

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN**

<p>Adriane Stevenson 816 West Washington Avenue Madison WI 53715</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> <p>Copps Food Center 620 South Whitney Way Madison WI 53711</p> <p style="text-align:center">Respondent</p>	<p>HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS</p> <p>Case No. 20042113</p>
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BACKGROUND

On June 28, 2004, Adriane Williams (then known as Adriane Stevenson) filed a complaint with the Madison Equal Opportunities Commission alleging that several Copps Food Centers located within the City of Madison had discriminated against her based upon her disability and conviction record when she was denied part-time positions bagging groceries. On July 23, 2004, the Respondent asserted that the Commission lacks jurisdiction over the matter because its parent company--the Roundy's Corporation--actually made the decision not to hire the Complainant. The corporation reportedly made this decision, like all personnel decisions affecting Copps stores located within the City of Madison, through its Vice President of Human Resources for the Retail Division, Kathleen Toohey. Toohey works in Milwaukee, Wisconsin. The Respondent maintains that although the Complainant was seeking employment within the City of Madison, the Commission lacks jurisdiction because the allegedly discriminatory act that forms the basis for her complaint, failure to hire, occurred in Milwaukee.

On July 28, 2004, Investigator/Conciliator David Lopez referred this matter to the Hearing Examiner to determine whether the Equal Opportunities Commission has geographical jurisdiction over the complaint. Shortly thereafter, the Hearing Examiner established deadlines for the submission of written briefs regarding the jurisdictional issue. To date, the Respondent has submitted an affidavit and brief supporting its Motion to Dismiss for Lack of Jurisdiction. The Complainant has submitted several letters addressing her case, generally.

DECISION

As the Respondent observes, in determining whether the Commission has geographical jurisdiction, "the operational question is where did the acts that constitute the alleged discrimination occur." Hawkins v. Volkman Railroad Builders, Inc., MEOC Case No. 22451 (Ex. Dec. 2/17/2000). Although the Hearing Examiner has deliberately avoided setting forth any specific, inflexible test to resolve the question of where conduct that allegedly violates the Equal Opportunities Ordinance occurs, Hawkins did address this issue:

[R]egardless of where the Complainant lives, if conduct constituting discrimination prohibited by the ordinance occurs within the City of Madison, the Commission has jurisdiction. Rappe v. Soderholm Wholesale Foods, Inc., MEOC Case No. 21811 (Ex. Dec. 12/13/93). Even if the Complainant was a resident of the City of Madison, but was employed outside the City, any act of discrimination occurring outside the City would fall outside the Commission's jurisdiction. Zabit v. Kraft Foods Inc. et al., MEOC Case No. 22563 (Ex. Dec. 5/19/98), Rappe, supra. The question from the perspective of the Respondent is similar, though not necessarily as clear. If the Respondent's principle place of business is located outside the City of Madison, the Commission will only have jurisdiction over those activities of the Respondent that occur within the City. White v. Work Bench, Inc., MEOC Case No. 19982018 (Ex. Dec. 12/15/98). If the Respondent's principle place of business is located within the City of Madison, but the incidents that give rise to a complaint of discrimination occur outside of the City, then the Commission would be without jurisdiction despite the presence of the Respondent. The question of where conduct constituting a violation of the ordinance occurs can be complicated and unusually highly fact-intensive.

In Hawkins, the Hearing Examiner dismissed the complaint because the allegedly discriminatory acts--permitting racial harassment and giving light duty work assignments based on racial preference--all occurred *outside* Madison. Daily work assignments were given out in Middleton, Wisconsin. Likewise, the supervisor who allegedly harassed the Complainant worked exclusively in Middleton during the time period referenced in the complaint. The Respondent cites Hawkins for the simple proposition that when discriminatory acts occur outside the City of Madison, the Commission lacks geographical jurisdiction over the complaint.

