

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

<p>Gary Rose 209 West Lakeside Street Madison, WI 53715</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Kippcast 201 Waubesa Avenue Madison, WI 53711</p> <p style="text-align: center;">Respondent</p>	<p style="text-align: center;">RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER. MEMORANDUM DECISION</p> <p style="text-align: center;">Case No. 20851</p>
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BACKGROUND

On October 29, 1988 Gary Rose filed a complaint of employment discrimination against Kippcast. The complaint alleges that Kippcast failed to hire Rose as a laborer because of his race. Following an investigation, MEOC Investigator Alberto de la Cerra issued an Initial Determination finding probable cause to believe that Kippcast had discriminated against Rose. Kippcast waived conciliation and the complaint was then certified to hearing.

A hearing was held in this case on July 12, 13 and 14, 1989. The Complainant was represented by Richard Thal of the firm of Cullen, Weston, Pines & Bach. Respondent Kippcast was represented by Thomas Crone of Melli, Walker, Pease & Ruhly.

On the basis of all the evidence, the hearing examiner now makes the following:

RECOMMENDED FINDINGS OF FACT

1. On April 10, 1987, Gary Rose filed an application for employment with Kippcast, a die castings manufacturer. Gary Rose is a black male. Kippcast is a division of Madison-Kipp, Inc. It is located in the City of Madison and employed over 400 persons in 1987. Over half of those people are employed in craft, semi-skilled or unskilled positions.
2. Gary Rose filed his application after his brother, Christopher Rose, told him he thought Kippcast would soon be hiring. Christopher Rose was then employed at Kippcast and told Cherlyn Johnson, the personnel administrator, that his brother would be applying for employment. Christopher Rose is black.
3. In the work history portion of his application, Gary Rose listed 6 years of employment by the State on a building maintenance crew; 6 months of work with the Forest Products Lab receiving, packaging, cataloging and distributing printed material; and 4 months of employment with the City of Madison as a parking ramp meter attendant. In another section, Rose noted that he had three years of experience as an aircraft material handler and that he could operate a fork lift and "pallet jack".

Rose did not identify any specific job he was seeking on his application. He indicated he would accept full-time or part-time employment and that he could work at night. He left "temporary employment" unmarked, indicating he was not interested in a temporary job. He also indicated on the application that he was referred to Kippcast by a relative.

4. Gary Rose had other, more recent employment which he did not report in his application. He had been employed briefly by Ray-O-Vac in 1987 and by Placon in early 1987. Rose did not include these jobs on his application because they were brief in duration.
5. Kippcast has a number of entry level production positions which the information listed on Rose's application indicated he would have been qualified to fill. These include weekend maintenance, sorter, furnace tender, processor, trimmer, die cast cleaner and mini-cast cleaner.
6. After filing his application, Rose regularly telephoned Kippcast to check on the status of the application. He usually spoke with Cherlyn Johnson, who, as personnel administrator, was responsible for the recruitment and hiring of part-time and temporary employees. Through April, and May, Johnson informed Rose that she had no employment to offer him.
7. Sometime after filing his application with Kippcast, Rose secured full-time employment with the postal service. He remained interested in employment with Kippcast and continued to call Johnson. During one of his telephone conversations with Johnson, Rose provided her with the names and telephone numbers of two references. Johnson recorded them on the second page of his application.

On another occasion, Rose questioned Johnson about the qualifications of other individuals who had been hired.

8. Between January 1 and May 31, 1987, Kippcast hired eight individuals into part-time, entry level positions as weekend maintenance workers. Kippcast did not hire anyone into a full-time entry level position during this period.
9. In early June, Johnson contacted Rose to offer him employment as a weekend maintenance worker, a part-time position. Rose was then working full-time for the postal service and had a variable work schedule. He told Johnson he was no longer interested in part-time employment. Johnson then filed Rose's application away with other applications for part-time employment.
10. Rose continued to call Johnson to check on the status of his application. On August 24, 1987, Rose was incarcerated. Thereafter, he telephoned Johnson two or three times a week.
11. The first hire into a regular full-time entry level position in 1987 was Marty Wilcox, a white male who was hired into the labor pool as a die cast cleaner on August 10. Wilcox was hired because he had prior die cast experience. Kippcast also hired three individuals into temporary jobs on August 12, August 17 and September 12, 1987. All three individuals hired were white.
12. In September of 1987, Kippcast placed an advertisement for general laborers in the Madison newspapers and received approximately 150 applications in response.
13. On September 10, Rose telephoned Johnson. She informed him that he should contact Kathy Buechel to discuss full-time employment. Buechel was Kippcast's Personnel Services Manager. Rose asked to speak with Buechel. When Johnson told him Buechel was not available, Rose exclaimed, "Jesus Christ, what does it take to get in there?"
14. Johnson informed Buechel that Rose might be calling her. She also told Buechel about her September 10 telephone conversation with Rose.
15. On September 16, Rose telephoned Buechel and had a brief conversation with her. Buechel told Rose that she did not have his application at the time but that she would check his references. She also asked Rose whether he had any experience in factory work. He told her he'd worked at

