

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

<p>Jack Rappe 3710 Sussex Lane Madison, WI 53714</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> <p>Soderholm Wholesale Foods, Inc. 6901 Mangrove Lane Madison, WI 53713-1596</p> <p style="text-align:center">Respondent</p>	<p>DECISION AND ORDER</p> <p>Case No. 21811</p>
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BACKGROUND

On November 9, 1992, the Complainant, Jack Rappe, filed with the Madison Equal Opportunities Commission a complaint of discrimination against the Respondent, Soderholm Wholesale Foods, Inc. alleging discrimination in employment on the basis of age. The complaint was cross-filed with the Wisconsin Department of Industry, Labor and Human Relations, Equal Rights Division (ERD). The complaint was assigned case number 9300924 by the ERD. Pursuant to a Memorandum of Agreement on Work Sharing and Cooperation, ERD deferred further action to the Commission. On May 14, 1993, the Commission issued an Initial Determination concluding that there was probable cause to believe that discrimination had occurred. Efforts to conciliate the allegations of the complaint proved unsuccessful. The complaint was transferred to the Hearing Examiner for the holding of a public hearing on the merits of the complaint.

The Hearing Examiner held a Pre-Hearing Conference on July 29, 1993. Subsequent to that conference, the Hearing Examiner issued a Notice of Hearing and Scheduling Order on August 2, 1993. The public hearing on the complaint was set for January 5, 6 and 7, 1994.

On November 19, 1993, the Respondent filed a Motion to Dismiss for lack of jurisdiction along with supporting affidavits. On November 23, 1993, the Hearing Examiner issued a briefing schedule giving the parties the opportunity to submit argument and supporting documentation. Based upon the arguments and documents submitted by the parties, the Hearing Examiner orders the complaint dismissed before the Commission and . . . transferred to the ERD for further processing.

DECISION

The Respondent's Motion to Dismiss is premised upon the fact that even though the Respondent's mailing address indicates that it is within the City of Madison, its place of business actually is in Monona and lies wholly outside of the City of Madison. Further, none of the acts upon which the complaint is based occurred within the City of Madison.

The Respondent allegedly became aware of these facts and their importance only late in the process and

as a result of the work of its attorney. There is no reason to doubt the Respondent's explanation of this unusual circumstance.

The Complainant's only argument in opposition to the Respondent's Motion to Dismiss is that the Respondent's motion comes too late and that presumably the Respondent has waived its right to question the jurisdiction of the Commission. The Complainant apparently does not dispute the factual allegations of the Respondent regarding the location of its place of business and the location of the events that give rise to this complaint.

The City of Madison's authority for creating the Commission stems from its home rule authority granted in Wis. Stats. Sec. 62.11(5). As such the Commission's authority to act is limited to its grant from the City Council which is in turn limited by the home rule statute. One of the obvious and necessary limitations on the City Council's power to grant authority to the Commission is that it can confer jurisdiction only within its own geographic boundaries. The City Council has no authority to act outside of the city limits. Since the City Council is limited in the geographic scope of its actions, it cannot pass on to one of its administrative agencies any greater authority to act than it possesses. In other words, presence in some form within the geographic limits of the City of Madison is an absolute requirement for the Commission to be able to exercise jurisdiction. Anchor Savings and Loan v. MEOC (Schenk) 120 Wis. 2d 391, 355 N.W.2d 234 (1984). The actual physical presence in the City of Madison of the Respondent is not required for the Commission to exercise its authority. The Respondent's constructive presence is all that is required. A respondent may be constructively present where it conducts business within the City of Madison, though it is physically located outside of the city limits and the act of discrimination occurred within the City of Madison.

In this case, the Respondent is neither located within the City of Madison nor did any of the acts that form the basis of the complaint occur within the City of Madison. Because the Respondent's presence in the City, either actual or constructive, is an absolute requirement for the Commission to act, an objection to the Commission's jurisdiction for this reason may not be waived. Generally speaking, objections to the Commission's jurisdiction are not waived and may be brought at any time including upon appeal. It is this ability of a respondent to challenge the jurisdiction of the Commission even on review that allows the Commission to constitutionally exist.

Accordingly, the complaint in this matter is dismissed before the Commission. It is ordered that this matter be transferred to the Wisconsin Department of Industry, Labor and Human Relations for processing pursuant to the requirements of that agency.

Signed and dated this 15th day of December, 1993.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner