

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

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| <p>Brenda Martinez 2209 Rusk Street Madison, WI 53704</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> <p>St. Mary's Hospital Medical Center 707 South Mills Street Madison, WI 53715-0450</p> <p style="text-align:center">Respondent</p> | <p>HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION</p> <p>Case No. 21812</p> |
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BACKGROUND

On November 9, 1992, the Complainant, Brenda Martinez, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, Saint Mary's Hospital Medical Center, discriminated against the Complainant in several ways on the basis of her handicap and in retaliation for actions protected by the ordinance. In particular, the complaint alleged that the Respondent refused to allow the Complainant to train for and retest for the position of EKG Monitor Technologist. After investigation, an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the basis of her handicap was issued on May 3, 1993. The same Initial Determination concluded that there was no probable cause to believe that the Complainant had been retaliated against for her exercise of rights protected by the ordinance. The Complainant did not appeal that portion of the Initial Determination finding that there was no probable cause.

The complaint was transferred to the Hearing Examiner for a public hearing on the merits of the complaint. On April 12, 1994, the Hearing Examiner held a telephone Pre-Hearing Conference with the attorneys for the parties. As a result of that Pre-Hearing Conference the Hearing Examiner issued a Notice of Hearing and Scheduling Order on April 14, 1994. This order indicated that the parties may file dispositive motions on or before June 3, 1994. On June 2, 1994, the Respondent filed a Motion to Dismiss for Lack of Jurisdiction. The Complainant did not file a response despite being given the opportunity to do so in the Scheduling Order.

DECISION

The Respondent contends that the issue of alleged discrimination on the basis of handicap/disability with respect to the position of EKG Monitor Technologist is not properly before the Hearing Examiner. The Respondent argues that there is no specific finding of fact in the Initial Determination with respect to this issue to support the Initial Determination's conclusion of probable cause. Though the Respondent does not explicitly refer to paragraphs I and K of the Initial Determination, it is likely that they form the basis for the Respondent's position. In general, these paragraphs indicate that the

Complainant did not state that she was interested in or had applied for the EKG Monitor Technologist position.

The Hearing Examiner concedes that the discussion of this issue in the Initial Determination is anything but clear. There is, however, sufficient notice on this record for the Respondent to know that this issue was being alleged by the Complainant. The complaint clearly places this issue in controversy. The Complainant alleges that others were given the opportunity to train or retest for the EKG Monitor Tech position. Inherent in this statement of the allegation is that the Complainant was prevented from doing what the others were allowed to do. The Investigator recognized this issue in his statement of the issues. If the Investigator had intended to find that there was no probable cause with respect to this issue he could have. The Conclusion portion of the Initial Determination does not make such a finding.

The Initial Determination clearly states that there is probable cause to believe that the Respondent discriminated against the Complainant on the basis of her handicap and that there is no probable cause to believe that the Respondent retaliated against the Complainant in violation of the ordinance. The breadth of the finding of probable cause is sufficient to encompass the allegations regarding the EKG Monitor Technologist position. While it is unfortunate that the Initial Determination is not more precisely written, the Respondent could and should be prepared to defend all of the allegations of handicap/disability discrimination.

If the Hearing Examiner were to adopt the Respondent's position, it would effectively prevent the Complainant from exercising her rights of appeal of a finding of no probable cause. The ordinance and Commission rules provide that the Complainant is entitled to a de novo review of a finding of no probable cause if that finding is timely appealed. The Initial Determination only made a specific finding of no probable cause with respect to the claims of retaliation. To now hold that there is an implied finding of no probable cause with respect to the EKG Monitor Technologist position, where the Initial Determination found probable cause with respect to the allegations of handicap/disability discrimination, would prevent the Complainant from appealing that conclusion. The Hearing Examiner cannot sanction a result that deprives the Complainant of rights granted by the ordinance and the rules.

Given the record in this matter, especially the complaint and the broad findings in the Initial Determination, the Hearing Examiner concludes that the Respondent is not prejudiced by any confusion stemming from the Investigator's findings in paragraphs I and K of the Initial Determination. The Respondent has been placed on notice of this issue and has had adequate time to prepare a defense. To rule otherwise would deprive the Complainant of rights granted by the ordinance and the rules of the Commission.

ORDER

The Respondent's Motion to Dismiss for Lack of Jurisdiction is denied. The hearing scheduled to commence on November 4, 1994 will proceed on the issues stated in the Notice of Hearing dated April 14, 1994.

Signed and dated this 5th day of October, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner