

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

<p>Dianne Steinbach 110 Leon St. Madison, WI 53714</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Meriter Health Services, Inc. 309 W. Washington Ave. Madison, WI 53703-2795</p> <p style="text-align: center;">Respondent</p>	<p>HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p>Case No. 22125</p>
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The complaint in this matter came on for a public hearing before Hearing Examiner Clifford E. Blackwell, III on July 8, 1996, July 9, 1996, July 10, 1996, July 11, 1996 and July 12, 1996. All proceedings were held in room LL 120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53710. The Complainant, Diane Steinbach, appeared in person and by her attorney, Jeffrey Spitzer-Resnick. The Respondent, Meriter Hospital, Inc. appeared by its attorneys, Michael Westscott and Curtiss Swanson of the law firm of Axley Brynelson. Based upon the record in this matter, the Hearing Examiner makes the following Recommended Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The Complainant is a lesbian who has been primarily employed in the mental health field.
2. The Respondent is a Wisconsin corporation with places of business at 202 S. Park Street, Madison, Wisconsin and 309 W. Washington Avenue, Madison, Wisconsin.
3. The Complainant began her employment with the Respondent as a Limited Term Mental Health Worker on the Adult Psychiatric Unit on or about May 10, 1993. Under the terms of the Complainant's limited employment her term of employment was to end on or before September 10, 1993. She generally worked P.M. or Night shifts. Her immediate supervisor was Assistant Nurse Manager Jo Ellen Crinion. Crinion reported to Nurse Manager Irma Korbitz. Korbitz worked the day shift but was responsible for the nursing-related personnel on all shifts of the APU. It was Korbitz who initially interviewed the Complainant and hired her in the spring of 1993.
4. One of the Complainant's professional goals that she hoped to be able to pursue while employed by the Respondent was to become certified as a therapist. Certification would allow the Complainant to be paid directly by patients' insurance carriers. In order to receive this certification, the Complainant had to have a certain number of her work hours supervised or observed by certain types of mental health professionals. The Complainant hoped that she could receive qualifying supervision while employed by the Respondent and that her temporary status might be extended or become permanent and that she would be able to complete her supervised hours.

5. Korbitz knew of the Complainant's interest in receiving certification of her work hours. When questioned by the Complainant about how to obtain such certification, Korbitz told the Complainant to contact Sue Janty, another Registered Nurse working for the Respondent.
6. The Complainant attempted to contact Janty but because of personal problems not related to this complaint, Janty was difficult to reach. Because of these difficulties, the Complainant once again asked Korbitz how to obtain certification of her hours.
7. Korbitz interpreted the Complainant's asking again about certification to be a sign that the Complainant had not really listened to Korbitz's earlier instructions. This left Korbitz with the impression of a communication problem with the Complainant.
8. Eventually Janty and the Complainant made contact and agreed to set up a meeting. Janty was concerned that either the Complainant had received inaccurate information about the certification process or had misunderstood the information that had been given her. Korbitz was also concerned about this additional evidence of a communication problem with the Complainant.
9. Early in August, 1993, the Complainant was erroneously informed that she was entitled to a raise in pay. Once the mistake was straightened out, Korbitz learned that the Complainant was attributing comments to Korbitz that Korbitz denied making.
10. While the Complainant was open about her status as a lesbian, she did not specifically tell many of her coworkers that she was a lesbian. Late in June or early in July of 1993, the Complainant told Marie Bunders that she (the Complainant) was a lesbian in response to a question by Bunders. Bunders had previously suspected that the Complainant was a lesbian because of discussion at the work site. Bunders may have told others on the Night shift but does not recall specifically. She did not tell anyone in a management position.
11. In late July of 1993, the Complainant told Marge Rolfing that she (the Complainant) was a lesbian. There is no indication that Rolfing told anyone else.
12. Sometime in August, 1993, the Complainant disclosed her sexual orientation to a patient on the Adult Unit. There is no indication that the patient shared that information with anyone else.
13. On August 19, 1993, the Complainant met with her immediate supervisor, Assistant Nurse Manager, Jo Ellen Crinion, to discuss the care of a lesbian patient on the Adult Unit. The Complainant believed that the patient should be referred to a local gay, lesbian, bisexual and trans-gender counseling and advocacy group called the United. The Complainant volunteered to act as a liaison to facilitate the referral. The Complainant disclosed to Crinion that she (the Complainant) was a lesbian. The Complainant was familiar with the services of the United. The Complainant also indicated that she could serve as a permanent liaison with the United.
14. Crinion did not tell her supervisor, the Nurse Manager, Irma Korbitz, of the conversation with the Complainant.
15. On or about July 22, 1993, the Complainant applied for a permanent .6 FTE Mental Health Worker position. She was interviewed by Korbitz. After Korbitz interviewed the Complainant and another candidate, Jolene Wangen, she set up group interviews for both candidates with any interested staff members.
16. In addition to the Complainant, Jolene Wangen applied for the Mental Health Worker position in late July or early August of 1993. Wangen was the Health Unit Coordinator on the Adult Unit and was just finishing her training as a Nursing Assistant.
17. After interviewing the Complainant and Wangen, considering the input from the group interviews, receiving a reference from Crinion and discussing the candidates with her supervisor, John Easterday, Korbitz decided that Wangen would best meet the needs of the Unit. The two candidates were both well qualified and brought different skills and abilities as a possible Mental Health Worker.

18. The fact that the Complainant was a lesbian played no part in Korbitz's decision to offer the position to Wangen. The factors that most influenced Korbitz in favor of Wangen were the fact that Wangen had been an employee of the Respondent for longer than the Complainant and Wangen's training as an EMT.
19. On August 30, 1993, the Complainant applied for the position of Health Unit Coordinator on the Adult Unit. This position was open because Wangen left the position to take the Mental Health Worker position. Sandy Rivera, a Health Unit Coordinator on another unit, also applied for this position at about the same time.
20. Korbitz interview both the Complainant and Rivera for the position. She did not hold group interviews because she believed both candidates were sufficiently familiar to the unit staff that such interviews were not necessary.
21. Korbitz selected Rivera for the position because Rivera was currently a Health Unit Coordinator and had held that position on the Adult Unit from time to time as a temporary fill-in.
22. The Complainant admits that Rivera was more qualified for the position of Health Unit Coordinator than she was.
23. The fact that the Complainant was a lesbian played no part in Korbitz's selection of Rivera rather than the Complainant.
24. On August 30, 1993, Korbitz told the Complainant that her LTE position would terminate on September 10, 1993. Korbitz had received a reminder of that fact from the Human Resources Department shortly before August 30. The Complainant was surprised because she had hoped her LTE position could be extended or she could be transferred to a full-time position.
25. During the period from August 30 through September 10, the Complainant was scheduled to work on only four days: September 1 through 3 and September 10. On two of these days, she was taken off the schedule because of a low patient census and was taken off for September 10 because it was scheduled to be her last day. The remaining days during the period she was not scheduled to work either because of her own request or the limitations of the position.
26. The Complainant had been taken off the schedule in the past because of a low patient census. It was the Respondent's policy to take LTE employees off the schedule first in cases of low census.
27. It was the Respondent's general policy particularly on nursing units not to extend LTE positions beyond their scheduled termination date. The Nurse Recruiter in the Human Resources Department while the Complainant was an employee, Sherry Burner, followed this policy.
28. The Complainant's LTE position was not prematurely terminated. The fact that the Complainant was not transferred to a full-time position or her LTE position not extended had nothing to do with the Complainant's sexual orientation.
29. During the Complainant's last week as an LTE on the Adult Unit, she applied for a 0.0 FTE Mental Health Worker position on the Child and Adolescent Unit (CHAD). A 0.0 FTE position is a permanent position but does not guarantee any number of hours of employment during a pay period. These positions are sometimes called "on call" or "float" positions.
30. The Complainant interviewed for this position with Janell Doering sometime between September 7 and 10, 1993. Doering was the Assistant Nurse Manager on the CHAD. Doering interviewed candidates for positions on the CHAD and made recommendations concerning who to hire to the Nurse Manager, Sarah Shatle. Shatle uniformly followed Doering's recommendations.
31. During Doering's interview of the Complainant, Doering was called back to her office for a reason unrelated to the interview. While in her office Shatle mentioned to Doering that Korbitz

- had some concerns about the Complainant as an employee and that Doering might wish to speak with Korbitz.
32. Doering took the opportunity to speak to Korbitz at that time. Korbitz expressed that she had concerns about the Complainant's communications with the Complainant's supervisors. After her brief telephone conversation with Korbitz, she returned to her interview with the Complainant.
 33. Korbitz's concerns about the Complainant's communications were based upon Korbitz's and Crinion's experience with the Complainant and were not motivated by the Complainant's sexual orientation.
 34. Doering believed that the Complainant's application was in order and that the Complainant met the qualifications of the position. Doering was not convinced that the Complainant was particularly interested in working with children though. Doering indicated to the Complainant that things looked fine and that the Complainant would be contacted if a group interview was required.
 35. Doering was not in a great hurry to fill the position but was interviewing so that the position would not be lost to the CHAD. The Complainant called Doering approximately a week later to check on the status of her application. The Complainant had believed that Doering was ready to offer her the position. Doering indicated that she was still interviewing and that if a second interview was necessary, the Complainant would be contacted.
 36. The Complainant called Doering again about a week later to once again check on the status of her application. Doering repeated what she had told the Complainant during her previous call.
 37. In early to mid October, 1993, the Complainant saw an advertisement for the position for which she applied or one substantially similar to it. She once again called Doering to check on her application. Doering said that the Complainant was still under consideration but that Doering was still interviewing and considering her needs. Doering said the Complainant would be contacted if another interview was required and indicated that further contact should be made through the Human Resources Department.
 38. Doering was no longer really interested in the Complainant's application. Doering believed that the Complainant was not really listening to what Doering said in their conversations.
 39. In early December of 1993, The Complainant once again saw a newspaper advertisement for the position for which she had applied or at least one that was substantially similar. She once again called Doering to ask about the advertisement and her application. Doering told the Complainant that she (Doering) wanted all contacts to go through the Human Resources Department.
 40. From approximately October 1, 1993 through January 31, 1994, the CHAD hired at least five Mental Health Workers and two Mental Health Assistants. The Complainant was not offered any of these positions. All of those hired were former employees or volunteers at Parkway Psychiatric Hospital.
 41. During the late fall of 1993, Parkway Psychiatric Hospital announced that it was closing. The Respondent decided that it would attempt to hire as many Parkway employees as it could to help with the anticipated increased demand for services resulting from the closing of Parkway.
 42. Doering has hired, worked with and socialized with gays and lesbians. There is no indication that Doering has any prejudice or animus towards gays and lesbians.
 43. The Complainant's sexual orientation played no role in the Complainant's failure to be hired for one or more positions on the CHAD in late 1993 and early 1994.

RECOMMENDED CONCLUSIONS OF LAW

44. The Complainant, a lesbian, is a member of the protected class "sexual orientation" as that term is used in the Madison Equal Opportunities Ordinance Sec. 3.23 et seq.
45. The Respondent is an employer within the meaning of the Madison Equal Opportunities Ordinance Sec. 3.23 et seq. and is subject to the requirements of the ordinance.
46. The Respondent did not fail or refuse to hire the Complainant as a Mental Health Worker on its Adult Psychiatric Unit in August of 1993 because of the Complainant's sexual orientation.
47. The Respondent did not fail or refuse to hire the Complainant as a Health Unit Coordinator on its Adult Psychiatric Unit in September of 1993 because of the Complainant's sexual orientation.
48. The Respondent did not prematurely terminate or refuse to extend the Complainant's LTE Mental Health Worker position in September of 1993 because of the Complainant's sexual orientation.
49. The Respondent did not fail or refuse to transfer the Complainant from her LTE position to a full-time position because of her sexual orientation.
50. The Respondent did not fail or refuse to hire the Complainant for any Mental Health Worker or Mental Health Assistant position on its Child and Adolescent Psychiatric Unit in the fall of 1993 or the winter of 1994 because of the Complainant's sexual orientation.

RECOMMENDED ORDER

51. The complaint is hereby dismissed without further cost to either party.

MEMORANDUM DECISION

The Commission utilizes the burden shifting approach developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) as that test has been refined by later case law. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). When applying this test, the Complainant must first demonstrate a prima facie case of discrimination. As a very general statement, a prima facie case of employment discrimination is made when the Complainant shows that she is a member of a protected class, she has suffered an adverse employment action and there is a basis for believing that the Complainant's membership in the protected class played at least a part in causing the adverse action. Other elements may exist in the prima facie case depending upon the precise allegation of discrimination.

Once a prima facie claim has been demonstrated, the burden shifts to the Respondent to put forth a legitimate, nondiscriminatory explanation for its conduct. This is a burden of articulation rather than one of proof. Simply put, a Respondent may rebut the Complainant's demonstration of a prima facie case by stating a legitimate, nondiscriminatory reason for its action.

The Complainant may overcome this burden and ultimately prevail by demonstrating that the reason or reasons proffered by the Respondent for its actions represent a pretext for discrimination or should not be given any credence because of a lack of credibility.

The Complainant states two different types of claims in her complaint. First, there is a claim for the failure to hire. The complaint specifies several particular positions for which the Complainant was not hired. The second general type of claim is for the premature termination of the Complainant's LTE position as a Mental Health Worker. For the first category of allegations, the battlefield for the parties is over the issue of whether the failure or refusal to hire for various positions was motivated at least in part by the Complainant's membership in the protected class "sexual orientation". For the second

general allegation, that of premature termination, at least initially the battle lines are drawn along the issue of whether the Complainant suffered an adverse employment action. For all allegations, it appears that the parties agree that the Complainant as a lesbian is a member of the protected group "sexual orientation".

The Hearing Examiner will first address the termination claim because it can be resolved without reference to the issues in dispute in the other claims. The Complainant began her employment with the Respondent on May 10, 1993. She began her work as a Mental Health Worker on the Adult Psychiatric Unit (Adult Unit) on May 20, 1993. The difference in start dates is due to a new employee orientation period. The Complainant was hired as a limited term employee (LTE) to fill the position of a Mental Health Worker who had taken a period of leave. At the time that the Complainant was hired, it was not clear whether the employee whose position the Complainant was temporarily filling would return or not. The Complainant was to work .6 of a full time position or six 8 hour shifts in every 14 day pay period. Her hours of work were to be on the P.M. shift (2:30 p.m. to 11 p.m.) or Nights (11 p.m. to 7 a.m.). The Respondent also had a day shift that ran from 7 a.m. to 2:30 p.m..

The Complainant was initially interviewed by Sherry Burner of the Respondent's Human Resources Department (HR). Burner was the person in the HR department responsible for recruiting, screening and overseeing the employment of people on the Respondent's nursing units. Not all employees on a nursing unit were actually nurses and though nurses were employed on most units, not all units with nurses were considered nursing units. It was the practice in 1993 for HR to perform a screening of applicants for a given position to determine whether they met the minimum qualifications for the position. If an applicant met the minimum qualifications that person's application was then forwarded to the hiring supervisor. In this case, the hiring supervisor was Irma Korbitz, the Nurse Manager on the Adult Unit. Korbitz supervised Registered Nurses, Mental Health Workers, Social Workers and Health Unit Coordinators on the Adult Unit for all three shifts. Korbitz worked Days and sometimes into the P.M.s. Her daily supervisory responsibilities on the P.M. shift were delegated to the Assistant Nurse Manager, Jo Ellen Crinion, who worked that shift. Korbitz's daily supervisory duties on the Night shift were delegated to the Charge Nurse. The position of Charge Nurse was held in rotation by all of the Registered Nurses on the Night shift.

After Burner interviewed the Complainant, Korbitz interviewed her for the LTE Mental Health Worker position on the Adult Unit. Korbitz believed that the Complainant could perform the duties of the position and reported that to Burner. The Complainant was the only person to apply for this position. The Complainant was hired.

For the Respondent, an LTE position lasts 120 days. Though Korbitz believed that she was hiring the Complainant for 90 days, the Complainant's position ran for 120 days until September 10, 1993. Burner reminded the Complainant in writing shortly after she began her employment that it was limited to 120 days.

It is not the Respondent's practice to extend LTE positions beyond the 120 day limit. While Burner was the nurse recruiter, she never extended an LTE position on a unit for which she was responsible.

Towards the end of August, Burner sent Korbitz a written reminder that the Complainant's LTE position was due to expire on September 10, 1993. After a meeting called for another purpose, Korbitz told or reminded the Complainant that her LTE position was scheduled to end on September 10, 1993.

Between August 30, 1993 and September 10, 1993, the Complainant was scheduled to work on 4 days. Work schedules on the Adult Unit were prepared several weeks in advance. If one wished to take time off, the request generally needed to be made approximately a month in advance. Korbitz delegated the duty to make up work schedules to others. Once a schedule was set, Korbitz would review it to make sure all shifts were covered and requests for time off were covered.

Once a schedule was approved and posted, it could be amended for several reasons. First, if the patient population of the unit, known as the census, went up or down from the projected census additional employees could be added or taken off the schedule. Second, if an employee who was scheduled to work wished not to work, he or she could seek someone else to work that shift for him or her. Such replacements were routinely granted. This type of schedule change could be disapproved if there had been a drop in census, in which case the employee would be permitted to take the time without a replacement, or if allowing another employee to work would place the replacement worker in the position of being eligible for overtime pay.

During the period August 30, 1993 to September 10, 1993, the Complainant had requested and been granted September 5, 1993 through September 8, 1993 as time off. As an LTE, the Complainant was not entitled to vacation leave. She was not scheduled to work on August 31, 1993 and September 9, 1993. She was scheduled to work on September 1, 2, 3 and 10. She worked on September 1 but was "called off" on September 2 and 3 because of a low census. She was taken off the schedule for September 10, 1993 because it was her scheduled last day.

The Complainant asserts that the above facts represent an adverse employment action sufficient to establish that element of a prima facie case. The Respondent disputes that interpretation. The Hearing Examiner agrees with the Respondent.

For purposes of this discussion, the Hearing Examiner will assume that Korbitz knew that the Complainant was a lesbian prior to taking any of the actions noted or implied above. This fact is highly disputed and will be resolved in a later discussion. It is the belief of the Hearing Examiner that even assuming Korbitz's knowledge, these facts do not demonstrate an adverse employment action.

Of the days in question, the Complainant only lost 3 days for which she was otherwise scheduled to work. Two of those days were lost to the Complainant because of a low census. At hearing, the Complainant admitted that was a valid reason to be taken off the schedule and the record indicates that had happened approximately 10 times throughout the period of her employment. Except for her last day of employment all other days during the period were either simply not scheduled or were specifically not scheduled at the request of the Complainant.

The only day that the Complainant arguably lost was September 10, 1993. The Respondent's position is that the Complainant was taken off that last day in order to avoid any possible accounting questions over the length of her LTE. The Complainant points to the fact that she was originally scheduled to work on a number of days after September 10, 1993. The Complainant was clearly scheduled to work these additional days. It seems equally clear that the Complainant was erroneously scheduled on these days. The schedule was prepared well in advance of the end of the Complainant's LTE position. Those doing the scheduling were not charged to keep track of the Complainant's employment status. While Korbitz should have caught the error, she did not. However when her error became clear to her, she took steps to correct it. She promptly told the Complainant that her position was scheduled to end and took appropriate steps to replace the Complainant on the schedule.

On this record, the Hearing Examiner concludes that the Complainant did not suffer an adverse employment action with the termination of her LTE position. Except for one day of employment, the Complainant's work schedule from August 30, 1993 to September 10, 1993 was perfectly normal and took into account the Complainant's own request for time off. While taking the Complainant off the schedule for her last day seems somewhat overly cautious to the Hearing Examiner, it does not appear unreasonable and there is no credible evidence in the record to indicate that the Complainant's sexual orientation played any role in this adjustment to the schedule.

The Hearing Examiner finds that the Complainant has failed to establish a prima facie case of discrimination with respect to her claim that her employment was prematurely terminated. The Complainant has failed to demonstrate that she has suffered an adverse employment action in connection with the manner in which her employment came to an end.

The Complainant also claims that her LTE position could and would have been extended were it not for her status as a lesbian. Again the Hearing Examiner finds that the Complainant has failed to establish that she has suffered an adverse employment action. The record is not quite so clear on this point as on the Complainant's last ten days of employment however.

There is evidence in the record indicating that LTE positions were extended beyond their termination date. Sometimes these apparent extensions extended for a significant period of time. The Hearing Examiner is convinced by the explanation of the Respondent's witnesses Meester and Burner that this evidence is wrong.

The evidence in question is a list of persons in LTE positions whose positions did not end on the final date of the LTE. This information was provided to the Complainant by the Respondent in response to an Interrogatory. At hearing, Meester stated that she had reviewed the files to verify the information and discovered that the vast majority of the individuals listed were not in fact LTEs but were employed as "on call" or 0.0 full-time equivalents (FTE). An "on call" employee was considered a permanent employee but one who was not guaranteed any number of hours. The one exception to this discovery was an LTE hired by Burner.

Burner testified credibly that she held strictly to the time limits of an LTE position. She testified that she had never permitted an LTE to stay beyond his or her period of employment. In the case of the one person listed by the Respondent as an LTE who stayed beyond his or her LTE position, though Burner hired that person, Burner left the employment of the Respondent prior to the end of the LTE position. Burner was not responsible for the extension of that person's LTE position.

The Hearing Examiner is convinced by the record as a whole that the Respondent maintained a strict policy not to extend LTE positions. While the record indicates that this policy may have been occasionally broken, it was most generally followed. The exceptions in the record generally occurred in units other than the one in question here and where the unit is the same, the person responsible for the oversight of the position was not the same as the person who was in charge when the Complainant's position expired. The Complainant had no right to an extension of her LTE position. She knew of its limited nature when she was offered the position and accepted it. Her position expired as she knew it would and this natural expiration does not represent an adverse employment action.

Moving to the remaining bundle of allegations, the Hearing Examiner is faced with essentially the same general allegation covering numerous positions and an extended period of time. The analysis of these allegations is of necessity multi-layered. The Complainant's allegations can be summarized as a failure to hire her because she is a lesbian. As noted above, there is no dispute that the Complainant is

a lesbian and as such is a member of the protected class "sexual orientation". Equally, the Respondent does not contend that the failure to hire the Complainant does not represent an adverse employment action. The question before the Hearing Examiner is whether the fact that the Complainant is a lesbian played any part in the Respondent's failure to hire her.

The first critical question in this analysis is whether the decision maker for each of the positions in question knew that the Complainant is a lesbian at the time the decision was made. It is insufficient for the decision maker to have had the opportunity to know that the Complainant was a lesbian. Actual knowledge is required. Rhone v. Marquip, MEOC Case No. 20967 (Ex. Dec. 07/31/89, Ex. Dec. 04/05/89). Without demonstrable knowledge of the Complainant's membership in the protected class, the Respondent cannot be said to have acted on that knowledge. This element of intentionality is an integral part of any claim of discrimination.

If the Complainant demonstrates that the respective decision makers had knowledge of her sexual orientation at the time of their decisions, the Complainant still must prove that the Respondent refused to hire her at least in part because of her sexual orientation. This represents a difficult burden for the Complainant to overcome. Proof of either of these points need not be made with direct evidence but may be inferred from the circumstances and the facts presented in the record as a whole.

At question here are two positions on the Adult Unit and several more on the Child and Adolescent Psychiatric Unit (CHAD). On the Adult Unit, there was a Mental Health Worker position for which the Complainant applied on July 22, 1993 and for which there was a decision in early August of 1993. There was also a Health Unit Coordinator position on the Adult Unit for which the Complainant applied on August 30, 1993 and for which the hiring decision was made in early September of 1993. On the CHAD, the Complainant submitted a single application during the first week of September, 1993. The Complainant believed this application would be considered for several Mental Health Worker positions as well as Mental Health Assistant positions that became available throughout the fall of 1993 and the early winter of 1994. The decision maker for both of the positions on the Adult Unit was Irma Korbitz. The decision maker for all of the positions on the CHAD was Janell Doering. Technically, as Assistant Nurse Manager, Doering made recommendations to the Nurse Manager, Sarah Shatle. However, in practice Shatle always accepted the recommendation of Doering, making her the real decision maker. With respect to the Mental Health Worker position on the Adult Unit, the record is clear that the Complainant had not disclosed her sexual orientation to any person in a management position and had not disclosed her sexual orientation to Korbitz as of the decision to hire another candidate. The Complainant contends however that Korbitz must have known because she (the Complainant) was open about her sexual orientation and referred frequently to her partner. Additionally, the Complainant "came out" to two coworkers and possibly a patient prior to Korbitz' decision on the Mental Health Worker position. "Coming out" describes a gay or lesbian individual's voluntary disclosure to another of his or her sexual orientation.

On the record before the Hearing Examiner, he concludes that the Complainant has failed to demonstrate that Korbitz had actual knowledge of the Complainant's sexual orientation at the time she (Korbitz) made the decision to hire someone other than the Complainant for the Mental Health Worker position. There was testimony from four individuals that they knew of the Complainant's sexual orientation while she was employed on the Adult Unit. The Complainant testified that she told another coworker, Marge Roling, that she (the Complainant) was a lesbian at the end of July. None of the other witnesses who testified, Jack Glendenning, Marie Bunders, Patricia Offer and Bill Elliot, were able or willing to state that the Complainant's sexual orientation was a matter of common knowledge on the Adult Unit. Bunders and Offer gave the most supportive testimony from the Complainant's perspective. Bunders testified that she believed there must have been speculation about

the Complainant's sexual orientation because Bunders felt emboldened to ask the Complainant if she was a lesbian one morning early in the summer of 1993 while the two were at the Farmer's Market. Offer testified that because the Complainant frequently referred to her partner, Offer came to the conclusion that the Complainant was a lesbian. However, Bunders, despite testifying that she probably told others on the Adult Unit of her conversation with the Complainant was unable to say with whom she shared this information or when. She also stated that she did not tell anyone in management. Offer indicated that she could not state that the Complainant's sexual orientation was a matter of common knowledge on the unit.

The most that this record demonstrates is that as of the date upon which Korbitz decided to offer the Mental Health Worker position to someone other than the Complainant, Korbitz had the opportunity to know that the Complainant was a lesbian, not that she actually knew. While the term "partner" is often used in gay or lesbian relationships, it is by no means limited to those relationships. It is as commonly used in committed non-marital relationships by heterosexuals. The use of the term "partner" by itself does not signal that the user is gay or a lesbian but most likely that he or she is not married. The lack of marriage may be for a variety of reasons, not just the legal inability to marry of a gay or lesbian couple.

The problem with assuming knowledge on the part of another because one is open about something was interestingly demonstrated by another witness in this matter. Barbara Burdulis, a lesbian, was called by the Respondent to testify that Korbitz, who had worked with Burdulis some years ago, never seemed to treat her badly or in a discriminatory manner because of her sexual orientation. Burdulis postulated that Korbitz must have known of her sexual orientation because she (Burdulis) was open about her sexual orientation and frequently referred to her partner. Korbitz testified, however, that she only knew of one gay person with whom she worked. That individual, Gary Johnson, worked with Korbitz before he moved out of Madison. Korbitz did not indicate that she remembered Burdulis as being a lesbian with whom she had worked despite Burdulis' feeling sure that Korbitz must have known. Korbitz's testimony in this regard was given thoughtfully and with no apparent concern or nervousness. It was internally consistent and consistent with that of other witnesses both for the Complainant and the Respondent. The Hearing Examiner has no reason to suspect Korbitz's credibility as a witness.

The Complainant and Korbitz did not frequently work on the same shift. Korbitz worked Days and sometimes into the P.M.'s. The Complainant worked primarily P.M.'s and Nights. Even if the Complainant's sexual orientation were common knowledge on the Night or perhaps P.M. shift, Korbitz as someone primarily working Days could well have no knowledge of what was common knowledge on those other shifts.

The Complainant testified somewhat confusedly about having "come out" to a patient. It is not clear whether this occurred in early August or later in August. There is testimony concerning the treatment of a patient and a relevant conversation between the Complainant and Jo Ellen Crinion that occurred on or about August 19, 1993. The Complainant seems to refer to a different patient at one point in her testimony but then seems to indicate that there was only the one patient. Even if there were two patients to whom the Complainant disclosed her sexual orientation, it proves little to the Hearing Examiner other than the Complainant was sufficiently comfortable with her sexual identity to share it with others. It does not demonstrate that Korbitz knew since there is no testimony that Korbitz had any contact with the patient in question or that the patient shared that information with anyone else on the Respondent's staff much less with anyone who might have shared that information with Korbitz.

Even assuming that Korbitz knew that the Complainant was a lesbian at the time Korbitz selected someone else for the Mental Health Worker position, on this record, the Complainant fails to demonstrate that she would have received that position absent a discriminatory motive on the part of Korbitz. The heart of the Complainant's claim is that she was much more qualified for the position of Mental Health Worker than was the person hired for that position, Jolene Wangen. She seems to base her opinion on the fact that she was incumbent in the position and she received supportive comments from her coworkers. The record on this point is anything but so clear as the Complainant believes.

Once the position was internally posted, Korbitz accepted applications from interested candidates. Though it is not entirely clear on this record, it appears that the Complainant and Wangen were the only two applicants. At any rate, they were the only applicants that Korbitz found to meet the minimum qualifications for the position and the only ones she interviewed. Though the applications should have first been reviewed by the HR Department, it appears that the Complainant's did not receive this qualifying review until sometime after the position had been awarded to Wangen. While this represents a departure from the Respondent's usual process, it does not seem to have had an effect on the hiring outcome. Both candidates had individual interviews with Korbitz and an opportunity for a group interview with interested coworkers.

The Complainant had the experience of holding the same position for the preceding two and a half months. The Complainant had also held similar positions elsewhere such as Parkway Psychiatric Hospital. The Complainant had a Master's degree and was motivated to work in the mental health field. She had told Korbitz of her desire to obtain certification so that she could become a private therapist. The Complainant was well liked by her coworkers.

Wangen had a desire to work in the mental health field. She had been an employee with the Respondent for a longer period of time than the Complainant mostly working as a Health Unit Coordinator on the Adult Unit. Wangen was apparently well liked by her coworkers and supervisors. She had training and experience as an EMT.

The Hearing Examiner is not in a position to evaluate all of the strengths and weaknesses of the two candidates. However, the record indicates that their respective qualifications were more closely balanced than supposed by the Complainant. The Complainant's own witness, Jack Glendenning, testified that he believed both candidates were well qualified and that he was glad that he didn't have to make the decision. He also testified that despite his professional respect for the Complainant, he had no objection to Korbitz's decision to hire Wangen.

Beverly Farrow, also a supporter of the Complainant, testified that Korbitz had told her that it had been a very difficult decision. While Farrow apparently initially believed the Complainant to have been the superior candidate, Farrow seems to have come to believe that Wangen had factors in her favor that Farrow had not considered before speaking with Korbitz.

Korbitz testified that in addition to considering the candidates' applications and individual interviews, she considered the feedback she received from those who had participated in the group interviews and the recommendation of Jo Ellen Crinion, the supervisor who most frequently was in contact with the Complainant. Despite having all this feedback and that of John Easterday, the Director of the Psychiatric Department and Korbitz's direct supervisor, the decision was solely Korbitz' to make.

Korbitz testified that there were several reasons for her to have selected Wangen over the Complainant. First, both Korbitz and Crinion had concerns about the Complainant's communications with them as supervisors. This concern did not extend to the Complainant's communications with

coworkers or patients. Crinion testified that if she asked Wangen to do several tasks in a certain order, Crinion had no doubts that her directions would be followed. She did not always have the same confidence about directions given to the Complainant. Korbitz had experienced some frustration in dealings with the Complainant over the Complainant's requests for someone to "supervise" her hours for purposes of obtaining her certification as a therapist. From this record, it appears that those communication problems may not have been entirely the fault of the Complainant but Korbitz in good faith believed them to stem from the Complainant.

Korbitz's main communication problem with the Complainant seems to have arisen when the Complainant asked Korbitz for the name of someone who could help her set up the certification of her hours. Korbitz told the Complainant to contact another Registered Nurse, Sue Janty. The Complainant attempted to do so but for personal reasons unrelated to this complaint Janty was difficult to reach and frequently failed to respond to the Complainant's inquiries. When the Complainant experienced this difficulty in communicating with Janty, she approached Korbitz again. Korbitz took the Complainant's new approach as an indication that the Complainant had not "heard" Korbitz's earlier instructions. Korbitz's perception that the Complainant was not listening to Korbitz seem to be a problem that both parties could have straightened out but apparently neither did.

Korbitz also favored Wangen over the Complainant because Wangen had more seniority as an employee of the Respondent and because Wangen had training as an EMT. While EMT training does not appear as a requirement or even as a desirable skill on any of the descriptions of the position, Korbitz indicated that Wangen's EMT training worked in Wangen's favor because the Adult Unit is located in a building where there is sometime no access to physicians. Having someone with EMT training might help with treatment of individuals in an emergency.

The fact that Wangen had more seniority as an employee of the Respondent is a legitimate nondiscriminatory factor. Seniority within a department or an employer is often used as a decision factor where candidates are equally qualified.

Korbitz's use of Wangen's EMT training seems somewhat more suspect. In order for either Wangen or the Complainant to be a Mental Health Worker, they had to be a qualified Nursing Assistant. The first aid training of a Nursing Assistant may give all the medical experience one needs on a unit like the Adult Unit. What lends Korbitz's use of this experience some greater credence for the Hearing Examiner is the testimony of Beverly Farrow. While Farrow had gone to Korbitz for an explanation of Korbitz's selection of Wangen, Farrow seems to have understood and agreed that Wangen's specialized training was an asset for the unit.

Korbitz indicated that she considered the feedback she received from the group interviews but that it did not weigh heavily in her ultimate decision. Apparently the Complainant felt very good about her group interview and she received a good deal of positive feedback from her coworkers. Korbitz stated that both the Complainant and Wangen received positive and negative feedback from those participating in the group interviews. The Complainant points to the feedback of John Easterday as being particularly important. Easterday had sat in on the Complainant's interview but not that of Wangen. Easterday and Korbitz discussed the applications of the Complainant and Wangen before Korbitz made her decision. Easterday found that the Complainant had had a good though not outstanding interview and that based upon his knowledge of the two, he would favor Wangen. He stressed to Korbitz that the decision was hers to make though. The factor that tipped Easterday to favor Wangen was the Complainant's long-term interest in becoming a therapist. It was Easterday's opinion that Wangen would be happier in the position longer because the Complainant would be more interested in providing therapy instead of the duties of a Mental Health Worker.

The record does not contain any information that would lead the Hearing Examiner to the conclusion that Korbitz did not take Easterday at his word about making her own decision. Korbitz did not indicate that she had any concern about the Complainant's long-term interests in becoming a therapist or that she was doing therapy on the Adult Unit instead of what she was hired to do as a Mental Health Worker. While the recommendation of one's direct supervisor may carry a significant amount of weight, there is no indication on this record that Korbitz had any concerns about making her own decision regardless of Easterday's thoughts. The Hearing Examiner is unpersuaded to give any weight to the Complainant's testimony about the supportive comments she received from her coworkers. The problem is that all of the statements are hearsay and it is not possible to determine what weight, if any, should be given them. For example, did the persons whose comments the Complainant recounted attend both interviews? Were the comments made between the interviews? Were the comments passed on to Korbitz? Were the statements attributed to the coworkers accurate? Because it is not possible to even guess about how these questions might be answered, the Hearing Examiner will not give them any particular weight and suspects that Korbitz may have appropriately discounted her input for much the same reason.

On this record, the Hearing Examiner would conclude that even if Korbitz had known of the Complainant's sexual orientation, she would not have chosen the Complainant over Wangen. The question was obviously close but there is sufficient evidence in the record to lead the hearing Examiner to conclude that Wangen, though differently qualified than the Complainant, was at least as qualified for the position of Mental Health Worker. Where two candidates are equally qualified, one may not use one's membership in a protected class as a decision factor either in favor or against that individual. The record does not indicate that the Complainant's status as a lesbian was used in either way.

The next position for which the Complainant applied was that of a Health Unit Coordinator on the Adult Unit. This was the position that Wangen was vacating to take the Mental Health Worker position. The Complainant completed an application for this position August 30, 1993. It appears that she was told of the availability of the position by Korbitz.

Analysis of the facts surrounding this position poses some interesting problems for the Hearing Examiner. At hearing and in Requests to Admit filed with the Commission, the Complainant admitted that Sandra Rivera, the only other applicant for the position of Health Unit Coordinator (HUC) was in fact more qualified for the position than was the Complainant. It is well settled that an employer need not accept a less qualified employee over a better qualified employee because that employee is a member of a protected class. Oviawe v. Madison United Hospital Laundry, Ltd., MEOC Case No. 20723 (Comm'n Dec. 08/03/90, Ex. Dec. 09/29/89). Given the Complainant's admissions, it would seem unnecessary to address the Complainant's allegation of discrimination. However in the interests of a complete record, the Hearing Examiner will briefly discuss the issues as he understands them.

The Complainant asserts that despite Rivera's superior qualifications for the HUC position, she believes that Korbitz failed to hire her for the position because of the Complainant's status as a lesbian. She apparently contends that she could have been trained into the position and since the Respondent was willing to train Wangen into the Mental Health Worker position, it was obligated to do the same for her. This position is, of course, partially premised on the Complainant's perception that she was vastly more qualified for the Mental Health Worker position than Wangen.

The first question to be addressed is whether anything had changed since the decision on the Mental Health Worker position to make Korbitz's knowledge of the Complainant's sexual orientation more likely. The answer is arguably, yes.

On or about August 19, 1993, the Complainant and Crinion met to discuss the status of a patient for whom the Complainant was concerned. The patient, a lesbian, was suffering from depression resulting at least in part from the loss of a partner relationship. The Complainant believed that a referral of the patient to the United could help in the patient's treatment. The United is a local organization serving a counseling and advocacy function in the gay, lesbian, bisexual and transgendered communities in Madison and the surrounding area. The Complainant offered to be a liaison between the Respondent and the United. As a part of this discussion, the Complainant disclosed that she was a lesbian to Crinion.

In discussing the possibilities of becoming a liaison between the Respondent and the United, The Complainant indicated that she believed the relationship could be financially beneficial for the Respondent. She believed that the gay and lesbian community would see the Respondent as being a safe place to come for health care.

The Complainant testified that Crinion told her that she (Crinion) would tell Korbitz. The Complainant understood Crinion to be saying that Crinion would tell Korbitz of the Complainant's sexual orientation, the Complainant's suggestion for treatment of the patient in question and of the Complainant's offer to be a liaison with the United on a continuing basis.

Crinion agrees that the meeting occurred with the Complainant's list of the subjects discussed. Crinion disagrees with the Complainant's interpretation of what was said. In particular, Crinion denies telling the Complainant that she would tell Korbitz of the substance of the conversation with the Complainant.

Instead, Crinion testified that she told the Complainant to discuss her concerns about the treatment of the patient in question with the patient's treatment team. Crinion indicated that suggestions about any patient's treatment would be considered and undertaken by the treatment team.

Crinion also denies that she told the Complainant that she would discuss the Complainant's suggestion of a formal liaison assignment with Korbitz. Crinion indicated that such assignments would be the responsibility of Korbitz as Nurse Manager.

At hearing, Crinion and Complainant's counsel debated the value of such a liaison relationship. The merits or lack of merits of such an idea appear to be irrelevant to any issue to be decided by the Hearing Examiner.

A fair reading of Crinion's testimony also indicates that she denied telling the Complainant that she (Crinion) would tell Korbitz of the Complainant's sexual orientation. Though there is no explanation of why Crinion would not share this information, it seems logical that it was irrelevant to the Complainant's work. The Hearing Examiner can well imagine Crinion concluding that if the Complainant wished Korbitz to know of her sexual orientation then it was up to the Complainant to let Korbitz know.

Both versions of the meeting are credible. The Hearing Examiner tends to accept Crinion's version as meeting somewhat more his expectations of how an organization such as the Respondent might run. However, the Complainant's version could have happened as she describes particularly if accepting things from the Complainant's perspective. If the news that she was a lesbian was going to be a surprise and a problem for Crinion, then Crinion might be expected to share that information with Korbitz or others.

The burden of convincing the Hearing Examiner that her version is more likely than that of Crinion falls upon the Complainant. If she fails to carry this burden, then the Hearing Examiner must resolve the issue against her.

The Hearing Examiner finds nothing in the record to permit him to conclude that the Complainant's version of the August 19, 1993 meeting is more likely than that of Crinion's. The Complainant urges the Hearing Examiner to examine the record as a whole to find that Korbitz must have known of the Complainant's sexual orientation and reacted on the basis of that knowledge. The Hearing Examiner does not find that the record taken as a whole leads him to this conclusion.

It seems to the Hearing Examiner that the Complainant received generally the same treatment subsequent to her disclosure of her sexual orientation to Crinion as she had received before. She had been considered for a permanent position as a Mental Health Worker and was not selected. After the August 19, 1993 meeting she was considered for a permanent position as a Health Unit Coordinator and was not selected. There is nothing in these employment decisions that indicate a discriminatory intent on the part of Korbitz.

The Complainant asserts that Korbitz did not hold second interviews for the HUC position to disadvantage her. She also contends that Korbitz did not conduct a fair one on one interview with her, choosing to discuss matters not relevant to the HUC position. It does appear from the record that Korbitz had determined that she wished to hire Rivera for the HUC position before conducting interviews. However, nothing in the record indicates that this decision was made on the basis of the sexual orientation of either of the two candidates. Rather, Korbitz seems to have selected Rivera because she was familiar with Rivera and how Rivera had performed in the position on earlier occasions. Also, Korbitz had her opinion about the Complainant's performance in the Mental Health Worker position. Lastly, as with Wangen, Rivera had been an employee of the Respondent for a greater time than the Complainant. This impression is strengthened by the Complainant's admission that Rivera was more qualified for the HUC position than she was. Rivera was at the time of application a HUC on another unit and from time to time had filled in as a HUC on the Adult Unit.

The Complainant's contention that since the Respondent was willing to train Wangen in the Mental Health Worker position it should have been willing to train her in the HUC position contains a couple of erroneous assumptions. First, it assumes that Wangen was significantly less qualified for the Mental Health Worker position than was the Complainant. While it is true that the Complainant had been performing in the position of a Mental Health Worker and would require less training than Wangen, there is nothing in the record to indicate that Wangen would need significantly more training than the Complainant. The record reflects that Wangen had been the HUC on the Adult Unit for some time and was likely familiar with the operation of the unit and most of the positions on the Adult Unit. The second assumption contained in the Complainant's position is that the Respondent had an obligation to train a less qualified applicant when it already had a qualified one. As previously noted, Wangen was not the obviously unqualified competition asserted by the Complainant, while the Complainant admits that she was less qualified than Rivera for the HUC position. The Respondent had no legal obligation to ignore Rivera's qualifications to maintain the Complainant's employment.

The Complainant contends that her LTE position was prematurely terminated after her conversation with Crinion. As noted in the earlier discussion, the Hearing Examiner does not find that the Complainant's position was in fact prematurely terminated. The Complainant cannot rely on the termination of her LTE position to demonstrate Korbitz's knowledge of her sexual orientation. To summarize the findings to this point, the Hearing Examiner concludes that the Complainant's LTE position expired of its own terms and was not prematurely terminated because of a discriminatory

motive triggered by knowledge of the Complainant's sexual orientation. The Hearing Examiner further concludes that the Complainant has failed to demonstrate by the greater weight of the credible evidence that Korbitz, the sole decision maker for the Adult Unit, knew of the Complainant's sexual orientation at the time a decision was made on the Mental Health Worker position or the Health Unit Coordinator position. Lastly the Hearing Examiner concludes that even if Korbitz knew of the Complainant's sexual orientation at the time she made hiring decisions, the record does not demonstrate that the Complainant's sexual orientation played any part in those decisions.

Next the Hearing Examiner will move to the several positions for which the Complainant believed she should have been considered on the CHAD. The facts and arguments surrounding these allegations also create some unusual issues to be resolved by the Hearing Examiner.

First and most importantly, the Complainant is willing to concede that Janell Doering was herself not prejudiced against the Complainant because of the Complainant's sexual orientation. The record clearly reflects that Doering worked with gay or lesbian coworkers knowing of their sexual orientation without problems. Doering also socialized with several of these coworkers. Most importantly, Doering hired gay or lesbian employees to work on the CHAD knowing of their sexual orientation. Essentially the Complainant argues that Korbitz poisoned Doering's attitude towards the Complainant because of Korbitz's prejudiced attitude towards the Complainant.

When the Complainant interviewed with Doering in early September of 1993, Doering was briefly called away during the interview. The interruption took Doering back to the office she shared with her Nurse Manager, Sarah Shatle. Doering told Shatle that she was interviewing the Complainant. Shatle mentioned that she had understood Korbitz, the Complainant's previous supervisor, to have had some concerns with the Complainant's work. Shatle suggested that Doering contact Korbitz to get more information. Doering called Korbitz and got a brief reference from her. The reference indicated that Korbitz had some communication problems with the Complainant.

The Complainant argues that she had no communication problems with Korbitz or anyone else. It is the Complainant's position that Korbitz lied to Doering because of an animus against the Complainant because the Complainant was a lesbian. The Complainant further contends that Korbitz's untruthful reference caused Doering not to consider the Complainant's application. The Hearing Examiner's determination that the Complainant had not demonstrated that Korbitz actually knew of the Complainant's sexual orientation essentially resolves the Complainant's remaining claims. If Korbitz did not know of the Complainant's sexual orientation, then Korbitz could not have lied to Doering because of the Complainant's sexual orientation. Korbitz could have lied for some other reason but that would not necessarily violate the ordinance.

Assuming *arguendo* that Korbitz did know of the Complainant's sexual orientation, there is evidence in the record to corroborate Korbitz's belief that the Complainant had some communication problems when dealing with her supervisors. That is not to say that this problem was entirely the fault of the Complainant but Korbitz apparently had a good faith belief that there was such a problem. As noted above, the Complainant and Korbitz both may have both contributed to the problem.

When the Complainant first interviewed for the LTE Mental Health Worker position, she told Korbitz that she (the Complainant) wanted to ultimately gain certification as a therapist so that she could directly bill patient's insurers. In order to gain this certification, the Complainant needed to have 3,000 hours of her work certified by an appropriate supervisory official. After the Complainant had been working on the Adult Unit for several weeks, she approached Korbitz to see how she might get her hours certified. Korbitz told her to contact another Registered Nurse, Sue Janty. Because of personal

problems not relevant to this complaint, Janty was not particularly responsive to the Complainant. Apparently when the Complainant had difficulty making arrangements with Janty, she once again approached Korbitz. Korbitz took this as evidence that the Complainant had not listened to her earlier instructions rather than as a follow up because of a lack of response from Janty.

Eventually Janty and the Complainant made some contact about Janty's certification of the Complainant's hours. However, Janty believed that the Complainant either had received inaccurate information about the process or had misunderstood the information she had received. Janty set up a meeting with the Complainant for August 31, 1993. Janty copied Korbitz on the message setting up the meeting. Exhibit J is a copy of Janty's memo. This document indicates that Janty had substantial concerns about her communications with the Complainant.

The record also indicates some problem surrounding a pay raise of which the Complainant was erroneously notified. The Hearing Examiner is frankly mystified as to the nature of this problem. However, it apparently involved a report of an alleged conversation between Korbitz and the Complainant in which Korbitz believed that the Complainant had substantially mischaracterized Korbitz's statements about the Payroll Department.

The record also reflects that Crinion had some concerns about the Complainant's ability or willingness to precisely follow directions. It seemed that Crinion's concern was not necessarily that the Complainant wouldn't do what was requested of her but might not do things in the manner or order requested.

The above examples while not exhaustive and perhaps not very serious to an outside party, indicate that there was some basis for Korbitz's observation of a communication problem between the Complainant and supervisors. As previously noted, these problems may not have been truly or at least solely attributable to the Complainant, but the perception whether right or wrong is what seems to have driven Korbitz's comment rather than any discriminatory animus.

Doering indicated that she eventually became concerned about the Complainant's communication abilities as a result of the Complainant's telephone calls following up on her initial interview. On this record, the Hearing Examiner is convinced that Korbitz's negative comment about the Complainant's communication played some role in Doering's attitude towards the Complainant. The calls made by the Complainant would be typical of an interested applicant and the frequency did not strike the Hearing Examiner as excessive. However, even if Doering were influenced by Korbitz's negative comment, on this record, the Hearing Examiner cannot conclude that such influence stemmed from an impermissible discriminatory motive.

Because the Complainant's argument with respect to all of Doering's actions is dependent upon a finding that Korbitz was motivated by the Complainant's sexual orientation, the Hearing Examiner need not address each claim individually. The determination that the Complainant did not meet her burden of proof on the issue of Korbitz's knowledge or that Korbitz, even if she knew of the Complainant's sexual orientation did not act in response to that knowledge, and the agreement that Doering's alleged discrimination was premised upon Korbitz's alleged discrimination, resolves all of the claims of discrimination relating to the Complainant's failure to be employed on the CHAD.

The Complainant puts forth a somewhat confusing argument about an alleged decision on the part of the Respondent to hire only or mostly former employees of Parkway Hospital. In the Fall of 1993, subsequent to the Complainant's application for a Mental Health Worker position on the CHAD, it was announced that Parkway Hospital was going to close. It is alleged that representatives of the

Respondent indicated that as they were expecting an increase in patient census because of transfers from Parkway, the Respondent would try to employ as many former employees of Parkway as possible. Sherry Burner, the Respondent's Nurse Recruiter, testified that such a policy would likely represent a violation of the Respondent's Affirmative Action Plan (AAP). The Complainant seems to argue that such a violation of the AAP tends to help demonstrate that the Respondent illegally discriminated against the Complainant.

The Hearing Examiner disagrees. To the extent that Parkway employees were being given an employment preference, it does nothing to advance the Complainant's claim that she was discriminated against because of her sexual orientation. Giving such a preference may represent a legitimate, nondiscriminatory employment practice. The Hearing Examiner might be able to envision an argument that such a policy has a disparate impact based upon lawful source of income but that is not an issue in this complaint. The fact that the Respondent might have been willing to take an action contrary to its AAP does not by itself indicate a predilection to discriminate. In general AAPs give targets for recruitment and hire that must be met over time. A temporary departure from the AAP in response to specific circumstances need not point to discrimination.

The Respondent raised arguments concerning the timeliness of the complaint and its various allegations. In order to adequately address these arguments, the Hearing Examiner would have had to address the merits of the complaint as a whole. The Hearing Examiner believed that because of the need for this extensive discussion, it was as easy to simply address and resolve the complaint on its merits. Had the Hearing Examiner concluded that there was discrimination with respect to any of the allegations, the Hearing Examiner would have additionally addressed the timeliness issues.

Additionally, because the Hearing Examiner found that the Complainant failed to meet her burden of proof on the merits of her claim, the Hearing Examiner need not address any of the damage issues. However in passing the Hearing Examiner will note that neither party's expert witnesses on the issue of future economic loss were particularly credible. Both witnesses seemed to ignore important factual elements in the analysis of such a claim. The Complainant's witness appeared to focus his analysis too narrowly. The Respondent's witness seemed to be unwilling to accept the premise that discrimination could have any long-term economic impact except for back pay. Neither approach would have been useful to the Hearing Examiner if he had to fashion a remedy.

In conclusion, the Hearing Examiner determines that the Complainant's complaint must be dismissed because the Complainant has failed to meet her burden of proof in the above indicated manners. The Hearing Examiner is left with an unflattering picture of the Respondent though. The Respondent had an employee who was generally acknowledged to have done a good job and who was interested in remaining with the Respondent as an employee for some time to come. Most employers would look at this as a golden opportunity. However, it appears that the Respondent and its managers let relatively minor problems to which they may have significantly contributed deprive the Complainant and the Respondent of the benefits of the Complainant's continued employment. While such shortsighted conduct is often attributed to large organizations such as the Respondent, it is disillusioning to see its destructive effects in a concrete case. The Hearing Examiner's concerns to the contrary, this record does not show that the Respondent violated the ordinance. Since no violation of the ordinance has been demonstrated, the Hearing Examiner must dismiss the complaint for the reasons stated above.

Signed and dated this 11th day of November, 1997.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner