

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

<p>Betsy Matlack 748 Jenifer Street Madison, Wisconsin 53703</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Badger Produce Company 913 Watson Avenue Madison, Wisconsin 53713</p> <p style="text-align: center;">Respondent</p>	<p>RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER</p> <p>Case No. 2394</p>
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BACKGROUND

The above captioned matter having come on for hearing before the Madison Equal Opportunities Commission on March 27 and April 9 and 10, 1979 before the undersigned Robert L. Greene, Jr., Hearing Examiner, and the Complainant appearing in person and by her Attorney Karla Dobinski and Respondent appearing by its President Nathan Ross and its Attorney Law Offices of Howard Goldberg, S.C. by Bryan Woods; and both parties submitting briefs herein. I now make the following:

RECOMMENDED FINDINGS OF FACT

1. Complainant is female, approximately 4'11" in height, weighing 100 pounds and resided in July, 1977 in Madison, Wisconsin.
2. Respondent, Badger Produce Company, employs persons at 913 Watson Street in the City of Madison.
3. Respondent is in the business of delivering fresh poultry and frozen fish. In July, 1977, 85 percent of its business was the delivery of fresh poultry in boxes weighing 100 pounds; 15 percent of Respondent's business was the delivery of frozen fish in boxes weighing 50 pounds.
4. On or about July 22, 1977, Respondent placed an advertisement in the WISCONSIN STATE JOURNAL indicating the need for drivers.
5. On July 22, 1977, there was a vacancy for a truck driver at the Badger Produce Company.
6. Complainant presented herself in the afternoon of July 22, 1977 at the offices of Badger Produce Company to apply for the position advertised in the WISCONSIN STATE JOURNAL.
7. Upon arrival, the Complainant greeted Respondent Nathan Ross, President of Badger Produce Company.
8. Complainant left the premises and later called the Equal Opportunities Commission.
9. Mr. Larry Gene Georgerson, a six foot male, was hired by the Respondent to fill the vacancy Complainant had applied for.
10. Georgerson had already been hired and begun work at the time of Complainant's interview on July 25. There was no job vacancy at the time of the interview.
11. Mr. Georgerson was not asked to lift a box.
12. Complainant returned to the Badger Produce Company on July 25, 1977, whereupon Respondent asked her some biographical questions for a job interview.
13. Respondent at that time informed Complainant that the position had already been filled and that he was "updating his files."
14. Respondent then asked Complainant to lift a box "to prove a point" to himself.
15. Complainant asked Respondent if he asked other applicants to lift boxes, and Respondent said "no," whereupon Complainant refused to lift the box.
16. Complainant then left the premises, and was never offered employment there.
17. The job at Badger Produce Company paid \$2.75 an hour and would have averaged 52.5 hours a week.

18. The job duties entailed lifting boxes ranging in weight from 50 to 100 pounds, loading and unloading trucks, and driving the trucks in the Madison area making deliveries.
19. Complainant had worked at the Common Market Co-op previously, unloading trucks and stacking items, and at the Intra-Community Co-op for three and one-half years previously.

Complainant's job duties at the Intra-Community Co-op included lifting packages, boxes and bags ranging in weight from 40 to 125 pounds, unloading and loading trucks, and driving the trucks in the Madison area, and to and from Chicago and Milwaukee, making deliveries and picking up orders for warehouses.

20. By virtue of this former experience, Complainant was qualified for the job Respondent had open on July 22, 1977.
21. Complainant left her job at the Intra-Community Co-op voluntarily in January, 1977.
22. Complainant remained in good health through July 22, 1979.
23. Complainant's employment after July 25, 1977, consisted of the following:

August 14 to August 27, 1977 - Waste Management Co.
 September to December, 1977 - Women's Exchange Bakery
 October 1977 to present - Madison Metro

24. Complainant applied at numerous other locations during the period from July 25 to October 1977, using the Wisconsin Job Service, newspaper ads, and the telephone directory to seek potential employers.
25. From October 1977 through December of 1977, Complainant was working two part-time jobs.
26. Complainant earned \$1,426.91 gross income through other employment from July 25, 1977 to January 15, 1978, and would have earned \$4,062.50 gross during that period had she been hired at the Badger Produce Company.
27. Complainant made diligent efforts to secure other employment, and worked at other jobs between July 25 and the present.
28. Complainant's employment at the Waste Management Co. paid \$3.50 an hour.
29. Complainant's duties at Waste Management consisted of collecting garbage.
30. Complainant was forced to leave Waste Management's employ because the hours exceeded her expectations and the workday did not include any breaks, as provided by law.
31. Respondent has never employed a woman as a driver.
32. No women other than Complainant have ever applied for jobs as drivers with Respondent.

RECOMMENDED CONCLUSIONS OF LAW

1. Complainant is a person within the meaning of the Madison Equal Opportunities Ordinance, Madison General Ordinances Section 3.23.
2. Respondent is an employer within the meaning of the Madison Equal Opportunities Ordinance, doing business in Madison, Wisconsin.
3. Complainant does not have a handicap within the meaning of the law.
4. Complainant has proven that on July 22, 1977 Complainant applied for a vacant position as a truck driver with Respondent. She was qualified for that position. Respondent President Nathan Ross rejected Complainant's application upon seeing her, with no knowledge of her abilities or qualifications other than her sex, weight, height, and other physical features. Subsequently, a male approximately 6 feet tall was hired.
5. The foregoing conclusion together with the Findings of Fact constitute discrimination on the basis of sex and physical appearance (height and weight) in violation of Madison General Ordinances 3.23(F). McDonnell Douglas v. Green, 411 US 792, 5 FEP 965 (1973); Dothard v. Rawlinson 15 FEP 10 U. S. (1977); Boynton Cab Co. v. DILHR 18 FEP 841, Wisconsin Court of Appeals IV (1978)
6. Respondent has failed to articulate a legitimate non-discriminatory reason for failure to hire Complainant, or to raise doubts about Complainant's qualifications.
7. Respondent has failed to meet its burden of showing that Complainant failed to exercise due diligence in seeking employment, Sprogis v. United Air Lines 517 F.2d 387, 10 FEP 1247, USCA 7 (1975). Through due diligence Complainant earned \$1,426.91 in the period July 22, 1977 through January 15, 1979.
8. Backpay awards should be calculated so as to put the victims of illegal discrimination in the economic position they would rightfully occupy but for the illegal discrimination. Albermarle Paper Co. v. Moody 422 US 405, 10 FEP 1181; Pettway v. American Cast Iron Pipe Co. 494 F.2d 211, 7 FEP 1115 USCA 5 (1974) at 1147, and

cases cited therein. Thus in this case, backpay should be calculated on the basis of the difference between Complainant's earnings between the period July 22, 1977 and January 15, 1978 and the amounts she would have earned had she been employed by Respondent during that period. Plus interest of 6.5 percent per annum on the total beginning January 15, 1978. No backpay is owing to Complainant from the period January 15, 1978 to present, owing to Complainant's continuous employment at a rate higher than that she would have earned at Badger Produce.

9. It is beyond the power of the Madison Equal Opportunities Commission to award attorney's fees or costs. Peterson v. Fisca Oil Co. MEOC Case #3040 (1978).

RECOMMENDED ORDER

Within twenty (20) days of this order becoming final, Respondent and Complainant shall submit to the Examiner:

1. Proof of payment of the sum \$2,397.59 plus 6.5 percent annual interest on that sum, interest to begin accumulating on January 15, 1978 and prior to the date of this order.
2. A proposed procedure for interviewing and testing of applicants for employment as drivers with Respondent.

Dated at Madison, Wisconsin this 11th day of May, 1979.

/s/
Robert L. Greene, Esq.
Hearing Examiner

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<p>Betsy Matlack 748 Jenifer Street Madison, Wisconsin 53703</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Badger Produce Company 913 Watson Avenue Madison, Wisconsin 53713</p> <p style="text-align: center;">Respondent</p>	<p>MEMORANDUM ACCOMPANYING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER</p> <p>Case No. 2394</p>
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I

ISSUES OF FACT

Complainant is a female who is 4'11" and weighs 110 pounds. For approximately 3 and 1/2 years, ending in December 1976, she was employed first by Common Market Cooperative and then the Intra-Community Cooperative doing warehouse work and driving trucks. As time went on she assumed additional duties as a produce buyer and a bookkeeper, while continuing to load, unload, and drive trucks carrying a wide range of produce, foodstuffs and related items, in the Madison area, as well as between Chicago, Milwaukee and Madison. Her duties included handling packages weighing up to 125 pounds, as well as oil drums weighing approximately 450 pounds. The evidence shows that she performed her duties very well, and her voluntary termination from that job had nothing to do with her performance. On July 22, 1977 after a 7 month period of very intermittent employment she answered a newspaper ad for a truckdriver placed by Badger Produce Company. That afternoon she entered the office of Mr. Nathan Ross, President of Badger Produce for an interview. At that point, without discussing Complainant's qualifications, Nathan Ross told her that she couldn't do the job, and after some conversation about judging people without knowing their qualifications, Ms. Matlack left. After making some phone calls, Complainant was directed to the Madison Equal Opportunities Commission; a Madison Equal Opportunities Commission staff member then contacted the Respondent

who said Ms. Matlack should return on Monday the 25th. She was informed of this and did return to Badger Produce Monday, sometime in the late morning or afternoon, with a companion. To this point the material facts are uncontested.

However, the course of that July 25 interview and circumstances surrounding it are the subjects of directly contradictory evidence. Both witnesses agree that Mr. Ross would not allow Ms. Matlack's companion to be present for the conversation. Complainant testified that Mr. Ross asked her about her qualifications, showed her the cooler room, told her that there was no job opening, and that he was only interviewing her to update his files, then asked her to lift a 100 pound chicken box "to prove a point to himself." She refused to do so, and the interview was concluded.

Mr. Ross testified that he did indeed have a job opening, and after hearing Ms. Matlack's qualifications and showing her the cooler room he had doubts about her ability to perform the job and so asked her to lift a box of chickens. She refused, and he refused to hire her because of her refusal. Mr. Ross's testimony about July 25, contains a number of inconsistencies. At hearing on April 9, 1979 when asked why he had doubts about hiring Ms. Matlack he responded: "I didn't think she was strong enough to do it, I've never had a person that small come in and claim" (interrupted by question) Almost immediately thereafter Mr. Ross testified that he had had people "around 5 feet" to apply for drivers jobs, and he had tested some, (asked them to lift a box) and hired some. However, he does not remember the names of any such people. Either he has had other people of Ms. Matlack's stature apply, or he hasn't. He claims both.

The following day, still under direct examination, Mr. Ross gave different reasons for his doubts about Ms. Matlack's ability to do the job. "Well first of all, her qualifications did not call for her working under freezer and cooler conditions. And this is a very strenuous job. It takes a lot of endurance to deliver a product of this type all day long and she tells me she hasn't worked for about six or seven months and I didn't think she was in any shape to take this job and do the right thing with it, because I didn't want to be in trouble with her." Mr. Ross subsequently stated that he did not ask Complainant whether she had ever worked in a freezer, and had previously testified that "I think she said she, if my memory serves me right, I think she said she hadn't worked for about seven months or something like that. I didn't proceed to question her why not because I didn't think it was any of my business." In addition to the fact that lack of freezer experience and a 7 month inactive period differ from the previous day's explanation of basic size and strength, the admission that Mr. Ross did not question Complainant about either freezer experience or the unemployed period is inconsistent with a statement that those were the factors that made him doubt Ms. Matlack's ability to do the job.

The most important inconsistency however, is the matter of whether or not there was in fact a job available on July 25, when Complainant was interviewed. Mr. Ross states clearly that he had not filled the vacancy advertised on July 22, that a job was available and that, had Complainant lifted the boxes, she would have been hired. He also states that Larry Gene Georgerson was the person hired to fill the vacancy.

Mr. Ross stated that the Badger Produce workday always starts on Monday between 4:00 and 4:30 a.m., that the workday is 8 hours, with sometimes a half hour for lunch. After eight hours, drivers are paid overtime.

He also testified that all employees hired in 1977 began work within one day of hire, and that the work week on payroll records begins on Thursday and ends with Wednesday's work. The date found in the left hand column of the payroll sheets (Respondent's exhibit 10) indicates payday, (Thursday) the day after the last work day included in the pay period. Mr. Georgerson's payroll record (Respondent's exhibit 10 page 1) indicates that he worked 22 1/2 hours of straight time and 3 1/3 hours overtime in the week beginning July 21, 1977 and ending July 27, 1977 that requires 3 full days work plus overtime in that period. Thus he must have worked a Saturday, or Monday with his probable starting time on Monday between 4:00 and 4:30 a.m. It is simply not possible to accumulate 22-1/2 hours straight time in 2 eight hour days (Tuesday and Wednesday). Thus the clear inference is that the person hired for the vacancy Ms. Matlack applied for was already on the job when she returned on Monday, July 25.¹

The conclusions then are two: First that Mr. Ross's testimony as to the events of July 25, 1977 is so inconsistent as to carry very little credibility. And second: That on July 25, there was no job available for Ms. Matlack, and consequently the Respondent was not interviewing her in good faith for a job.

Consequently, the events of July 25 are irrelevant to a determination of whether there was or was not discrimination in hiring. If it occurred, it occurred on the 22nd. The "interview" of the 25th was a subterfuge. On the 22nd, Mr. Ross denied Complainant consideration for the driver's job based on his subjective opinion of her size and strength.

On July 25, he interviewed Complainant, told her there was no job available, and asked her to lift a box, just "to prove a point" to himself, not to determine whether to hire her.

SUBSTANTIVE ISSUES OF LAW

In determining whether or not Respondent's actions constitute discrimination on the basis of sex, physical appearance or handicap, it is first necessary to ascertain whether those terms apply to Complainant in a way that entitles her to the protection of the Equal Opportunities Ordinance, Madison General Ordinances 3.23. The application of the term sex is clear, as is that of physical appearance, since height and weight are specifically mentioned in the physical appearance definition, (Madison General Ordinances 3.23(2)(K)). "Handicap" however, is not so clearly applicable. The Madison Equal Opportunities Ordinance does not define handicap. However, Wisconsin Courts have construed that term where used in the similar provision of the Wisconsin Fair Employment Act.

In Chicago Milwaukee & St Paul R.R. Co. v. DILHR Department 62 Wis. 2d 392, 215 N.W.2d 433 (1974), the Wisconsin Supreme Court defined handicap as a "disadvantage that makes achievement unusually difficult; esp: a physical disability that limits the capacity to work."

The Courts have held that the term includes such diseases and defects as: asthma, Chicago, Milwaukee & St. Paul supra; alcoholism or drinking problems, Connecticut General Life Insurance Company v. DILHR, Dane County Circuit Court #149-179 (1976); leukemia, Chrysler Outboard Corporation v. DILHR Dane County Circuit Court #150-069 (1976); diabetes, Fraser Shipyard Inc. v. DILHR Dane County Circuit Court #149-466 (1979); heart murmurs, City of Wisconsin Rapids v. DILHR Wood County Circuit Court #9461 (1977); loss of one arm, Boynton Cab Company v. DILHR Wis Court of Appeals IV, 18 FEP 841 (1978). This is a fairly liberal interpretation. However, the status of being a 4'11", 110 pounds female does not seem to be condition unusual enough or imposing a great enough disability to justify its categorization as a handicap. Therefore, handicap discrimination is not involved in this case.

In order to establish sex and physical appearance discrimination the Complainant must establish, in addition to coverage by the Ordinance that Complainant was qualified for a job that Respondent had open, that she applied and was rejected, and that another person was subsequently hired. McDonnell Douglas v. Green 411 U.S. 792, 5 FEP 965 (1973). Complainant's evidence concerning her previous experience meets that burden as to qualification. That she applied, was rejected, and that a male approximately 6 feet tall was hired for the vacancy, are all uncontested. Respondent contends that Ms. Matlack was not hired because she refused to take a weight lifting test on July 25, 1977 which the Respondent wished her to submit to because of doubts about her ability to do the job. "If she would have lifted those boxes she would have had the job." (Testimony of Nathan Ross) As discussed above that contention is clearly a subterfuge. There was no job for Complainant on July 25, and Respondent told her that before asking her to lift the box. Complainant was under no obligation to lift boxes for Mr. Ross's personal edification. On July 22, when the job was available, Mr. Ross took a look at Ms. Matlack and decided she was not strong enough to do the job. There was no discussion of qualifications or request that she take a test. He decided simply on the basis of a picture "in the back of (his) mind" of what kind of person can do the job. That clearly constitutes discrimination against Complainant on the basis of physical appearance and sex. Dothard v. Rawlinson ____ U.S. ____ 15 FEP 10 (1977)

III

REMEDY

Respondent contends that back pay is not appropriate in this case because the complaint does not contain a request for an offer of employment, thus raising the implication that Complainant was primarily interested in testing Respondent's employment practices. Aside from the fact that Madison Equal Opportunities Commission form on which Complaint was made does not contain a space for requested relief, and thus no such implication is proper, Respondent's argument does not approach the weight necessary to overcome the strong presumptions in favor of a back pay award Albermarle Paper Company v. Moody 422 U.S. 405, 10 FEP 1181 at 1186-90 (1975).

Respondent further contends that back pay should be limited to a period between July 25, 1977 and August 24, 1977 when Complainant began work for Waste Management Co. at a wage higher than she would have received at Badger Produce. Complainant quit her job at Waste Management on August 27, because the hours of work significantly exceeded those she was promised, and she did not receive any breaks during the course of workdays in excess of 8 hours, the lack of such breaks may be illegal.

Deduction from back pay are appropriate for sums earned by Complainant or that could have been earned with due diligence. The evidence on the record does not substantiate finding that Complainant's termination of her employment at Waste Management was an act not excusable, or indicating a lack of due diligence in seeking employment. Thus it would be improper to limit back pay on that basis Albermarle Paper Co v. Moody supra. Consequently, back pay as requested by Complainant is appropriate given the circumstances of this case.

Dated at Madison, Wisconsin this 11th day of May 1979.

Robert L. Greene, Esq
Hearing Examiner

¹There was no testimony that Badger had more than one vacancy on July 22 or 25, nor was anyone else hired the week of July 25. One other driver was hired the following week, Tim Allan Storkson (Respondent's exhibit 10 page 8). However, it appears that he was hired to replace Georgerson, who only worked one week at Badger (Respondent's exhibit 10 page 1) and not to fill another spot. Thus the Ross testimony and Badger payroll records show that there was no vacancy other than the one filled by Mr. Georgerson.

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The above captioned matter having come on for hearing before the Madison Equal Opportunities Commission on March 27, and April 9 and 10, 1979 before Robert L. Greene, Jr., Hearing Examiner, and the Complainant appearing in person and by her Attorney Karla Dobinski and Respondent appearing by its President Nathan Ross and its Attorney Law Officers of Howard Goldberg, S.C. by Bryan Woods; and both parties submitting briefs herein; Respondent having appealed the Examiner's Recommended Findings, Conclusions of Law and Order; both parties having submitted briefs, and presented oral arguments on July 26, 1979, the Madison Equal Opportunities Commission makes the following:

FINDING OF FACT

1. Complainant is female, approximately 4' 11" in height, weighing 100 pounds and resided in July, 1977 in Madison, Wisconsin.
2. Respondent Badger Produce Company employs persons at 913 Watson Street in the City of Madison.
3. Respondent is in the business of delivering fresh poultry and frozen fish. In July, 1977, 85 percent of its business was the delivery of fresh poultry in boxes weighing 100 pounds; 15 percent of Respondent's business was the delivery of frozen fish in boxes weighing 50 pounds.
4. On or about July 22, 1977, Respondent placed an advertisement in the WISCONSIN STATE JOURNAL indicating the need for drivers.
5. On July 22, 1977, there was a vacancy for a truck driver at the Badger Produce Company.
6. Complainant presented herself in the afternoon of July 22, 1977 at the offices of Badger Produce Company to apply for the position advertised in the WISCONSIN STATE JOURNAL.
7. Upon arrival, she greeted Respondent Nathan Ross, President of Badger Produce Company.
8. Complainant left the premises and later called the Equal Opportunities Commission.
9. Mr. Larry Gene Georgerson, a six foot male, was hired by the Respondent to fill the vacancy Complainant had applied for.
10. Georgerson had already been hired and begun work at the time of Complainant's interview on July 25. There was no job vacancy at the time of the interview.
11. Mr. Georgerson was not asked to lift a box.

12. Complainant returned to the Badger Produce Company on July 25, 1977, whereupon Respondent asked her some biographical questions for a job interview.
13. Respondent at that time informed Complainant that the position had already been filled and that he was "updating his files."
14. Respondent then asked Complainant to lift a box "to prove a point" to himself.
15. Complainant asked Respondent if he asked other applicants to lift boxes, and Respondent said "no," where upon Complainant refused to lift the box.
16. Complainant then left the premises, and was never offered employment there.
17. The job at Badger Produce Company paid \$2.75 an hour and would have averaged 52.5 hours a week.
18. The job duties entailed lifting boxes ranging in weight from 50 to 100 pounds, loading and unloading trucks, and driving the trucks in the Madison area making deliveries.
19. Complainant had worked at the Common Market Co-op previously, unloading trucks and stacking items, and at the Intra-Community Co-op for three and one-half years previously.

Complainant's job duties at the Intra-Community Co-op included lifting packages, boxes and bags ranging in weight from 40 to 125 pounds, unloading and loading trucks, and driving the trucks in the Madison area, and to and from Chicago and Milwaukee, making deliveries and picking up orders for warehouses.

20. By virtue of this former experience, Complainant was qualified for the job Respondent had open on July 22, 1977.
21. Complainant left her job at the Intra-Community Co-op voluntarily in January, 1977.
22. Complainant remained in good health through July 22, 1979.
23. Complainant's employment after July 25, 1977, consisted of the following:

August 14 to August 27, 1977 - Waste Management Co.
 September to December, 1977 - Women's Exchange Bakery
 October 1977 to present - Madison Metro

24. Complainant applied at numerous other locations during the period from July 25 to October 1977, using the Wisconsin Job Service, newspaper ads, and the telephone directory to seek potential employers.
25. From October 1977 through December of 1977, Complainant was working two part time jobs.
26. Complainant earned \$1,426.91 gross income through other employment from July 25, 1977 to January 15, 1978, and would have earned \$4,062.50 gross during that period had she been hired at the Badger Produce Company.
27. Complainant made diligent efforts to secure other employment, and worked at other jobs between July 25 and the present.
28. Complainant's employment at the Waste Management Co. paid \$3.50 an hour.
29. Complainant's duties at Waste Management consisted of collecting garbage.
30. Complainant was forced to leave Waste Management's employ because the hours exceeded her expectations and the day did not include any breaks.
31. Respondent has never employed a woman a driver.
32. No women other than Complainant have ever applied for jobs as drivers with the Respondent.

CONCLUSIONS OF LAW

1. Complainant is a person within the meaning of the Madison Equal Opportunities Ordinance, Madison General Ordinances Section 3.23.
2. Respondent is an employer within the meaning of the Madison Equal Opportunities Ordinance, doing business in Madison, Wisconsin.
3. Complainant does not have a handicap within the meaning of the law.
4. Complainant has proven that on July 22, 1977 Complainant applied for a vacant position as a truck driver with Respondent. She was qualified for that position. Respondent President Nathan Ross rejected Complainant's application upon seeing her, with no knowledge of her abilities or qualifications other than her sex, weight, height, and other physical features. Subsequently, a male approximately 6 feet tall was hired.
5. The foregoing conclusion together with the Findings of Fact constitute discrimination on the basis of sex and physical appearance (height and weight) in violation of Madison General Ordinances 3.23(F). McDonnell

Douglas v. Green, 411 US 792, 5 FEP965 (1973); Gothard v. Rawlinson, 15 FEP 10 US (1977); Boynton Cab Co. v. DILHR, 18 FEP 841, Wisconsin Court of Appeals IV (1978).

6. Respondent has failed to articulate a legitimate non-discriminatory reason for failure to hire Complainant, or to raise doubts about Complainant's qualifications.

Respondent has failed to meet its burden of showing that Complainant failed to exercise due diligence in seeking employment, Sprogis v. United Air Lines, 517 F. 2d 387, 10 FEP' 1247, USCA 7 (1975). Through due diligence Complainant earned \$1,426.91 in the period July 22, 1977 through January 15, 1979.

8. Backpay awards should be calculated so as to put the victims of illegal discrimination in the economic position they would rightfully occupy but for the illegal discrimination. Albermarle Paper Co. v. Moody, 422 US 405, 10 FEP 1181; Pettway v. American Cast Iron Pipe Co., 494 F. 2d 211, 7 FEP 1115 USCA 5 (1974) at 1147, and cases cited therein. Thus in this case, backpay should be calculated on the basis of the difference between Complainant's earnings between the period July 22, 1977 and January 15, 1978 and the amounts she would have earned had she been employed by the Respondent during that period. Plus interest of 6.5 percent per annum on the total beginning January 15, 1978. No backpay is owing to Complainant from the period January 15, 1978. No backpay is owing to Complainant from the period January 15, 1978 to present, owing to Complainant's continuous employment at a rate higher than that she would have earned at Badger Produce.
9. It is beyond the power of the Madison Equal Opportunities Commission to award attorney's fees or costs. Peterson v. Fisca Oil Co. MEOC Case #3040 (1978).

ORDER

Within twenty (20) days of this order becoming final, Respondent and Complainant shall submit to the Examiner:

1. Proof of payment of the sum \$2,397.59 plus 6.5 percent annual interest on that sum, interest to begin accumulating on January 15, 1978 and prior to the date of this order, in order to put the Complainant in the position she would have occupied but for the discriminatory act.
2. A proposed procedure for interviewing and testing of applicants for employment as drivers with Respondent.

It is so ordered. BY COMMISSIONERS: BASURTO, BAUM, BELL, BROWN, GASSMAN, MITA, SWAMP, and WARE.
DISSENTING: None. ABSTAINING: None.

Dated at Madison, Wisconsin this 9th day of August, 1979.

Roberta Anne Gassman
Vice President

J. C. Wright
Executive Director

See Dane County and State Supreme Court Findings for Case No. [79-CV-4405](#) on STATE ex rel. BADGER PRODUCE CO., INC. v. EQUAL OPPORTUNITIES COMMISSION, CITY OF MADISON