennis Antony.

Based upon the record of the hearing, and after consideration of the 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, Kathleen Maxson, is an adult female residing in the State of Wisconsin.

2. The Respondent, Means Services, Inc., is a corporate entity doing business in and employing persons in the City of Madison. The Respondent operates a laundering business which provides clothing and towels to restaurants, factories and other business establishments.

3. The Complainant began her employment with the Respondent on May 17, 1973. She worked in the Respondent's load make-up department where she basically assembled garments for the truck drivers' daily deliveries.

4. From the period of July 1, 1980 to February 6, 1981 there were usually four people daily who performed the load make-up duties for the Respondent: the Complainant, Darlene Heimbecker, Kathy Squires (Chapin), and Linda Everson. Other individuals were cross-trained in that they were able to do the work in load make-up but were ordinarily assigned to other departments. Heimbecker was put on a lay-off status some time prior to February 6, 1981.

5. At least from July 1, 1980 until sometime in October, 1980, a Mr. Hargis supervised the Respondent's load make-up department. After Hargis' departure, Dennis Antony became plant manager at the Respondent's Stoughton Road plant and thereby supervised the Complainant and other individuals in load make-up.

6. When work in the Complainant's department was light, she sometimes was moved to other departments and learned and performed their work. At some other times, the Complainant and/or other individuals were permitted to leave work early because of lack of work. From July 1, 1980 to February 6, 1981, the Complainant was permitted by the Respondent to leave work early on twenty-four occasions because of lack of work. 7. On July 1, 1980, the Respondent instituted a new policy regarding absenteeism and tardiness. In conjunction with the institution of said new policy, all employees were treated as if their records had been wiped clean and as if they had no absences or tardiness prior to July 1, 1980. Respondent's new absenteeism and tardiness policy may be summarized as follows:

A. The Company Rules (see Complainant's Exhibit 2) classified "repeated tardiness or absence" (Rule 6) as a "Group B" violation. Group B violations were usually penalized as follows: a "warning" for the first offense, "2 days off" (a 2-day suspension) for the second offense, and "may be discharged" for the third offense within any 6-month period. (Group A violations were normally penalized by discharge for the first offense while Group C violations were normally penalized in still another manner.)

B. The new policy that became effective on July 1, 1980 was embodied in a document entitled "Tardiness and Absenteeism Guidelines" (see Complainant's Exhibit 1) which read as follows:

For the purpose of disciplinary action for excessive tardiness and absenteeism the following will be applied:

With any three occurances of combined tardiness or absenteeism in any consecutive three month period the employee will be given a verbal warning. Upon the fourth occurance the employee shall be given a written warning. Upon a fifth occurance a written warning accompanied with a two day suspension without pay shall be applied. A sixth occurance within any consecutive three month period will bring immediate termination of employment.

"Occurance" should not be confused with days. For example, an employee sick for three consecutive days would be one occurance. Reporting late for work one day would be a second occurance. If the same employee were sick for two more consecutive days this would be the third occurance, if this all took place in a three consecutive month period.

The first occurance would not be dropped until the three month anniversary date of the initial occurance. For example, if an employee were tardy January 1, this occurance would not be dropped or removed until April 1. Any single occurance could possibly be the start of a three consecutive month period, causing a roll over effect similar to the written warning procedure.

The removal of any written warnings for tardiness and/or absenteeism shall be done the same as before which is a six month period. These guidelines will be strictly enforced effective July 1, 1980, without exception. If there are any questions concerning this matter feel free to contact management.

The "Tardiness and Absenteeism Guidelines" (hereinafter, "Guidelines") were essentially an interpretation of the Respondent's Company Rule 6 regarding "repeated tardiness or absence".

8. The Complainant was made aware of the new "Guidelines" around the time of their institution (July 1, 1980) by the Respondent and the Complainant understood the Guidelines.

9. The Complainant was tardy for work by 1/10 of an hour on July 3, 1980. This tardiness constituted her first "occurrence" under the Guidelines.

10. The Complainant was absent on July 28, 1980 due to a migraine headache. This absence constituted the Complainant's second occurrence under the new Guidelines.

11. The Complainant left work 1.9 hours early on August 11, 1980 and continued to be off work for two additional days due to migraine headaches. Her absence during this period (August 11-13) constituted her third occurrence under the Guidelines. Upon her return to work on August 14, 1980, she presented to the Respondent a note dated August 13, 1980 from a Dr. Miley, a neurologist to whom she had been referred by her personal physician (Dr. Fields) for the purpose of treating her migraine headaches, that read as follows:

> "To Whom it May Concern:
> Kathleen Maxson is under my care. She can return to work tomorrow."

Pursuant to the Guidelines, the Complainant received a verbal warning from the Respondent on August 14, 1980 for having had three occurrences within a three month period.

12. On September 4, 1980, the Complainant missed work due to a migraine headache. This constituted the Complainant's fourth occurrence under the Guidelines and pursuant to said Guidelines she received a written warning concerning absenteeism for having had four occurrences in a three-month period. (The written warning was equivalent to the first offense penalty usually given for a violation of a Group B company rule.)

13. The Complainant missed two consecutive days of work, October 14-15, 1980 due to migraine headaches. She saw Dr. Fields on October 14, 1980 and he gave her an injection of some medication given when migraine headaches are very severe. The October 14-15, 1980 absences constituted the Complainant's fifth occurrence under the Guidelines. This occurrence was, however, the fourth occurrence in a three-month period (the July 3,

1980 occurrence was now outside the three month period). Nevertheless, as the Complainant had received a first-offense written warning on September 4, 1980, this time she was considered to have committed a second "offense" in a 6-month period and received a 2-day suspension (pursuant to the Company Rules for penalizing second offenses of Group B rules) which she served on October 17, 1980 and October 20, 1980.

14. On November 17, 1980, the complainant left work early and missed the following day of work due to chest wall inflammation. This constituted her sixth occurrence under the guidelines and was the third in a three-month period (measured back from the start of the occurrence) for which the Complainant received a verbal warning pursuant to the Guidelines.

15. On December 30, 1980, the Complainant left work six hours early because of a migraine headache. This constituted her seventh occurrence under the Guidelines, and was the third occurrence in the most recent three-month period (measured back from December 30, 1980). The Complainant was not immediately disciplined as a result of this occurrence, however.

16. The Complainant missed work from January 5-7, 1981 as a result of an earache. She also complained of a migraine headache. This constituted the Complainant's eighth occurrence under the Guidelines, and fourth occurrence in three months. Because of the Respondent's failure to give a verbal warning after the December 30, 1980 occurrence, however, Antony gave the Complainant two verbal warnings after the January 5-7, 1981 occurrence.

17. On February 5, 1981, the Complainant left work six hours early because of a migraine headache. (A day earlier, she had been seen in an emergency room and was given an injection for migraine headeaches.) The Complainant was aware that by leaving work on this day she could be discharged. On February 6, 1981, the Complainant was given her termination notice and discharged.

18. From July 1, 1980 through February 6, 1981, the complainant experienced migraine headaches from time to time and was diagnosed by Dr. Fields as suffering from chronic migraine headaches. While she has also suffered from tension headaches at times, she did not suffer from tension headaches in the July 1, 1980 to February 6, 1981 period.

19. Migraine headaches are "certainly disabling when they occur" (see Fields testimony) and may be maifested by as many as twenty symptoms including nausea, vomiting and visual disturbances. While the Complainant could work at some times while experiencing a migraine headache, she could not work at other times while experiencing a migraine headache.

20. The Complainant was hospitalized for migraine headaches in January, 1980 and May, 1980, prior to the institution of the Guidelines governing tardiness and absenteeism. She informed both Hargis (her supervisor until October, 1980) and Antony (her supervisor after Hargis departed) that she suffered from migraine headaches. The Respondent was aware even prior to July 1, 1980 that the Complainant suffered from migraine headaches.