With respect to the Wisconsin Fair Employment Act (WFEA), The State of Wisconsin Labor and Industry Review Commission (LIRC) has taken the following approach to the question of geographical jurisdiction:

[T]he controlling factor in determining whether the Wisconsin Fair Employment Act applies to a particular employment action is where the discrimination occurred. However, the question of where discrimination occurs is . . . by no means obvious. Consideration of both the factual situations in *Buyatt*, *Gray* and *Birk*, and the consequences of a number of possible interpretations, leads the commission to conclude that discrimination must be deemed to occur in the place where the employment which is affected by it occurs.

If discrimination were considered to occur where the challenged decision was made, the results would be anomalous. A decision to fire a Wisconsin resident working in a Wisconsin worksite would arguably be outside of the jurisdiction of the Wisconsin Fair Employment Act if the person who made the decision to fire the worker was outside of the state when making that decision . . . If discrimination were considered to occur where the affected worker was informed of the challenged decision, similar anomalies could result, not to mention the difficulty in assessing situations in which a worker within the state is informed of the challenged action by way of a letter or telephone call originating outside the state . . .

Although they have dealt with disparate factual situations, the results in *Buyatt*, *Gray* and *Birk* are consistent with the view that the location of the employment is the most important factor. In *Buyatt* and *Birk*, in which jurisdiction was found, the activities of the employees which constituted their employment appear to have taken place to some

significant degree within the State of Wisconsin. In *Gray*, by way of contrast, it does not appear that the employment took place to any significant degree within the state.

Peterson v. RGIS Inventory Specialists, ERD Case No. 199703982 (LIRC 10/19/2001). In Peterson and the cases cited therein, the determining factor was the place where the *impact* of discrimination was felt, not where the discriminatory decision was made. Again, the rationale for this approach was that "[i]f discrimination were considered to occur where the challenged decision was made, the results would be anomalous."

The EOC Hearing Examiner concluded in Hawkins that the Equal Opportunities Commission lacked geographical jurisdiction because the allegedly discriminatory acts occurred entirely outside the City of Madison. However, the Hearing Examiner noted that "[t]he question of where conduct constituting a violation of the ordinance occurs can be complicated and unusually highly fact-intensive. The Hearing Examiner need not set forth any hard and fast test to resolve the issues presented in this record."

For the following reasons, the Hearing Examiner finds that the Madison Equal Opportunities Commission *does* have geographical jurisdiction over this case: (1) Hawkins was factually distinct and non-binding; (2) the Madison EOC should conform its position on geographical jurisdiction to that recently expressed by the State of Wisconsin LIRC in Peterson v. RGIS Inventory Specialists; and (3) under the circumstances of this case, to hold that the Equal Opportunities Commission lacks geographical jurisdiction would undermine the stated public policy of the City of Madison.

First, Hawkins. Although that decision was largely given over to whether the Equal Opportunities Commission had jurisdiction over allegedly discriminatory acts that took place entirely outside the City of Madison, the Hearing Examiner also noted that "[t]he Complainant contends that throughout the period of his employment, he worked in several locations including the City of Madison. *It is insufficient to sustain jurisdiction for the Complainant to have frequently worked within the City of Madison*" (emphasis added). The essential distinction between Hawkins and this case is that Mr. Hawkins could not show that he performed any work within the City during the time period referenced in the complaint. Simply stated, the Madison EOC would not have had jurisdiction over the Hawkins complaint, notwithstanding whether *or where* the Respondent actually engaged in discriminatory conduct toward the Complainant. In contrast, the record in this case indicates that Ms. Williams applied and was rejected for several positions located within the City of Madison. It is undisputed that she sought and was denied work within the geographical boundaries of the City.

