

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION

Donald L. Gasser
6593 Clyde Rd.
Spring Green, WI 53588

Complainant

**NON-FINAL
DECISION AND ORDER**

v.

ERD Case No. CR200803095

UW-Madison University Health Services
1552 University Ave.
Madison, WI 53705-4085

Respondent

On September 15, 2008 the Complainant, Donald L. Gasser, filed a complaint with the Equal Rights Division (ERD) against the UW-Madison University Health Services (UW-Madison), alleging that it had discriminated against him in hiring on the basis of conviction record. On January 27, 2009 the Equal Rights Officer assigned to the case issued an Initial Determination finding probable cause to believe that UW-Madison had violated the Wisconsin Fair Employment Act (WFEA) by refusing to hire or employ Gasser because of conviction record. The case was therefore certified for a hearing on the merits on that issue.

The hearing took place on March 29, 2010 in Madison, Wisconsin before Administrative Law Judge John L. Brown. Gasser was present and was represented by Attorney Timothy Scheffler of the Stix Law Offices of Madison, Wisconsin. UW-Madison was present and was represented by Attorney Brian Vaughan of UW-Madison. The evidentiary record was closed on March 29, 2010 and the parties submitted post-hearing briefs. The case has been ready for decision since June 14, 2010.

Based on the evidence received at the hearing the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The University of Wisconsin – Madison is an institution of higher learning employing teaching and administrative staffs in Madison, Wisconsin.
2. Donald Gasser is an individual with a conviction record. He was convicted of attempting to violate 18 U.S.C. § 2252(a)(4)(B), which states:

Any person who...knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if--(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (ii) such visual depiction is of such conduct...

3. The term sexually explicit conduct is defined in 18 U.S.C. § 2256(2)(A):

...actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; (v) lascivious exhibition of the genitals or pubic area of any person...

4. An individual, by being convicted of attempting to possess or access visual depictions as described above, has shown a willingness to act on a desire to see depictions of minors engaging in sexually explicit conduct as defined above, to the extent of using or impacting interstate commerce in order to gain access to them.

5. The University of Wisconsin – Madison University Health Services (UHS) maintained a written description for the position of Medical Program Assistant Associate (MPAA). (Ex. R-1). The summary of the position stated:

This position provides a critical interface with the patient and client care delivery system at University Health Services (UHS) and includes reception duties, appointment scheduling, information verification, billing duties, insurance verification and telecommunication operations for the Clinical Services Teams. Knowledge of over-all Clinic operations and Counseling and Consultation operations, policies and procedures is required to coordinate clinical and mental health activity at UHS. Appropriate decision making abilities are required for assisting patients to receive appropriate and timely services. The Medical Program Assistant Associate staff is expected to exercise good judgment and

demonstrate initiative in identifying problems and seeking and implementing solutions.

This position requires strong communication skills, excellent organizational skills, careful attention to detail and the ability to handle a variety of tasks simultaneously. Knowledge of medical terminology is necessary. Good interpersonal skills, personal initiative and the willingness to work as part of a team are expected. Work is performed under general supervision...

6. An individual performing the job of MPAA has access to the health records of the patients of UHS, principally via computer. Health records could include photos or depictions of private parts of patients' bodies, if the depiction is related to medical care. Barbara Behrend was a supervisor for UHS for over 20 years. She had never seen a medical record at UHS depicting minors engaged in sexual conduct.
7. Some patients of UHS are under age 18, mainly due to the fact that summer camp students, ages 12 to 17, are eligible to use the services of UHS.
8. An individual, by virtue of working as an MPAA for UHA, does not have a substantial opportunity to access depictions of minors engaged in sexually explicit conduct, or a realistic expectation of gaining such access.
9. In the spring of 2008 Gasser applied for the position of MPAA. Applications for this position were screened by a state personnel office to determine their eligibility to fill the position. Eligible applicants were certified for an interview. The certified applicants were instructed by letter to contact Barbara Behrend for an interview. Behrend was a supervisor in the internal medicine clinic at the time of Gasser's application, and was responsible for interviewing applicants. She was the supervisor of the MPAA staff. Behrend was the individual who made hiring decisions for MPAA's during this time.
10. Gasser was certified as eligible for the MPAA position. Before conducting in-person interviews, Behrend conducted telephone interviews of the certified applicants, including Gasser. Behrend made handwritten notes of her telephone interviews. (Ex. R-2, p. 2). She noted during Gasser's telephone interview that he had five or six years of experience answering the telephone for a medical clinic, doing scheduling and triage. She noted that he dealt with frustration by talking to someone, and that he considered himself a level-headed person. She noted that he considered his strengths to be natural empathy, a desire to help, loyalty, resilience and being good at settling down difficult people. She noted that his

challenges were that he was impatient with himself and that with respect to organization he flies by the seat of his pants. Behrend requested a resume in advance of the interview, and Gasser sent his resume to her by email. (Ex. R-2). At the conclusion of her telephone screening of Gasser Behrend believed Gasser was a good candidate. Behrend was unaware of Gasser's conviction until she held his in-person interview.

11. Behrend interviewed Gasser on or about June 24, 2008. Behrend asked questions from an interview questionnaire prepared in advance, and jotted down notes as Gasser answered the interview questions. She also asked Gasser why he had a two-year gap in employment. Gasser responded that he was in federal prison for one and one-half years, and explained that in 2004, when he was a social worker for child protective services in the City of Milwaukee, he also did independent research on the internet on women's sexual abuse of children. He explained that, after some email correspondence with an individual, the individual mailed Gasser a DVD purporting to show sexual conduct between boys and adult women. Gasser was arrested when the delivery was made.
12. At the in-person interview, in answering the question why he was interested in the position, Gasser referred to his desire to work with people and be useful, and mentioned his experience answering the telephone for Dean-On-Call, and his experience as a resident care technician.
13. In answering a question about what co-workers would say about him, Gasser said that he was thoughtful, consistent, loyal, that he did what he was asked to do, that he was social, liked to talk, was reflective and open.
14. In answer to a question involving a conflict and how it was resolved, Gasser described an incident that occurred when he was a child protective service worker in Milwaukee, in which there was a mother and seven or eight children who were sexually inappropriate with each other. He had transported several of the children to be interviewed by officials about their relationship with their mother, and on the way home, when they said they were hungry, Gasser bought them lunch.
15. In answer to a question about his attendance at work, Gasser indicated that it was perfect at his last two places of work.
16. In answer to a question about experience working with people of other cultures, Gasser referred to his work in Milwaukee, where he said 95% of the families he worked with were African American. He also mentioned working with Latinos, and said that he worked well with people of different cultures.

17. Shortly after Behrend concluded her interview of Gasser, she sought out Sarah Van Orman, M.D., the director of clinical services at UHS, in order to tell her about Gasser's conviction. She appeared to Van Orman to be upset and shaken as a result of her interview with Gasser. She related to Van Orman what she understood to be Gasser's conviction, and Van Orman suggested that they get advice from a human resources representative for the University. The representative advised them to continue with the interview process without considering Gasser's conviction record, and ask for a substantial relationship analysis only if Gasser was the candidate whom they wanted to hire. Then Behrend and Van Orman, fearing that Gasser's criminal conduct stemmed from a personal interest he developed in his clients as a social worker, and involved his use of private information that he had obtained at work, expressed a concern that Gasser did not respect professional boundaries. Gasser, however, had not told Behrend that his conduct stemmed from a personal interest he developed in his clients as a social worker, and had not told her that his conduct involved the use of private information he had obtained at work.
18. Another applicant for the position of MPAA was Ruth Ann Wetzel. Wetzel was certified for an interview. At the time of her application Wetzel was currently employed as an MPAA for the UW School of Medicine and Public Health, in the hematology/oncology section, a position she had held since March 2007.
19. Prior to her interview, Wetzel sent an employment evaluation to Behrend concerning her performance as an MPAA for the UW Medical School, which was signed by Wetzel and her supervisor on September 7, 2007. (Ex. R-6). The evaluation indicated that Wetzel successfully completed probation in her position, and indicated that her performance was excellent in judgment/independence, productivity, dependability/reliability, creativity/initiative, rate of learning, work habits/work quality, and interpersonal/communication skills. The overall appraisal of Wetzel's job performance stated:

Rae Ann Wetzel has consistently demonstrated the ability to learn quickly and apply her knowledge to perform her work duties at a highly functional level. She has built a strong work relationship with her physicians and has become an incredibly valuable asset to the section.
20. Behrend interviewed Wetzel, using the same questionnaire she used for Gasser. (Ex. R-5). In answer to a question about why she was interested in the position, Wetzel stated that she missed face-to-face contact with patients, and that her current job involved more research. In answer to a question about what her co-workers would say about her, Wetzel said that

she was organized, motivated and that she learned the state system very quickly. In answer to a question involving a conflict and how it was resolved, Wetzel described a conflict involving an insurance problem, that required a telephone call and a letter of explanation. In answer to a letter about work attendance, Wetzel said she had not called in sick since 2000. In answer to a question about working with people of other cultures, Wetzel said that when she was an office manager for Community Psychological Services in Waupun, she served people of different cultures by making use of a telephone interpreter service.

21. Behrend decided that Wetzel was the best applicant for the position, and checked her references, which were very positive. Behrend offered the job to Wetzel and she accepted.
22. Gasser's conviction, and the circumstances of the conviction as Behrend understood them, had a negative effect on Behrend's opinion of Gasser's qualifications for the MPAA position. Gasser would have chosen Wetzel over Gasser, however, even in the absence of this negative effect.
23. Around August 2008 an opening for another MPAA position occurred. Gasser received a letter announcing the opening and inviting him to contact Behrend for an interview. Gasser left a telephone message for Behrend, and sent an email message to her expressing his interest in the position. He received no response.
24. Behrend conducted interviews and offered the second MPAA position to an applicant other than Gasser and that applicant was hired on or about October 27, 2008
25. Behrend gave no serious consideration to Gasser's expression of interest in the second position, and failed to compare the successful applicant's qualifications to Gasser's. Behrend's knowledge of Gasser's conviction, and the circumstances of the conviction as she understood them, had a negative effect on her opinion of Gasser's qualifications for the MPAA position. In the absence of this negative effect, Behrend would have considered Gasser's application and compared his qualifications to the other applicants.

Based on the above Findings of Fact the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The University of Wisconsin – Madison University Health Services (UHS) was an employer subject to the provisions of the Wisconsin Fair Employment Act (WFEA).

2. Donald Gasser was an individual and an applicant for employment with UHS entitled to the protections of the WFEA against discrimination on the basis of conviction record.
3. With respect to its failure to offer Gasser the position filled by Rae Ann Wetzel, Gasser has shown by a preponderance of the evidence that UHS was motivated in part by Gasser's conviction record, in violation of the WFEA. UHS, however, demonstrated that it would have hired Wetzel even in the absence of the unlawful motivation.
4. With respect to its failure to contact Gasser in response to his communications to Behrend expressing an interest in the second MPAA position, Gasser has shown by a preponderance of the evidence that UHS was motivated in part by Gasser's conviction record, in violation of the WFEA. UHS has failed to demonstrate that it would have hired the other applicant in the absence of the unlawful motivation.
5. UHS has not shown by a preponderance of the evidence that the circumstances of Gasser's conviction record were substantially related to the circumstances of the position of MPAA.

Based on the above Findings of Fact and Conclusions of Law the Administrative Law Judge issues the following:

ORDER

1. That the Respondent shall cease and desist from discriminating against the Complainant on the basis of conviction record in violation of the WFEA.
2. That the Respondent shall offer the Complainant the next available comparable position for which the Complainant is qualified, with seniority retroactive to the date on which the Complainant would have commenced employment if he had been hired to fill the second MPAA opening described above.
3. That the Respondent shall make the Complainant whole for any losses in pay he suffered during the period beginning with the date on which he would have commenced employment if he had been hired to fill the second MPAA opening described above and continuing until the date on which the Complainant commences comparable employment with the Respondent or would commence such employment but for his rejection of a valid offer of such employment. The Respondent shall also make employer contributions to any applicable retirement fund on behalf of the Complainant for the applicable time period. The amount of back pay shall

be offset by any interim earnings the Complainant received during each calendar quarter. Any unemployment or welfare benefits received by the Complainant for any relevant pay period shall not reduce the amount of back pay liability, but that amount shall be withheld by the Respondent and paid to the Unemployment Insurance Reserve Fund and/or to the applicable welfare agency (reimbursement of unemployment insurance should be in the form of a check and made payable to the Department of Workforce Development, and should include the Complainant's name and the ERD case number).

4. That the amount of back pay payable to the Complainant after all statutory setoffs have been deducted shall be increased at the rate of 12 percent per annum, simple. For each calendar quarter, a separate amount of back pay due shall be computed, then interest shall be computed on each quarterly amount from the last day of each calendar quarter to the date of payment (see worksheet attached).
5. That the Respondent shall pay to the Complainant reasonable and actual attorney's fees and costs in this matter, which shall be paid by check made out to the trust account of Attorney Timothy M. Scheffler.
6. That within 30 days of the date this Order becomes final, the Respondent shall file a compliance report detailing the specific action taken to comply with the Order. The compliance report shall be directed to the attention of Mr. Robin Barkenhagen, Equal Rights Division, P.O. Box 8928, Madison, WI 53708-8928.

Dated at Milwaukee, Wisconsin _____

John L. Brown
Administrative Law Judge

cc: Donald Gasser, Complainant
University of Wisconsin – Madison, Respondent
Timothy M. Scheffler, Attorney for Complainant
Brian D. Vaughan, Attorney for Respondent

MEMORANDUM

Conviction record was a factor

Although Behrend denied taking Gasser's conviction record into account in the hiring process, there are persuasive reasons to conclude that she did. First, it appears that the news of Gasser's conviction made a strong emotional impact on Behrend. She sought out Dr. Van Orman immediately after the interview, appearing shaken and upset, and told Van Orman the story of Gasser's conviction. Second, despite getting advice from human resources to ignore Gasser's conviction record and compare the applicants based on qualifications, she and Van Orman appeared to have speculated on the connection between what they believed to be the circumstances of the conviction and the functions of the job, to the detriment of Gasser's job prospects. Third, Behrend's testimony about how poorly Gasser performed in the job interview seemed exaggerated. For example, with respect to Gasser's response to a question asking for experiences working with persons of other cultures (he said 95% of the families he worked with in Milwaukee were African American, and that he worked well with people of different cultures, and was not judgmental), she testified that his answer was "limited", without satisfactorily explaining why. With respect to his response to a question about what co-workers would say about him (he said he was thoughtful, consistent, loyal, did what he was asked to do, social, liked to talk, reflective and open), she criticized the fact that he didn't talk about the quality of his work, teamwork or initiative.

With respect to a question about how Gasser resolved a conflict (Gasser related a story from when he was a social worker, in which he bought lunch for children in a family he was helping, following a difficult morning in which the children were interviewed about inappropriate sexual activities), Behrend testified that it was troubling because his buying lunch crossed professional boundaries. Of all the answers to interview questions, this one stood out, in Behrend's testimony, as the worst, but in Behrend's lengthy written description of the interview (C. Ex. A), it is barely mentioned, if at all. Behrend did question Gasser's ability to maintain professional boundaries in her written description of the interview, but not because of his answer to the question about resolving conflict. Instead, it was his identification of his strengths (naturally empathetic, likes to help others, loyal, good with difficult people), that made her say she doubted his ability to maintain boundaries.

The exaggerations and inconsistencies of Behrend's testimony made her a less credible witness than Gasser regarding the job interview. Between the two of them, Gasser's testimony about the strength of his handshake, his eye contact, his appearance, the way he walked, and his interaction with people he met on the tour of the facility, was more credible than Behrend's.

Based on Behrend's written description of the interview, it appeared that what she perceived as Gasser's refusal to take responsibility for his situation (primarily the fact of his conviction) made a big impact on Behrend. While that impression was capable of being formed separately from any impressions based on the conviction itself, in this case the evidence points to both the conviction and the impression that Gasser did not take responsibility for his situation as being motives for Behrend's negative opinion of Gasser.

Mixed motive and remedy

If an individual is not hired in part because of his membership in a protected class, liability attaches. *Larson v. Tomah Police Dept.* (LIRC, 07/20/1994). Evidence that legitimate reasons also contributed to the employer's decision can be considered in fashioning an appropriate remedy. If the individual would not have been hired even in the absence of the prohibited motivation, the appropriate remedy is a cease and desist order and attorney's fees. If, however, the adverse act would not have occurred in the absence of the prohibited factor, the Department has the discretion to award some or all of the remedies ordinarily awarded. *Hoell v. LIRC*, 186 Wis.2d 603, 522 N.W.2d 234 (Ct. App. 1994).

In deciding what remedies are appropriate, uncertainties should be resolved against the discriminating employer. *Nunn v. Dollar General* (LIRC, 03/14/2008); *Silvers v. Madison Metropolitan School District* (LIRC, 07/25/1986). Where the Respondent is in the best position to offer evidence about what jobs were available, how they were filled, and by whom, it is not reasonable to penalize the Complainant for the Respondent's failure to present evidence on these points. *Fields v. Cardinal TG Co.* (LIRC, 02/16/2001). With respect to the position filled by Wetzel, the Respondent put on sufficient evidence that it would have hired Wetzel even in the absence of the prohibited motivation. Wetzel was currently performing the very job that was being filled, and the evaluation of her performance was excellent. Although Gasser had more years of performing a job very similar to the one being filled, he had not been working in that job for a number of years, and did not offer an independent evaluation of his performance in that job.

With respect to the second position, however, the Respondent's evidence was confusing and sketchy at best. Behrend had a very vague memory of the process by which she filled the job, and even had trouble remembering who filled the job. She acknowledged conducting interviews, and acknowledged that she may have gotten a message from Gasser expressing interest in the position, but offered no explanation of why she did not contact Gasser or consider his qualifications, much less how she compared his qualifications to the successful applicant. Respondent's burden is to show by clear and convincing evidence that the Complainant would not have been hired, even in the absence of the prohibited motivation. *Silvers, supra*. The Respondent fell well short of its burden with respect to the second hiring. It is clear in the evidence that Gasser

was qualified for the job, by virtue of his being placed on the certification list. The fair "make whole" remedy in this situation is to allow Gasser to fill the next available opening, and to pay his back pay from the date of second hiring, consistent with the remedy in *Silvers*.

Substantial relationship

The basis for the affirmative defense that there is a substantial relationship between the circumstances of a conviction and the circumstances of a job has been stated by the Wisconsin Supreme Court:

It is evident that the legislature sought to balance at least two interests. On the one hand, society has an interest in rehabilitating one who has been convicted of crime and protecting him or her from being discriminated against in the area of employment. Employment is an integral part of the rehabilitation process. On the other hand, society has an interest in protecting its citizens. There is a concern that individuals, and the community at large, not bear an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime. This concern is legitimate since it is necessarily based on the well-documented phenomenon of recidivism.

County of Milwaukee v. LIRC, 139 Wis.2d 805, 821, 407 N.W.2d 908 (1987). The burden for establishing a substantial relationship is on the Respondent. The appropriate method of evaluating whether a substantial relationship exists is to look first and foremost at the elements of the offense involved to determine the character traits revealed by violation of the criminal statute. *Zeiler v. State of WI, Dept of Corrections* (LIRC, 09/16/2004); *Lillge v. Schneider Nat'l* (LIRC, 06/10/1998). The character trait revealed by a conviction for attempting to see depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(4)(B), is a willingness to act on a desire to see depictions of minors engaging in sexually explicit conduct as defined in the statute, to the extent of using or impacting interstate commerce to gain access to them. The question is whether the circumstances of the employment provided a greater than usual opportunity for repeating the criminal behavior, or provided a particular or significant opportunity for such behavior. *Robertson v. Family Dollar Stores* (LIRC, 10/14/2005). There was no evidence that the electronic data to which MPAAAs had access contained depictions of minors engaging in sexually explicit conduct, or that MPAAAs had an expectation that they would have such access. The clinical photos or other depictions in medical records, even those that may show private body parts, are a far cry from depictions of minors engaged in sexual activity. The Respondent argues that Gasser "would have ample unsupervised opportunities to possess, access, and use images of minors in a

manner unrelated to his work.” The opportunity to see “images of minors”, however, is not the issue. The issue is whether Gasser would have the opportunity to see images of minors engaged in sexually explicit conduct. The job did not present a significant or realistic opportunity for Gasser to re-offend by poring through the electronic medical records, or by greeting patients and getting health information from them. The test articulated in *County of Milwaukee* is not whether employment of the individual with a conviction record will present *any* risk of re-offense, it is whether it will present an *unreasonable* risk of re-offense. In this case it is concluded that the legislative interest in rehabilitation, through protection against discrimination in employment, outweighs a risk of re-offense on the job.