21. In addition to the Complainant, five other employees were discharged pursuant to the absenteeism and tardiness policy in effect after July 1, 1980. Two of those employees were rehired: Brandi Holmes was rehired on May 12, 1981, approximately two months after her termination for having violated the absenteeism and tardiness policy; Jim Kinnear was rehired on August 24, 1981, approximately five months after his termination for having violated the absenteeism and tardiness policy. The Respondent believed that neither Holmes nor Kinnear suffered from migraine headaches. The Complainant had previously worked for the Respondent for more time than either Kinnear or Holmes at the time of their respective rehires.

22. The following exceptions to the Respondent's Guidelines, (i.e., employees could miss time from work for these reasons without having an occurrence marked off) were:

A. Acts of God that have a sufficient impact on the total work force.
B. Doctor and dentist appointments with three days notice.
C. Jury duty.
D. Court appearances.
E. Audits.

F. Recuperation time for minor surgery.
G. Counseling appointments with advance notice.

23. The Respondent was aware, prior to the Complainant's discharge, that at least three of the Complainant's nine occurrences in the July 1, 1980 to February 6, 1981 period were related to migraine headaches:

(a) August 11 13, 1980
(b) October 14 15, 1980
(c) February 5, 1981 (the final occurrence leading to discharge)

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class of handicap 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 Complainant was not discriminated against by the Respondent on the basis of her handicap in regard to discharge from employment.

4. The Complainant was discriminated against by the Respondent on the basis of her handicap in regard to failure to (re)hire under sec. 3.23, Madison General Ordinances.

RECOMMENDED ORDER

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

2. That the Respondent instate the Complainant into the next available position as a load make-up worker with all rights, privileges, benefits and perquisites of employment (including, but not limited to, seniority) to which she would have been and would be entitled had she been (re)hired on May 12, 1981.

3. That the Respondent pay to the Complainant all amounts that she would have received and would receive had she been (re)hired, less any ordinance setoffs, from May 12, 1981 to the time she is (re)instated pursuant to Order #2, above. This provision is intended to include both back pay and front pay.

4. That the Respondent shall submit to the Hearing Examiner, documentary of evidence of compliance with all provisions of this ORDER within thirty (30) days of the date this ORDER become final, and that the Respondent shall send to the Hearing Examiner every thirty (30) days thereafter updated evidence of compliance with this Order until provisions 2 and 3 of this Order have been fully satisfied.

MEMORANDUM OPINION

I. Jurisdiction

I will first discuss the Respondent's contention that the Commission is without jurisdiction to entertain the instant complaint because of federal labor policy. I state briefly that the Commission does have jurisdiction to entertain the instant case, that the principle that issues of discrimination are most appropriately resolved in the public domain and not by the law of the shop (collective bargaining agreements by private parties) was made clear in Alexander vs. Gardner - Denver[1] and that the jurisdictional issues raised by the Respondent, if they have any merit (which I don't find they do), are best left to the state courts to address. Thus far, the Commission has prevailed on all jurisdictional matters raised in the state courts.

II. A Boynton Analysis

The Wisconsin Supreme Court set the following guidelines (which I have applied to the Madison Ordinance) for deciding a handicap discharge case:[2]

1. The Complainant must be handicapped within the meaning of the Ordinance;

2. The Complainant must establish that the employer's discrimination was on the basis of handicap; and

3. It must appear that the employer cannot justify its alleged discrimination under the exception set forth in Section 3.23(7)(h)2, Madison General Ordinances.

(a) Was the Complainant Handicapped Within the Meaning of Section 3.23, Madison General Ordinances? Was the Employer Aware of the Condition?

The testimony of Dr. Fields is sufficient to support a finding that the Complainant was in fact handicapped within the meaning of Sec. 3.23, Madison General Ordinances.[3]

Further, I hold that the Respondent was aware of her handicap, and resolve all credibility issues in this regard in favor of the Complainant.[4]

(b) Was the Complainant Discharged on the Basis of her Handicap?

This question must also be answered in the affirmative. While, there is no dispute that the Complainant was discharged for violation of the Respondent's absenteeism policy, the Complainant's handicap was a determining factor leading to her violation of that policy and to her ultimate discharge. At least three and as many as six "occurrences" were caused by her handicap, and the Respondent was aware or should have been aware that at least three of the "occurrences" were caused by her handicap. While the absence and tardiness policy may appear neutral on its face, a Complainant who can show a causal connection between handicap-related absence(s) and ultimate violation of such a policy has demonstrated a sufficient connection between the Complainant's handicap and the consequences imposed by the employer as a result of violating the policy in order to shift the burden of proof to the Respondent to justify its actions under the exception in Section 3.23 (7)(h)2, Madison General Ordinances which states in relevant part:

Discrimination because of handicap is not prohibited if the employer can show that the handicap is reasonably related to the individual's ability to adequately undertake the job related responsibilities of that individual's employment.

(c) Was the Complainant's Handicap Shown to be Reasonably Related to Her Ability to Adequately Undertake the Job Related Responsibilities Her Employment?

The answer to this question is in the affirmative. There is no real dispute that she was discharged for violating the Respondent's absenteeism and tardiness policy. At least three of her nine absences contributing to the violation of said policy were handicapped related. By incapacitating her from working on occasion, her handicap was per se reasonably related to her ability to adequately undertake the job related responsibilites of her employment.

(d) Could the Complainant's Absences Nevertheless Have Been Reasonably. Accommodated by the Respondent?

The issue of whether Section 3.23, Madison General Ordinances imposes a duty of reasonable accomodation on the employer need not be reached, because I hold that even if such a duty were imposed by said ordinance on the Respondent, such a duty does not apply to this case. (Consequently, I will not discuss what effect, if any, AMC v. DILHR, 101 Wis. 2d. 337 (1981), a religion case, has on whether or not in a handicap case the Madison Ordinance can still be construed to impose such a duty absent explicit ordinance language to that effect.)

The duty of reasonable accomodation is an affirmative duty imposed on a Respondent to enable an employee to perform work.[5] While the degree of the duty imposed may vary,[6] the bottom line is the same: the purpose of the duty is to have the employer make some reasonable accomodation in order to enable the person to perform the required duties of the job at the required level of performance.

When the issue at hand is one of absenteeism, the law requires that the Respondent afford to the handicapped individual the same treatment regarding time off as other employees, but the law does not require that the handicapped individual be granted special privilege regarding time off (whether paid or unpaid).

(1) Medical Leaves

The Complainant argues that she ought to have been granted a medical leave of absence for days that she missed due to migraine headaches. The Respondent contends that it grants medical leaves only where an employee is out for a period of at least four weeks. Although the employer's alleged medical leave practice is not in writing (as far as the four-week minimum), the Complainant failed to present any evidence to contradict the existence of this unwritten minimum. Further, I do not find it to be a reasonable accomodation for an employer to have to grant a medical leave every time a handicapped employee, like the Complainant, misses a single day here or there or has to leave early because of a handicap where such practice is not extended to non-handicapped employees. Such an accomodation would in this instance allow handicapped employees up to 90 days annually of additional absence possibly one day at a time, usually with no advance warning to the employer who would have the burden and inconvenience of finding a replacement.

(2) Vacation

It is not a reasonable accommodation for an employer to grant vacation time to an employee whose sproadic and unanticipated absences due to handicap cause that employee to miss work or leave work early for the same reasons that it is not a reasonable accommodation for the employer to grant a medical leave to an individual for sproadic, unanticipated handicap-related abences.[7]

However, it is discriminatory treatment for an employer to refuse to grant vacation time to an employee to excuse an absence under the same circumstances that non handicapped related absences are excused. In this instance, however, the Complainant failed to prove that the exceptions for non-handicapped related absences were granted on the same short notice as the Complainant either gave or would have required.

An examination of the exceptions (see Finding of Fact 22) for which an employee was granted time off without having an occurrence charged included:

A. Acts of God that have a sufficient impact on the total work force.
B. Doctor and dentist appointments with three days notice.
C. Jury duty.
D. Court appearances.
E. Audits.
F. Recuperation time for minor surgery.
G. Counseling appointments with advance notice.

While the "acts of God"[8] and "recuperation time for minor surgery" exceptions are particulary troublesome, the Complainant failed to show that any of the seven exceptions were or would have been allowed with one day notice or less (or even after the fact). Further, the Complainant failed to show that vacation time for non-handicap reasons was granted with one day notice or less, which is the notice that the Complainant alleged that she gave in requesting vacation prior to one of her absences due to a migraine headache. Consequently, I do not find that the Complainant was discriminated against by the Respondent's refusal to grant her vacation time for one or any of her migraine headache absences under these circumstances.

(e) Was the Complainant Discriminated Against on the Basis o her Handicap by the Respondent's Failure to Recall
Her to Work While Recalling Less Senior Employees Who Had Previously Been Discharged or Violating the Same Rule?

This question is answered in the affirmative. The Complainant was discharged on February 6, 1981. Jim Kinnear, an employee who had worked for the Respondent for less time than the Complainant, was discharged on March 25, 1981 for violating the same rule as the Complainant. Kinnear was rehired on August 24, 1981.

Brandi Holmes, an employee who was first hired on May 29, 1980, was discharged on March 4, 1981 for violating the same rule as the Complainant. Holmes was rehired on May 12, 1981.

Both Holmes and Kinnear performed load make-up duties. Neither employee was perceived by the Respondent to suffer from migraine headaches. In light of the Complainant's greater previous seniority with the Respondent, in light of the Respondent's failure to articulate any credible reason to justify why Kinnear and/or Holmes were rehired ahead of the Complainant, and in light of the fact that all three had originally been discharged for violation of the same company policy, I find that the Complainant was discriminated against on the basis of her handicap by the Respondent's failure to (re)hire her on May 12, 1981 (the date Holmes was rehired) and have entered an order accordingly.

Signed and dated this 18th day of November, 1982

EQUAL OPPORTUNITIES COMMISSION
Allen T. Lawent
Hearing Examiner

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[1]. Alexander vs. Gardner Denver, 415 U.S. 36, 7 FEP Cases 81 (1974).Even where a case has gone through arbitration, the courts are reluctant (except where stringent conditions are met) to adopt the arbitration or grievance process as dispositive of discrimination issues. Further, an employee's decision to bypass the grievance process and litigate the discrimination issue in a public forum is at the employee's discretion. Guarantees of protection from discrimination by ordinance law is a right that supersedes the law of the shop.

[2]. Boynton Cab Co. v. DILHR, 96 Wis. 2d 396, 291 N.W. 2d, 850. It shall be noted that the Boynton was a case decided under the Wisconsin Fair Employment Act (WFEA) (and not the Madison Ordinance) prior to recent revisions in the WFEA (Section 111.31, et. seq., Wis. Stats.) imposing a duty of reasonable accommodation on the employer. Consideration of that duty and whether or not a similar duty is imposed under the Madison Ordinance is discussed later in this opinion.

[3]. I find that the Complainant's condition is a handicap whether the definition applied to Section 3.23, Madison General Ordinances is that applied in Steinbring v. Oakwood Lutheran Home (MEOC Examiner, 02/11/2) and other MEOC cases and see also Dairy Equipment v. DILHR, 290 N.W. 2d 330, 22 EPD 30, 809 (1980) where said definition was applied to the Wisconsin Fair Employment Act) or whether the definition applied to the Madison Ordinance is that found in the recent revision of the WFEA (see Chapter 334, Laws of 1981 published May 6, 1982 and effective August 4, 1982).

The Dairy Equipment definition (adopted from Section 504 of the Rehabilitation Act of 1973, a federal law) is that a handicapped person is ". . .any person who (A) has a physical or mental impairment which substantially limits one or more major life activities, (B) has a record of such impairment, or (C) is regarded as having such an impairment." (See 29 U.S.C., Section 706(6) 1976)

A migraine headache, based on Dr. Fields testimony, is clearly a physical or mental impairment which limited at least one major life activity of the Complainant, her ability to work (as she was incapacitated from working on occasion due to the migraine headaches).

The recently revised WFEA includes a definition of handicap which reads as follows (see Section 111.32(8), Wis. Stats.):

"Handicapped individual" means an individual who:

(a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
(b) Has a record of such impairment; or
(c) Is perceived as having such an impairment.

Again, on the basis of Dr. Field's testimony, the Complainant suffered from migraine headaches which, by virtue of incapacitating her from working (on occasion), is a physical or mental impairment which "limits the capacity to work". Even applying the WFEA language to the Madison Ordinance, the Complainant is clearly handicapped within the meaning of the Ordinance.

[4]. While the Respondent denies that it had any knowledge that the Complainant suffered from migraine headaches prior to discharging her, I find more credible the Complainant's testimony that she discussed the problem with both Hargis and Antony (her supervisors) prior to even the July 1, 1980 implementation of the Respondent's tardiness and absenteeism policy.

[5]. Whether in the context of religious discrimination or handicap discrimination, the duty of reasonable accommodation has always been one of accommodating an individual to permit that person to perform work, and has not been one of accommodating that individual to enable the person to be absent from work.

In religious accommodation cases such as TWA v. Hardison, 432 U.S. 63, 14 FEP Cases 1697, the accommodation involved was one of time: rather than performing the work at an assigned time (which was a Sabbath for the plaintiff), could the individual be accommodated without hardship to perform the work at a different time.

In the handicap accommodation cases such as Teggatz v. LIRC, No. 159 497 (Dane County Circuit Court, Hon. Michael B. Torphy, October 3, 1977 and Fischer v. DILHR, No.154 381 (Dane County Circuit Court, Ilon. P. Charles Jones, February 19, 1979 , the accommodations involved

providing assistance to the Complainants so they could perform their essential job duties (but did not involve replacement of the Complainants by other employees who then performed the essential job duties).

[6]. Hardison (See Footnote 5) establishes a "de minimis" rule for Title VII religious discrimination cases which makes unreasonable accommodations that create an undue hardship on the employer. Teggatz and Fischer established a broader rule which has probably been narrowed by the recent WFEA revision (see Chapter 334, Laws of 1981, Wisconsin) which includes the following languge (Section 111.34(1), Wis. Stats.):

. . . Employment discrimination because of handicap includes, but is not limited to

(b) Refusing to reasonably accommodate an employee's or prospective employee's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's program, enterprise or business.

I find that applying even the broadest burden on the employer, any accommodations of the Complainant's absences would pose undue hardship to the employer in this case.

[7]. The Complainant argues that on various occasions that all of the Respondent's load make-up people left early on days that the Complainant was absent or left early due to migraine headaches, that persons from other departments (who were cross-trained in load make up) left early but could have been transferred to load make-up on days that the Complainant left early or was absent due to migaine headaches, or that another employee (Darlene Heimbecker) was on layoff and could have been called in when the Complainant had to miss work due to the migraines.

I find that any situation requiring the replacement of an employee by a current or laid off worker is per se not a reasonable accommodation (but may still constitute disparate treatment i the same is or would be done for non handicapped employees), nor is it reasonable to expect that an employer could anticipate that on a given day there would not be sufficient work for other employees to do such that it would not have to call in a replacement and could excuse an "occurrence".

[8]. The "acts of God" or natural disaster exception, (which likely would exempt certain absences without advance notice) would likely not by itself expose an employer to a handicap discrimination violation, depending upon its application. It it were in fact applied only in situations where there was "a sufficient impact on the total workforce," this exception would likely be exempt from scrutiny and only the other six exceptions would be examined to determine whether or not the Complainant had a case for handicap discrimination.

The "recuperation time for minor surgery" exception is likely in the future to be problematic for this Respondent although it is not in this case.