- Ray-O-Vac and Placon. Buechel noted this on a slip of paper which she attached to Rose's application.
16. Buechel was familiar with Christopher Rose. She met him shortly after he was hired and later spoke with him on several occasions.
 17. Buechel telephoned the references listed on Rose's application and learned that each had a different telephone number than the one listed on the application. She recorded their new telephone numbers on Rose's application and attempted to contact them, but was unable to do so.
 18. Rose telephoned Buechel on the morning of Monday, September 21, 1987. Buechel told Rose that she had been unable to reach either of his references. As she was explaining this to Rose, he interrupted her. She became annoyed and told Rose she'd been told he had been rude and used foul language in his conversations with others in the personnel office. Rose denied this, and the conversation deteriorated into an argument. Buechel informed Rose that his behavior would be considered in making hiring decisions. Rose then indicated that he would be contacting an attorney, and Buechel replied that she was confident his attorney would find Kippcast in compliance with all EEOC guidelines.
 19. Following her conversation with Rose, Buechel reported it to Pamela Ryan, the Director of Personnel. She also reported Rose's earlier, "Jesus Christ, what do I have to do to get in there," remark. Buechel and Ryan jointly decided that Rose's application would not be given any further consideration. They did not discuss Rose's race.
 20. Audrey Preston applied for employment with Kippcast. Her application was not considered because she was rude to Ryan during a telephone conversation. No evidence was presented on Preston's race.
 21. In general, all applications which indicate a willingness on the part of the applicant to accept part-time employment are referred to Cherlyn Johnson. If the applicant later indicates he is not interested in part-time employment, his application is placed in an expanding file in alphabetical order, unless Buechel is recruiting full-time workers. At the time Rose told Johnson he was not interested in part-time employment, Kippcast was not recruiting to fill any full-time entry level positions.
 22. After Rose first contacted Buechel on September 16, 1987, she reviewed his application and attempted to check his references, as she would have done with any other applicant she was considering.
 23. Applications were not necessarily considered in their chronological order of filing or in any other particular order.
 24. In the early 1980's, Madison-Kipp Corporation, Kippcast's parent corporation, made it a practice to place a code on all applications to indicate the sex and race of each applicant for employment. This was done in connection with a government supply contract which another of the divisions of the corporation, Kipp Lubrication Systems, had secured. The practice of coding all applications ended in 1984 or earlier, but some applications continued to be coded. It does not appear that any particular pattern or method was followed in determining which or how many applications would be coded.
 25. Of 437 applications filed in 1986, some 63 were coded. Five were from black applicants. In 1987 Kippcast received 512 applications, of which 150 contain discernible codes. Twenty of these coded applications were filed by black individuals. Gary Rose's application was not coded. The coded applications are not necessarily a representative sampling of Kippcast's applicant pool for 1986 and 1987.
 26. In 1987, Kippcast hired 27 individuals into permanent, full-time entry level jobs. Two of those individuals are black. This represents 7.5% of the hires into permanent, full-time entry level jobs in 1987.

27. In Dane County, 1.3% of the total labor force is black. In the City of Madison, 2.7% of the total population is black.
28. In March of 1986, blacks not of Hispanic origin accounted for 1.2% of Kippcast's entire labor force and 3.8% of its semi-skilled and unskilled workers.
29. In March of 1988, blacks not of Hispanic origin accounted for 1.1% of Kippcast's entire labor force and 3.4% of its semi-skilled and unskilled workers. In 1987, Kippcast employed Evan Domingo, who apparently remained in its employ at the time of the hearing in this matter in February of 1989. Domingo who is of Hispanic origin, is also black. Thus, blacks accounted for 1.3% of Kippcast's total labor force and 3.9% of its semi-skilled and unskilled workers in March of 1988.
30. Kippcast did not reject or fail to consider Gary Rose's application for employment because of his race.

RECOMMENDED CONCLUSIONS OF LAW

31. The Respondent, Kippcast, is an employer subject to the Equal Opportunities Ordinance.
32. The ordinance prohibits discrimination in employment, including the hiring of an individual for employment, because of race.
33. The Complainant has failed to prove by a preponderance of the evidence that the Respondent intentionally discriminated against him because of his race, or that the Respondent engaged in a pattern or practice of discrimination against blacks and against Complainant in particular.
34. The Complainant has failed to prove by a preponderance of the evidence that the Respondent's hiring practices had an adverse impact on black applicants.

RECOMMENDED ORDER

35. It is hereby ordered that the complaint herein is, dismissed.

MEMORANDUM DECISION

This case involves a claim of employment discrimination by a black male. The Complainant, Gary Rose, charges that the Respondent, Kippcast, intentionally discriminated against him because of his race when it failed to consider his application for employment. He also charges that Kippcast has engaged in a pattern and practice of discrimination against blacks in hiring. Finally, Rose has charged that Kippcast's subjective hiring practices have an adverse impact on black applicants and therefore amount to unlawful discrimination.

Rose filed an application for employment with Kippcast in April of 1987. He indicated on the application that he would accept full-time or part-time employment. At the time, Kippcast had between four and five hundred employees in various positions, including managerial and professional employees, technicians, office and clerical employees, and craft, semi-skilled and unskilled manufacturing employees. The last three, craft, semi-skilled and unskilled workers, comprised the majority of Kippcast's work force.

Rose was qualified by his training and experience, as reflected on his application, for a number of entry level factory-type jobs. These were: weekend maintenance, which is part-time work; sorter; furnace tender; processor; trimmer, die cast cleaner and mini-cast cleaner. There is no evidence he was qualified for any other positions. At the time Rose applied, Kippcast was not recruiting for or hiring into any of the full-time entry level positions identified above. Thus, in accord with Kippcast's usual practice, Rose's application was referred to Cherlyn Johnson. She is Kippcast's personnel

administrator and is responsible for recruiting and hiring part-time and temporary employees. Rose did not indicate that he had any interest in temporary employment on his application.

Rose telephoned Johnson occasionally to follow-up on his application. On one occasion, to Johnson's annoyance, he questioned her about the qualifications of the individuals who were hired. In early June, Johnson contacted Rose to offer him part-time employment. Rose turned down that offer and told Johnson he was no longer interested in part-time employment.¹ Since Kippcast was not hiring into full-time entry level positions at the time, Johnson placed Rose's application in a file folder in which applications were kept in alphabetical order. In 1987, Kippcast hired only one full-time entry level employee prior to September 16. On August 10, Marty Wilcox, who is white, was hired as a die cast cleaner. Wilcox had prior die cast experience.

In early September Kippcast advertised that it was seeking to hire laborers. Kathy Buechel, the employee services manager, began reviewing applications for full-time employment. Rose spoke with Cheryl Johnson, who suggested he talk to Buechel. When Johnson told Rose Buechel was unavailable, he said "Jesus Christ, what does it take to get in there". Johnson reported this remark and Rose's persistence to Buechel and told her to expect a call from him. Rose spoke with Buechel twice. The second time they spoke, Buechel told Rose she'd been informed that he had been rude and that he had used foul language, and the two then had an argument. Following this, Buechel and Pamela Ryan, Kippcast's Personnel Director, agreed that Rose's application would not receive any further consideration.

Rose's brother, Christopher Rose, was employed by Kippcast from September of 1986 until May of 1987. Johnson, Buechel and Ryan all knew him. He informed Johnson that his brother would be applying for a job at Kippcast.

We turn first to Rose's individual disparate treatment claim which is, simply stated, that he was not hired by Kippcast because he is black. The prima facie case analysis employed by federal courts in Title VII cases is applicable to this claim. See, Madison General Hospital v. Equal Opportunities Commission, No. 81-CV-1925, Dane Co. Circ. Ct., Hon. R. Bardwell (July 9, 1982). Under the prima facie case framework, we first consider whether the Complainant has made out a prima facie case of discrimination, which he does by proving the existence of facts which, if otherwise unexplained, raise a presumption of discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254-55, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981). If the Complainant succeeds in making out a prima facie case, the burden of production is shifted and the respondent must rebut the prima facie case by producing competent, credible and specific evidence that it had legitimate, non-discriminatory reasons for its decision. id., at 254-55. Where a respondent presents such evidence, a complainant will prevail only by demonstrating that the respondent's proffered explanation is a pretext for discrimination. id., at 255-56. He may do so directly by proving that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence. id., at 256.

Rose has made out a prima facie case of race discrimination. He is black;² he applied for employment with Kippcast; Kippcast has conceded that he was qualified to fill a number of entry level positions and at one point even offered him one such position, albeit part-time; and, despite his qualifications for and the availability of a number of entry level positions, he was not hired.

Kippcast has successfully rebutted Rose's prima facie case by presenting evidence of his inappropriate behavior, specifically, pressing Johnson to defend Kippcast's hiring decisions, his "Jesus Christ" exclamation, also made to Johnson, and his argument with Buechel.

It is at the final stage of the prima facie analysis that Rose's claim fails. He has not proven Kippcast's explanation to be a pretext for discrimination. Although he denied having engaged in the behavior reported by Johnson and Buechel in their testimony, his denial was less than certain. Next, Rose argues that the term "Jesus Christ" is not intrinsically foul, obscene or rude. I find it neither incredible nor improbable that Rose's exclamation, "Jesus Christ, what do I have to do to get in there" was considered offensive, rude or abusive by either Johnson or Buechel, or that his remark, in combination with his subsequent behavior would have been considered inappropriate by Buechel or Ryan. Finally, Rose has failed to demonstrate that others who behaved comparably were not rejected³ or to present any other evidence to suggest that the reasons advanced by Kippcast were not in fact the reasons for his rejection.

Rose next argues that the statistical evidence and the evidence of Kippcast's hiring practices proves that Kippcast engaged in a pattern and practice of intentional discrimination against blacks, and that Kippcast's hiring practices are unlawful because they result in the disproportionate rejection of blacks. The evidence falls short of proving discrimination under either theory.

Statistics can play a significant role in establishing a pattern and practice of discrimination⁴, and are indispensable to an adverse impact case.⁵ In this case, however, the statistics provide a less than clear picture. Moreover, there is no expert evidence in the record to explain the meaning of the statistics offered into evidence and whether any disparity, if indeed one exists, is statistically significant and therefore of any probative value.⁶

There is no evidence that the small portion of applications sporadically coded by Kippcast in 1986 and 1987 are representative of the entire applicant pool, or that it would be reasonable to extrapolate from these coded applications the racial compositions of the entire applicant pool in 1987. See, Fudge, supra., at 658 (a small sample is not necessarily representative of a larger pool). Yet this is what Complainant did, and it is with these extrapolated figures that the Complainant attempts to prove the statistical significance of the apparent disparities which are revealed by this exercise. In the absence of evidence that this practice is acceptable and that the resulting statistics are reliable, the Complainant's calculations are meaningless.

The only certain and useful statistics of relevance which we are able to derive from the data offered into evidence is that blacks comprised 7.4% of Kippcast's 1987 hires into full-time, entry level positions, the positions which are at issue in this case. We do not know what proportion of the 512 applications received in 1987, or how many of those which were coded, were applications for those positions. As already observed above, we do not know the racial composition of the group of 362 applicants whose applications were not coded. These statistics are simply inadequate, without more, to establish statistically significant disproportionate hiring rates for black and whites.

In the absence of proof of a significant disparity in the hiring of blacks and whites into full-time entry level jobs, Complainant cannot prevail on his disparate impact claim. Because he relies almost exclusively on the same statistical evidence as well to prove that Kippcast is engaged in a pattern and practice of racial discrimination, and because there is no evidence of any specific instances of discrimination, I also conclude that the Complainant has failed to prove any pattern or practice of discrimination by Kippcast.

Dated at Madison this 29 day of September, 1989.

EQUAL OPPORTUNITIES COMMISSION

Harold Menendez
Hearing Examiner

¹Rose does not contend that Kippcast discriminated against him with respect to part-time employment.

²On the basis of the evidence, I have rejected Kippcast's contention that the two individuals who decided Rose's application would no longer be considered, namely, Kathy Buechel and Pamela Ryan, did not know he is black.

³The evidence is to the contrary. Audrey Preston's application was rejected because she was rude.

⁴International Brotherhood of Teamsters v. United States, 431 U.S. 324,339 n.20, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

⁵See, B. Sehle and P. Grossman, Employment Discrimination Law (2d ed.) at 1324-31, and cases cited therein.

⁶In cases involving a relatively small data base, courts should require a showing that any disparity is statistically significant. Fudge v. Providence Fire Dep't., 766 F.2d 650, 658 (1st Cir. 1985). Moreover, use of the 4/5 rule, suggested by complainant here, is inappropriate where small samples are involved. 766 F.2d at 658 n.10.