Regarding the second point, that the Madison EOC should conform its position on geographical jurisdiction to that recently expressed by the State LIRC in Peterson v. RGIS Inventory Specialists, the Hearing Examiner notes that while the EOC and the LIRC represent different political bodies, and although the State has not preempted the field of employment discrimination and has not abrogated local law-making, Anchor Savings and Loan v. Madison Equal Opportunities Commission, 120 Wis.2d 391, 355 N.W.2d 234 (Wis. 1984); Federal Rural Electric Ins. Corp. v. Madison Equal Opportunities Commission, 102 Wis.2d 719, 308 N.W.2d 419, 1981 WL 138689 (Wis. Ct. App. 1981), the WFEA clearly speaks to substantive and procedural issues of major concern to the EOC. Furthermore, the stated public policy of the City, contained in Section 3.23(1), Madison General Ordinances, does not differ significantly from the policy behind Wis. Stats. Chapter 111, Subchapter II, Fair Employment. The WFEA prohibits discrimination in Wisconsin--"unfair discrimination in employment . . . substantially and adversely affects the general welfare of the state." Wis. Stats. ' 111.31(1). "[T]he intent of the legislature [is] to protect by law the rights of all individuals to obtain gainful employment . . . and to encourage the full, nondiscriminatory utilization of the productive

resources of the state to the benefit of the state, the family and all the people of the state." Wis. Stats. 111.31(2). Similarly, the Equal Opportunities Ordinance prohibits discrimination within the community--"Denial of equal opportunity in employment deprives the community of the fullest productive capacity of those of its members so discriminated against and denies to them the sufficiency of earnings necessary to maintain the standards of living consistent with their abilities and talents." Section 3.23(1), Madison General Ordinances.

As the Wisconsin Court of Appeals stated in Federal Rural Electric Ins. Corp. v. Madison Equal Opportunities Commission, 102 Wis.2d 719, 308 N.W.2d 419, 1981 WL 138689 (1981), "[t]he ordinance and the act have a common purpose. They are intended to protect the general public and individual citizens from the harmful effects of discrimination based upon factors legislatively presumed to bear no reasonable relationship to job performance." The Ordinance goes further than the WFEA, extending the prohibition against discrimination to housing and credit and expanding the factors upon which discrimination is prohibited, but the policies pursued by the State and the City are essentially the same, the sole exception being that the State prohibits discrimination within its geographical borders, while the City prohibits discrimination within *its* geographical borders.

The Hearing Examiner believes that incongruity with the LIRC on the question of geographical jurisdiction--whether discrimination "occurs" where the challenged decision was made or where the impact was felt--would serve no useful purpose. The City and the State have enacted similar laws, serving identical public policies. The Hearing Examiner cannot disagree with the reasoning in Peterson. If discrimination were considered to occur where the challenged decision was made, the results would be anomalous. For example, a personnel decision affecting a Madison resident working within the City limits would be outside the jurisdiction of the Equal Opportunities Commission simply because the decision-maker was outside the City when the decision was made.

Finally, the Hearing Examiner believes that under present circumstances, one cannot find that the Commission lacks geographical jurisdiction without violating MGO Section 3.23(1). Again, that subsection reads: "Denial of equal opportunity in employment deprives the community of the fullest productive capacity of those of its members so discriminated against and denies to them the sufficiency of earnings necessary to maintain the standards of living consistent with their abilities and talents." If the Commission lacks jurisdiction simply because the personnel decision that forms the basis for the complaint was made somewhere outside the City of Madison, the Commission will arbitrarily lose jurisdiction over some complaints pertaining to employment practices that affect Madison workers. Moreover, employers will gain the ability to avoid liability for discriminatory hiring practices merely by stepping outside the City limits and the reach of the Equal Opportunities Ordinance to make decisions that would otherwise violate the Ordinance. LIRC does not permit employers to sidestep the WFEA in this manner. Neither may the Commission permit employers to sidestep the legal protections enacted by the City of Madison for this community.

ORDER

The Hearing Examiner finds that the Commission has jurisdiction over the complaint. The complaint is hereby remanded to the investigator.

Signed and dated this 5th day of February, 2005.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner