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

Steven Meyer 1114 Woodland Way Madison, WI 53711 Complainant vs. Purlie's Cafe South 2102 South Park Street Madison, WI 53713 Respondent	COMMISSION DECISION AND FINAL ORDER Case No. 3282

BACKGROUND

On May 13, 1991, the Complainant, Steven Meyer, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint alleged that Meyer had been denied access to a place of public accommodation or amusement by the Respondent, Purlie's Cafe-South, on the basis of his race. After investigation, an Initial Determination concluding that there was probable cause to believe that discrimination had occurred was issued on July 16, 1991. After attempts to conciliate the allegations of the complaint failed, the complaint was certified to public hearing.

Hearing Examiner Clifford E. Blackwell III held a Pre-Hearing Conference on November 21, 1991. A Notice of Hearing and Scheduling Order were issued on November 22, 1991. Pursuant to the provisions of the Notice of Hearing, a public hearing was held on March 12, 1992. Subsequent to the hearing, the parties were given the opportunity to submit written argument in support of their respective positions. On April 6, 1994, the Hearing Examiner issued his Recommended Findings of Fact, Conclusions of Law and Order. This recommended decision concluded that the Complainant had been discriminated against on the basis of his race with regard to access to a public place of accommodation or amusement. The Hearing Examiner recommended that a cease and desist order be issued, that the Respondent pay to the Complainant the amount of $1,000.00 in compensatory damages and that the Respondent be required to pay the reasonable costs including the attorney's fees of the Complainant.

On April 18,1994, the Respondent appealed the Hearing Examiner's recommended decision. The Commission issued a Notice of Appeal and Briefing Schedule to allow the parties to submit written arguments in support of their positions. On May 26, 1994, Anne Sulton, the Respondent's attorney, withdrew as counsel for the Respondent and asked that the Briefing Schedule be extended by thirty days to allow the Respondent to submit his own brief or to obtain new counsel. This extension was granted by Interim Executive Director Paul B. Higginbotham on May 26, 1994. Neither party submitted any materials on appeal.

On September 8, 1994, the Commission met in executive session to consider the appeal of the Respondent. Commissioners Anderson, Fieber, Greenberg, Johnson, Miller, Rosas, Verridan, Washington and Wilberg were present and took part in the deliberation of the Commission. Commissioner Booker Gardner recused himself and took no part in the deliberation.

DECISION

In its initial appeal, the Respondent contended that the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order were erroneous for several reasons. First, the Respondent argued that there was no evidence of a racial motivation because on one occasion another White patron was not asked to leave. Second, the Respondent contended that the Hearing Examiner was wrong in finding that the use of the term "White boy" was not simply a means of identification. Third, the Respondent seems to contend that the

Complainant should have expected the use of loud or rough language in an establishment such as the Respondent's. It is not entirely clear whether this argument was meant to counter a finding of liability or to reduce the amount of damages. Fourth, the Respondent asserts that the damage award was excessive because the Complainant returned on several occasions and was not asked to leave on those occasions. Finally, the Respondent makes a general plea for leniency based upon its status as a small, neighborhood bar.

The Commission respectfully disagrees with the contentions of the Respondent. The Commission adopts and incorporates by reference the Findings of Fact, Conclusions of Law and Order of the Hearing Examiner with respect to liability. The record compiled at hearing supports the Hearing Examiner's conclusion that the Complainant had been discriminated against on the basis of his race. The Hearing Examiner's reconstruction of the facts is supported by the record and is more credible and consistent with the record than either of the scenarios offered by the parties in their post-hearing briefs.

The one area in which the Commission disagrees with the conclusions of the Hearing Examiner is the amount of compensatory damages to be paid to the Complainant in order to make him whole. The Commission believes that the Hearing Examiner did not give sufficient weight to the fact that the Complainant had returned to the Respondent's premises on at least three occasions, after having been initially excluded, without any further problems from the Respondent. The Commission takes this as evidence that the Complainant did not feel so badly about his exclusion as the Hearing Examiner found. While some amount of damage or injury may be presumed from the circumstances surrounding an incident of discrimination, it is still the Complainant's ultimate burden to demonstrate the degree of compensation to which he is entitled. Chomicki v. Wittekind, 128 Wis. 2d 188, 381 N. W.2d 561 (Ct. App. 1985).

The Commission concludes that the Complainant did not demonstrate that a damage award of $1,000.00 was warranted in this case. Instead the Commission will order the Respondent to pay to the Complainant the amount of $750.00 in compensatory damages. The Commission reaches this conclusion from the fact of the Complainant's repeated return to the Respondent's establishment. As the Hearing Examiner noted in his recommended decision, given the fact that the Complainant has been able to return to the premises on at least three occasions without being excluded, one can only conclude that the Complainant's continuing exile is a matter of his own choice. The Complainant's return to the Respondent's establishment and his apparent decision not to return on other occasions are factors to which the Hearing Examiner did not give sufficient weight in making his damage award. The Commission infers from these facts that the Complainant did not feel particularly distraught about his exclusion and that therefore the lower dollar amount is appropriate.

The Commission leaves in place the other findings and conclusions of the Hearing Examiner with respect to the damages to be awarded to the Complainant. The provision of the Hearing Examiner's recommended order regarding costs and reasonable attorney's fees is specifically adopted by the Commission. It is an imperative part of any decision for a Complainant that the Complainant be made whole by the award of the costs reasonably expended in pursuit of his or her claim. To not include this provision would not make an injured party whole because of the expenses incurred by the Complainant in pursuing his or her claim.

ORDER

The Commission adopts and reissues the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order as its own except that it amends paragraph 30 to replace $1,000.00 with $750.00.

Joining in this decision with respect to liability were Commissioners: Anderson, Fieber, Greenberg, Johnson, Miller, Rosas, Verridan, Washington and Wilberg. Commissioners joining in the decision on damages were: Fieber, Greenberg, Johnson, Miller, Rosas, Verridan and Wilberg. Commissioner Gardner took no part in either decision.

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

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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

Steven Meyer 1114 Woodland Way Madison, WI 53711 Complainant vs. Purlie's Cafe South 2102 South Park Street Madison, WI 53713 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 3282

This matter came on for a public hearing before Madison Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, on March 12, 1992 in Room 312 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard Madison, Wisconsin. The Complainant, Steven Meyer, appeared in person and by his attorney, Mary Kennelly of the law firm of Fox and Fox S.C. of Madison, Wisconsin. The Respondent, Purlie's Cafe South, appeared by one of its owners, DeWitt Moore, and by its attorney, Anne Sulton of Madison, Wisconsin. Based upon the record of these proceedings and the argument of the parties, the Hearing Examiner makes his RECOMMENDED FINDINGS of FACT, CONCLUSIONS of LAW and Order as follows:

FINDINGS of FACT

1. The Complainant is a White male.
2. The Respondent is a tavern or bar located at 2102 South Park Street in the City of Madison. Though its liquor license requires the Respondent to operate as a private club during certain hours, it does not so operate and the Respondent is open to the general public. The Respondent did not require or check for memberships when someone entered the establishment except on occasions where the patron was either unknown to the employees of the Respondent or was acting suspiciously.
3. Prior to May 7, 1991, the Complainant had been an occasional patron of the Respondent. He had been to the Respondent's on perhaps 10 to 20 occasions over the two or so years preceding May 7, 1991. His visits were sufficiently frequent for him to be recognized by DeWitt Moore, an employee and co-owner of the Respondent. Though Moore recognized the Complainant's face, he did not know the Complainant's name. On these occasions, the Complainant was not asked to leave or in any other way bothered.
4. On May 7, 1991, the Complainant went to the Respondent's bar with Richard Redman. They arrived at approximately 11:00 p.m. Redman went to the bar to purchase drinks for the Complainant and himself. The Complainant went to speak with some friends, Joseph Fleming, Willie Fleming and Terry Crawford. At that time the Complainant was the only White male patron in the bar.
5. On May 7, 1991, DeWitt Moore was tending bar. He customarily tended bar on Tuesday evenings. May 7, 1991 was a Tuesday.
6. As Redman was at the bar, the Complainant and his group of friends stood approximately behind Redman. The group was not standing in an aisle or blocking any means of entrance or exit.
7. At that time Moore looked directly at the Complainant and said in a loud and aggressive voice, either, "Get your White ass out of my bar" or "White boy get out of my bar."
8. The Complainant had not been disruptive or caused a problem. He was upset and concerned about the statement. Crawford, an acquaintance of the Complainant, questioned Moore's order. Moore told Crawford that if he didn't like it, he (Crawford) could get out too.
9. After briefly discussing the event with his friends, the Complainant left the Respondent's establishment without further delay. Both Crawford and Redman had urged the Complainant to leave and to address the problem at a later time.
10. The Complainant had also been a patron at the Respondent's bar on either the weekend preceding May 7, 1991 or the weekend prior to that. On that occasion the Complainant had been speaking with several friends next to a booth close to the entrance of the Respondent's establishment. Moore asked the

participants to this conversation to not block or stand in the aisle. Some of the participants sat down in the adjacent booth. The Complainant did not sit down but remained standing in the aisle next to the booth. Moore asked the Complainant at least two more times to move out of the aisle. Moore then asked the Complainant to leave the bar.

11. Despite Moore's requests or orders, the Complainant failed or refused to move out of the aisle and to leave the bar. Due to the noise level of a nearly full bar with a jukebox and disk jockey, Moore is not sure that the Complainant heard his requests.
12. Moore then asked Terry Crawford, one of the people with whom the Complainant was speaking, to get the Complainant to leave the bar. Moore identified the Complainant as "that White boy" or "that White dude". This identification was made only to Crawford and because of the noise level was likely not heard by anyone else. Crawford got the Complainant to leave.
13. Keeping the aisles open and free is important in a bar because blocked aisles can be a point where people bump into each other and cause the spilling of drinks. Minor collisions and spilled drinks are often the spark that erupts into a fight or more serious confrontation. The threat that such a minor incident may result in a greater problem increases throughout the night and is at its highest near closing time.
14. The incident described in paragraphs 10 through 12 occurred at closing time. On this occasion, Moore was not tending bar but was the "man on the door" or the bouncer.
15. The liquor license for the Respondent effective in 1990 and 1991, recognizes a 15-day no re-entry practice relating to persons who have been asked to leave the bar.
16. At no time relevant to these proceedings has the Respondent had a policy or practice of excluding persons on the basis of their race. White persons other than the Complainant have been patrons of the Respondent both before and after May 7, 1991.
17. After having been told to leave on May 7, 1991, the Complainant has returned to the Respondent's premises on four occasions.
18. On or about May 8, 1991, the Complainant returned to speak with Moore about his expulsion on the preceding day. Moore refused to speak with the Complainant and told him to "Get the hell out of my bar."
19. On or about May 27, 1991, the Complainant returned to the Respondent's establishment. Again he was told to leave the premises. He was speaking to another White patron in a booth. The Complainant refused the order to leave. Moore called the police and after a discussion about the status of the Respondent's business as a private club with the police the Complainant left. The people with whom the Complainant had been speaking were not asked to leave despite not being members of any private club.
20. On a date not known to the Complainant but after May 27, 1991, he returned to the Respondent's with a friend to purchase tickets for a performance of the friend's musical group. The Complainant was not asked to leave on this occasion.
21. The Complainant again returned to the Respondent's, subsequent to his purchase of the tickets referred to above, to see the performance of his friend's musical group. He was not asked to leave on that occasion.
22. As of the date of hearing, the Complainant had not returned to the Respondent's except on those occasions listed above because of his embarrassment and humiliation over his treatment on May 7, 1991 and two of the subsequent occasions. Except for the occasions discussed above, the Complainant has not been denied access or service at the Respondent's bar.
23. The action of DeWitt Moore on May 7, 1991 was at least in part motivated by the Complainant's race.
24. The Complainant suffered some degree of embarrassment and humiliation on May 7, 1991 as a result of Moore's singling him out with the words "White boy" or "White ass" in front of his friends and other strangers. He also suffered some amount of outrage and hurt feelings as a result of being excluded from the bar on May 8, 1991 and again on May 27, 1991. His exile from the Respondent's establishment subsequent to May 27, 1991 is self-imposed. The only time that the Complainant was aware of any racially explicit language being directed at him by any employee of the Respondent's was the incident of May 7, 1991.

CONCLUSIONS of LAW

25. The Complainant was deprived of the use or of access to a public place of accommodation or amusement by the Respondent on May 7, 1991 at least in part on the basis of his race.
26. The Respondent is a public place of accommodation or amusement within the meaning of MGO Sec. 3.23(2)(e) and 3.23(5).

27. The Respondent violated MGO 3.23(5) by ordering the Complainant to leave the bar on May 7, 1991 when Moore used the words "Get your White ass out of my bar" or "White boy, get out of my bar."
28. Moore's actions, as an employee and co-owner of the Respondent, are attributable to the Respondent.

ORDER

29. The Respondent is ordered to cease and desist from further violations of MGO 3.23(5).
30. The Respondent is ordered to pay to the Complainant, within 30 days of this Order becoming final, the sum of $1,000 as compensatory damages for the embarrassment and humiliation suffered by the Complainant as a result of the Respondent's violation of the ordinance.
31. The Complainant is ordered to submit a petition for his attorney's fees and costs to the Commission within 30 days of this Order becoming final. The Respondent shall have 30 days to respond to the petition of the Complainant by submitting briefs and affidavits in opposition within 30 days of its receipt of the Complainant's petition. The Complainant shall have 15 days to submit any reply to the Respondent's submission. In all cases the opposing party must be served with the materials submitted by a party. The Hearing Examiner may order additional proceedings if he believes that they are warranted.

MEMORANDUM DECISION

This case presents a difficult problem in reconciling the positions of opposing parties. While in virtually all complaints that come before the Commission, the parties present different explanations of an event or incident, this case is somewhat different from most. In the general situation, the difference is often resolved through a finding that one side is more credible than the other. In this case both sides appear credible. The answer to resolving the different explanations, in this case, is found in understanding the differences in the explanations.

First, there is no real issue of whether the Respondent is a public place of accommodation or amusement as that term is defined in the ordinance. The Respondent's operating license or liquor license provides that the Respondent may operate as a private club. The testimony clearly established that the Respondent was open to the general public except on certain special occasions. There is no question that May 7, 1991 was not one of those special occasions. On that date the Respondent was open to the public and operating as a tavern. A tavern is specifically enumerated in the definition found at MGO 3.23(2)(e) of a public place of accommodation or amusement.

The Complainant describes an incident that occurred on May 7, 1991. On that date, he and a friend, Richard Redman, went to the Respondent's establishment to have a couple of drinks. The Complainant had been a somewhat regular patron of the Respondent over the prior two or three year. In the approximately twenty times that he had visited the Respondent's tavern, his face and general appearance had become known to DeWitt Moore though Moore did not know the Complainant's name. On May 7, 1991, a Tuesday, Moore looked up as Redman was ordering drinks and noticed the Complainant. Moore pointed his finger at the Complainant and in a loud and aggressive voice ordered the Complainant out of the bar. In doing so, Moore specifically said either, "Get your White ass out of my bar" or "White boy, get out of my bar." The Complainant was not engaged in any disruptive conduct or interfering with other patrons or the operation of the bar. The Complainant left as ordered.

The Respondent does not dispute that the Complainant was ordered from the tavern. Rather it contends that the Complainant was ordered out for legitimate nondiscriminatory reasons and in a nonracial manner. For purposes of this decision, the Hearing Examiner will identify the Respondent as DeWitt Moore. Moore is a co-owner and employee of the Respondent. Moore asserts that on a date earlier than May 7, 1991, in either late April or early May, he ordered the Complainant out of the bar because the Complainant was blocking the aisles and refused to move after repeated requests. Moore tested that when the Complainant did not move or leave on that occasion, he went to a friend or acquaintance of the Complainant and sought his help in removing the Complainant. In seeking the help of Terry Crawford, Moore admits that he may have used the phrase "White boy" in referring to the Complainant. The Respondent has, and occasionally enforces, a 15-day no return policy for those ordered to leave the bar for misconduct.

The Respondent also produced testimony by DeWitt Moore to show that the Complainant was ordered out of the tavern because he had exhibited conduct that gave Moore the reasonable belief that the Complainant might have been engaged in dealing drugs from the tavern. Though Respondent's counsel represented at the time of hearing that this would be an element of the Respondent's defense, the Respondent did not argue this position

in its post-hearing brief. Additionally, as Moore was questioned about this subject, he did not appear to have a firm conviction that the Complainant had actually been dealing drugs. To the Hearing Examiner, this theory appeared to be one of Respondent's counsel's and not actually one of the Respondent. In any event, the Respondent produced no corroborative testimony or evidence to support this theory and did not raise it after the day of hearing.

There is a significant issue with respect to the date upon which the incident that is the subject of the complaint occurred. The complaint filed in this matter on May 13, 1991 indicates that the incident occurred on May 7, 1991 and that the Complainant was also ordered from Moore's establishment the next day, May 8, 1991. At the time of hearing, the Complainant testified that May 7, 1991 was the date, but that it was his impression that it had happened on a weekend night. As indicated above, May 7, 1991 was a Tuesday. In rebuttal testimony, the Complainant admitted that he had visited the bar on one of the two weekends prior to May 7, 1991 and that he could have been confusing these dates and times. Moore testified that he thought that the incident had occurred earlier than May 7, 1991, perhaps in late April or early May.

The Hearing Examiner is satisfied that the incident occurred on May 7, 1991, a Tuesday, even though the Complainant's recollection was of a weekend night. The complaint quite specifically identifies when the incident occurred by date and since the complaint was filed within a matter of days of the events, it is likely to be an accurate reflection of the date of occurrence. The Complainant does not give the impression of one who would confuse matters over a period of a few days. At the time of hearing, he spoke clearly and with a sense of sureness. He is a small business owner and, at least over the short run, would not be able to maintain a business if he were confused about dates within a week of their passing. Since the hearing occurred almost a year after the incident, it is normal for some confusion of time frame to occur. The Complainant's confusion between a weekend and a Tuesday is not indicative to the Hearing Examiner of either fraud or a lack of credibility on the Complainant's part.

Equally, despite the Hearing Examiner's conclusion that the incident that is the subject of this complaint occurred on May 7, 1991, Moore's recollection that it occurred on an earlier date does not necessarily mean that Moore is not credible. Certain aspects of Moore's account are corroborated by Complainant's own witness, Terry Crawford. This gives some degree of credibility to Moore's explanation.

The differences in the parties' versions where both parties appear credible can be explained if the parties are describing two different events. This would be particularly true if the different events hold different levels of significance for each party. The Hearing Examiner concludes that this is the case.

On one of the two weekends prior to May 7, 1991, the Complainant was at the Respondent's bar. This is relatively uncontroverted. On this occasion, it was late in the evening, close to closing time. The Complainant was speaking with several friends near a booth at the front of the bar. The tavern ways at or close to its capacity of 99 or 100 persons. The jukebox was competing with a disk jockey who was playing music for the dance floor. Moore asked the group that the Complainant was part of to move out of the aisle. It is important to keep the aisles clear because minor physical contacts can erupt into major personal conflicts or fights particularly later in the night after the consumption of alcohol. Such contact had been the source of these confrontations and conflicts in the past. Some members of the group complied with Moore's request and sat down in the adjacent booth. Other members of the group, including the Complainant, remained standing in the aisle talking to those in the booth.

Moore asked for the aisle to be cleared two more times. The Complainant did not move as requested. There is no evidence in the record to indicate that this represented a willful ignoring of Moore's order. Moore recognized at the time of hearing that the Complainant may not have heard his order or request. It was very loud.

When the Complainant failed to heed Moore's third request, Moore ordered him out of the bar. Again the Complainant may well have been unable to hear Moore because he did not leave as ordered. Moore had become more upset with the Complainant's apparent indifference to his orders. He then sought the assistance of Terry Crawford. Crawford was a part of the group with whom the Complainant was associated. Crawford may have been seen in the company of the Complainant on earlier occasions. Moore asked Crawford to "Get that White boy out of the bar." Crawford apparently objected and was told that he could leave also. The group left shortly after.

It seems clear that Moore believed that he had thrown the Complainant out of the bar for reasons of misconduct on the part of the Complainant. The misconduct being blocking the aisles and refusing Moore's request to move.

This scenario is consistent with Moore's general testimony, Crawford's testimony that Moore used racially explicit language to refer to the Complainant and that Moore wished the Complainant to move from the aisle, and the Complainant's rebuttal testimony that he had been in the bar on one of the preceding weekends. This was clearly an important event to Moore because of the apparent failure of the Complainant to obey Moore's instructions, and represented a challenge to Moore's authority. This event would have little or no significance to the Complainant if, as Moore hypothesizes, the Complainant did not hear Moore's orders to move or to leave.

When the Complainant next came to the bar on May 7, 1991, only a few days or perhaps a week later after the weekend incident, Moore recognized the Complainant as the person who ignored him on the earlier occasion, and using the 15-day no return policy, ordered the Complainant out of the bar. In making this order Moore used racially inflammatory language. Either the words recalled by the Complainant, "White boy, get out of my bar" or the words testified to by Richard Redman, "Get your White ass out of my bar" indicate some degree of racial motivation.

This event would be significant to the Complainant because of the direct and public insult. The incident might not have as much significance to Moore, if he thought that he was routinely enforcing a standard bar policy concerning misbehaving patrons. Richard Redman would find this incident important because of the insult to his friend and companion. Terry Crawford, who was present for both incidents, is likely to find them both significant because of his involvement and his belief that Moore was racially motivated in his actions regarding the Complainant.

This scenario is consistent with the general testimony of the Complainant and of Richard Redman. It is consistent with Terry Crawford's belief that Moore's conduct was racially motivated. It is also consistent with Moore's testimony about the 15-day no return policy.

The testimony of the parties is generally consistent with regard to the fact that the Complainant returned to the Respondent's shortly after the incident excluding him. The Complainant states that he wished to know what he had done wrong to result in his expulsion. Moore generally confirms that the Complainant appeared at the bar during the day time and asked what he had done wrong. Again there is some discrepancy with regard to the date of this visit. The Complainant states that it was the next day. Moore is of the impression that it was several days, perhaps a week later. These time frames are consistent with the Hearing Examiner's conclusion that the parties are describing two separate dates.

On the day that the Complainant returned to ask about the reason for his having been ordered out, Moore refused to speak to him and ordered him out again. This is consistent with the testimony of both parties. The Complainant does not indicate that there was any racially explicit language used on this occasion. Moore states that he was busy and that those who have been kicked out of his establishment often return asking about the reasons for their expulsion. There is little to indicate that this incident was racially motivated other than it involved the same parties and that it occurred in close temporal proximity to the other incident. It is also clear that the Complainant was not seeking service on this date. Moore's telling him to get out does not violate the ordinance for this particular date because the Complainant was not denied service within the meaning of the ordinance. He did not want to buy a drink, he sought an explanation.

There was additional testimony about a subsequent exclusion of the Complainant on May 27, 1991 and several other times after May 7, 1991 when the Complainant was not expelled from the bar. The complaint was not amended to reflect the May 27, 1991 incident. It cannot be the basis for a finding of liability for a separate incident of discrimination. It, along with the other post-May 7 dates, will be considered in determining liability for the May 7 and 8 incidents. It will be more particularly relevant to the issue of damages.

Having determined that the Complainant's version of events is credible and that therefore he was denied or refused service on May 7, 1991, the Hearing Examiner must determine whether the Complainant's race was at least a factor in the denial of service. Race need only be one of several factors for the Respondent's action. Sandford v. R.L. Coleman Realty Co., Inc., 573 F.2d 173, 175 (4th Cir. 1978). Green v. Century 21, 740 F.2d 460, 464 (6th Cir. 1984). Smith v. Sol D. Adler Co., 436 F.2d 344, 349-350 (7th Cir. 1970). It does not have to be the sole or primary factor in the Respondent's action.

The testimony is clear that the Respondent does not have a policy or practice of denying service to people on the basis of their race or other protected characteristics. Moore testified that there was no such policy or practice. This was corroborated by the testimony of two of his employees. The Complainant testified that the only occasions on which he was excluded were May 7, May 8 and May 27, 1991. The only occasion on which race was mentioned was May 7, 1991. On May 27, 1991, the Complainant was ordered to leave while other White patrons present at that time were not asked to leave. No witness for either party had ever seen a White person ordered to leave except for the Complainant on May 7, 1991.

Despite the lack of a policy or practice of discrimination, one can be found to discriminate illegally in an individual instance against an individual person. One must still find that one's membership in a protected class was a factor in the adverse action taken against them. There is sufficient evidence in the record for the Hearing Examiner to conclude that Moore's action in ordering the Complainant to leave the establishment on May 7, 1991 was, in part, racially motivated. Terry Crawford, the Complainant's witness, testified that he believed that Moore had acted partially on the basis of the Complainant's race in excluding him. Crawford appeared as the result of a subpoena and not as a volunteer. While there was testimony showing that the Complainant and Crawford were acquaintances, there is nothing in the record tending to show other than a casual relationship between Crawford and the Complainant. From the record, it could be said that Crawford had approximately the same level of contact with Moore as he had with the Complainant.

In addition to Crawford's opinion, the language used by Moore on May 7, 1991 supports the conclusion that race was a factor in the Complainant's expulsion. Whether the Complainant's recollection or Redman's recollection is more accurate seems immaterial. Being ordered to leave with specific reference to being a "White boy" or "White ass" clearly raises the inference that race is behind the order.

The Respondent contends that when Blacks or African Americans wish to speak derogatorily of Whites that words such as "honky", "red-neck", "dago" or "wop" would be used. The Respondent produced no expert testimony or even lay testimony to support this allegation. The Respondent further contended that Moore used "White" as a word simply to designate the person to whom he was speaking and did not intend it to be insulting or derogatory. In this regard the Respondent asserts that the phrase "White boy" was not intended to insult because Blacks or African Americans use the word "boy" in everyday slang without derogation such as in the expression "home boy".

The Hearing Examiner is not convinced by the explanations of the Respondent. The circumstances described by the Complainant, Redman, Crawford and to some extent Moore are not ones in which the use of familiar slang would be expected. The incident was apparently charged with emotion and friendly or neutral greetings were not being exchanged between the participants. In this situation, words that may be acceptable in one context are not likely to be acceptable in another. It may be acceptable for Blacks or African Americans to use the word "boy" amongst themselves. It may be acceptable for a Black or African American and a White with whom that person is acquainted. It would not be acceptable for a White to use the word "boy" with a Black or African American that he or she does not know. It is unlikely for the reverse to be acceptable either. This is similar to the use of the word "nigger". It may be used in a bantering manner between Blacks or African Americans or their close friends. It is not acceptable in transactions between strangers.

As indicated above this was a situation of stress. It was not one involving two friends or close acquaintances. The situation involved two adult males of different races. One of them, Moore, was in a position of power or authority over the other, the Complainant. In this context, use of the word "boy" or the phrase "White ass" was intended to have power and effect. These words were not said with a smile on the face. They had the desired effect of command and resulted in the Complainant leaving without creating a further disturbance. This effect was the result of shock, insult and intimidation. Intimidation does not necessarily have to be physical but can, as in this circumstance, be essentially psychological.

The Complainant has met his burden of proving that he was denied service on the basis of his race in a public place of accommodation or amusement. Having demonstrated liability, it is still the Complainant's burden to prove the existence and amount of any damages to which he may be entitled. The Commission has made awards of out of pocket losses, Krasnick v. Solner and Barbie's House Day School, MEOC Case No. 3190 (July 25, 1989); compensatory damages including damages for emotional injuries: Nelson v. Weight Loss Clinic of America, Inc. et al, MEOC Case No. 20864 (September 29, 1989), Ossia v. Rush, MEOC Case No. 1377 (June 7, 1988), Wilker v. Bermuda's Night Club, MEOC Case No. 3221 (July 10, 1989); and punitive damages: Ossia, (supra), Sprague v. Rowe and Hacklander, MEOC Case No. 1462 (Ex. Dec. December 27, 1991,

Com'n. Dec. February 11, 1994), Balch v. Snapshots, Inc. of Madison, MEOC Case No. 21730 (October 14, 1993). The Complainant claims no out of pocket damages. He seeks an award of compensatory damages for the shock, shame, humiliation and embarrassment that he felt as a result of the incident. He also seeks an award of punitive damages.

One need not prove emotional damages by use of an expert witness. An award of such damages can be supported by the testimony of the injured party alone. Chomicki v. Wittekind, 128 Wis. 2d 188, 381 N.W.2d 561 (Wis. App. 1985). It is also permissible to infer damage from the circumstances surrounding an incident. id. The Complainant testified that he was hurt and upset. He was embarrassed by being made to be the focus of attention. The feelings of humiliation and embarrassment continued for a short period of time. As a result of the incident, he felt that he was not welcome at a place where he used to meet his friends and where he felt accepted. He does not feel comfortable with the idea of returning to the Respondent's place of business. The fact that the Complainant was upset at the time was corroborated by Richard Redman.

Being made the center of attention particularly when the attention is essentially negative is bound to generate feelings of embarrassment and humiliation. Whether these feelings are or should result in an award of damages that is more than nominal is the question before the Hearing Examiner. It is difficult to see that this individual incident supports an award of more than $1,000 (one thousand dollars). The Complainant testified that he had not been denied service or mistreated at the Respondent's establishment in the two or three years prior to May 7, 1991. In the two instances where the Complainant was excluded after May 7, 1991, no racial language was used and on May 27, 1991, other White patrons of the bar were not ordered to leave. Subsequent to May 27, 1991, the Complainant has returned to the bar and has not been bothered. This leads to an inference that the Complainant could return again without further trouble and that his failure to return is a result of his own preference. While the concept of the mitigation of damages is not directly applicable in this situation, the policy behind that doctrine is. The law seeks to have people go on with their lives after an injury and not to hold on and preserve the injury. It is appropriate to compensate the Complainant for his embarrassment or humiliation suffered on May 7, 1991 but it would result in a windfall to increase the damages because the Complainant feels uncomfortable returning to a bar where he has been able to return without further incident. The Hearing Examiner believes that an award of $1,000 (one thousand dollars) is sufficient to compensate the Complainant for his injuries suffered on May 7, 1991. This award is generally consistent with awards made in previous Commission cases. Perez v. Affiliated Carriage Systems, MEOC Case No. 20938 (December 30, 1991), Chung v. Paisans, MEOC Case No. 21192 (February 10, 1993), Sprague v. Rowe and Hacklander, (supra).

The Complainant asks the Hearing Examiner to make an award of punitive damages. The record does not support such an award. In order to award punitive damages there must be a showing by clear and convincing evidence that the Respondent acted intentionally, maliciously or in gross disregard of the rights and feelings of the Complainant. While the Hearing Examiner deplores the language used by Moore during the May 7,1991 incident, the record does not contain clear and convincing evidence that Moore acted intentionally or maliciously. Neither is there evidence that Moore acted with gross negligence or in gross disregard of the rights and feelings of the Complainant. It is the Hearing Examiner's opinion that the primary motivating factor on the part of Moore was anger at seeing the person who he believed had ignored him several days earlier. While his language reflects some racial insensitivity on Moore's part, it seems to be more of a product of temper than true racial animosity. The Hearing Examiner will not award any sum for punitive damages.

It is a long standing policy of the Commission and other similar civil rights agencies to make a prevailing Complainant whole by adding to the damages awarded, an award of the costs and attorney fees reasonably expended in pursuing a claim. Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984), Vance v. Eastex Packaging, MEOC Case No. 20107 (May 21, 1985). Such an order is entered in this case for the same purposes. Time is provided to allow the Respondent to challenge the appropriateness of the amount of the award but not to challenge the basis of the award.

This case represents a regrettable incident for both parties. The language used in describing the motivations of the Complainant in bringing and pursuing this claim seem particularly unwarranted. The Hearing Examiner hopes that the parties will be able to put this matter behind them and proceed with their lives. It would be preferable if the parties could have separately resolved their differences prior to this litigation. Since they were not able to do so, perhaps they will be able to reach some accord now.

Signed and dated this 6th day of April, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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

Steven Meyer 1114 Woodland Way Madison, WI 53711 Complainant vs. Purlie's Cafe South 2102 South Park Street Madison, WI 53713 Respondent	NOTICE OF RIGHT TO APPEAL Case No. 3282

Attached are the Recommended Findings of Fact, Conclusions of Law, and Order of the Equal Opportunities Commission's Hearing Examiner. The Rules of the EOC provide for appeal of this decision in the following terms:

> 10.1 Either party may appeal the recommended findings of fact, conclusions of law, and order of the Commission's designee by filing written exceptions to such findings, conclusions, or order in the EOC offices no later than ten (10) days after receipt of said findings, except that where the tenth day falls on a federal holiday or on a non-business day, the appeal will be accepted on the first business day thereafter.
>
> 10.2 If neither party appeals the recommended findings of fact, conclusions of law, or order within ten (10) days, they become final findings, conclusions and order of the Commission. If an appeal is made to the Commission, it shall consider only the record of the hearing, written exceptions to the recommended findings, conclusions and order, any brief properly submitted before it, and oral arguments presented by the parties at a review hearing scheduled by the Commission. To be properly submitted, briefs by any party must be served upon opposing parties or their counsel and received by the Commission at least ten (10) days prior to any scheduled oral arguments or by another date determined by the Commission. Cross appeals are allowed in accordance with Rule 15.521. Any party requesting a written transcript of the hearing that was held by the Hearing Examiner shall pay the actual cost of preparing the transcript, including copying costs. The Commission shall affirm, reverse or modify the recommended findings, conclusions and order. Any modification or reversal shall be accompanied by a statement of the facts and ultimate conclusions relied on in rejecting the recommendations of the Commission's designee. Such decision of the Commission shall be the final findings of fact, conclusions of law and order of the Commission.

This Notice and the attached Recommended Findings of Fact, Conclusions of Law, and Order have been sent to all parties by certified mail. Any appeal from these Recommended Findings of Fact, Conclusions of Law and Order must be delivered at the offices of the EOC within ten (10) days of the date of receipt. Cross appeals are allowed in accordance with EOC Rule 15.521. Unless timely appealed, the enclosed Recommended Findings of Fact, Conclusions of Law and Order will become final without further notice to the parties.

Signed and dated this 20th day of March, 1995.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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

Steven Meyer 1114 Woodland Way Madison, WI 53711 Complainant vs. Purlie's Cafe South 2102 South Park Street Madison, WI 53713 Respondent	RECOMMENDED DECISION AND ORDER ON ATTORNEY'S FEES Case No. 3282

The Recommended Order entered in the matter on April 6, 1994 awarded the Complainant his costs and reasonable attorneys fees and established a schedule for the submission of a petition for costs and attorneys fees, and for briefs in support of and in opposition to such a petition. On October 5, 1994, the Commission affirmed the Hearing Examiner's Recommended Findings of Facts, Conclusions of Law and Order except that it reduced the damages to be awarded to the Complainant to $750 from $1,000. The Commission Order did not eliminate the Hearing Examiner's Order relating to attorney's fees. On November 2, 1994, the Complainant filed his petition for $4,910.00 in attorneys fees and $119.95 in costs.

The Hearing Examiner has reviewed the petition of the Complainant and affidavits submitted by the Complainant and has considered the arguments advanced by the Complainant and now makes the following:

RECOMMENDED FINDINGS OF FACT - ATTORNEYS FEES

1. On April 6, 1994, the Hearing Examiner entered a recommended Order awarding the Complainant his costs and reasonable attorneys fees in the proceeding. The Commission, on October 5, 1994, entered an order affirming the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order except that it reduced the damages to be awarded to the Complainant from $1,000 to $750.
2. On November 2, 1994, the Complainant filed her petition for costs and attorneys fees, together with affidavits executed by his attorney, Mary E. Kennelly and attorney Jeff Scott Olson, in support of the petition.
3. The Complainant has incurred certain costs in connection with the proceeding, which are as follows:
   a. Photocopying costs in the amount of $8.40
   b. Fees for service of subpoenas in the amount of $64.02;
   c. Telephone expenses in the amount of $5.53;
   d. Witness fees of $42.00.
4. The Complainant's attorney, Mary E. Kennelly, is employed by the firm of Fox and Fox S.C., which was formed in 1991. The firm has a general practice, with an emphasis on civil litigation and particularly civil rights and employment discrimination. Mary E. Kennelly has been licensed to practice law for a number of years and has worked principally in the areas of civil rights and discrimination law since her admission. Ms. Kennelly had sole responsibility for the Complainant's case from its inception until the present.
5. The usual and customary fee charged by Mary E. Kennelly to her individual clients for legal services appears, to have been $110 per hour for the majority of the time covered by this litigation. Her fee has

changed from $100 per hour at the beginning of her representation of the Complainant to $130 per hour for recent charges.

6. The Complainant has filed an itemized bill which reflects that his attorneys expended a total of 43.4 hours representing the Complainant in the proceeding. All but .5 hours attributable to proceedings involving the Equal Rights Division were reasonably expended in representing the Complainant. None of the hours billed by the Complainant's attorney were for duplicative, unnecessary or non-productive time except for the .5 hours attributable to Equal Rights Division.
7. The reasonable hourly rate for the legal services rendered the Complainant by his attorney is $110.00 per hour for the work of Mary E. Kennelly.

RECOMMENDED CONCLUSIONS OF LAW - ATTORNEYS FEES

8. A Complainant, in proceedings before the Equal Opportunities Commission, is entitled to recover costs and reasonable attorneys fees on any significant issue on which she or he prevails. MEOC Rule 17; see also, Vance v. Eastex Packaging, Case No. 20107, (MEOC, 08/29/85) citing Hensley v. Eckerhart, 461 U.S. 424 (1983); C. Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984).
9. One of the fundamental purposes of a fee award is to compensate an attorney for her or his efforts. Accordingly, the fee award should be determined by allowing the attorney to recover a reasonable hourly rate for all time reasonably expended in representing her or his client. Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (en banc).
10. It is appropriate to use an attorney's or law firm's customary billing rate in setting a reasonable hourly rate in awarding fees to that attorney or law firm. See Laffe v. Northwest Airlines, Inc., 746 F.2d 4, 15 (D.C. Cir. 1984).
11. The fees awarded to a prevailing complainant in a civil rights case ought not be limited by any monetary award because substantial non-monetary benefits are also realized by successful complainants, and because an adequate fee is necessary to attract competent counsel in such cases. City of Riverside v Rivera, 477 U.S. 561, 573-78 (1986); Copeland v. Marshall, 641 F.2d at 987.
12. A prevailing party is entitled to her or his costs including a reasonable attorney's fee incurred in support of a fee petition. Bond v. Stanton, 630 F.2d 1231, 1235 (7th Cir. 1980) appeal after remand, 655 F.2d 766 (7th Cir.), cert. denied, 454 U.S. 1063 (1981).

RECOMMENDED ORDER

13. The Respondent is ordered to pay the Complainant's attorney's fees in the amount of $4,719.00.
14. The Respondent is ordered to pay the Complainant costs in the amount of $119.95.

MEMORANDUM DECISION

On April 6, 1994, the Hearing Examiner issued Recommended Findings of Fact, Conclusions of Law and Order determining that the Respondent had discriminated against the Complainant on the basis of his race in refusing him the benefits of a public place of accommodation or amusement. The Hearing Examiner's Order included remedies to be awarded including the reasonable costs and attorney's fees of the Complainant incurred in bringing this action. The Respondent appealed the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order to the Commission. On October 5, 1994, the Commission entered a Final Order affirming the Hearing Examiner's decision in all respects except that it reduced the damages to be paid to the Complainant for emotional distress from $1,000 to $750. The Commission did not eliminate the requirement that the Respondent pay the Complainant's reasonable costs and attorney's fees.

On November 2, 1994, the Complainant filed a Motion or Petition for his costs and attorney's fees. This petition was supplemented by affidavits of Mary E. Kennelly, the Complainant's attorney, and Jeff Scott Olson, an experienced civil rights attorney in the Madison area. The Respondent did not submit any material in opposition to the Complainant's Motion and affidavits.

In general, the Hearing Examiner finds that the Complainant's motion adequately sets out the work performed and the rates charged for that work. The costs expended on behalf of the Complainant are also adequately documented. The Hearing Examiner has only two concerns with the materials submitted by the Complainant.

First, the rate sheets and information submitted by the Complainant indicate that the hourly rate charged by Mary Kennelly increased over the period of her representation. The first approximately five entries reflect an

hourly rate of $100 per hour. The last approximately five entries reflect that Ms. Kennelly's hourly rate had risen to $130 per hour. The vast majority of the time in between these extremes is charged at $110 per hour.

The cases cited above and adopted by the Commission indicate that an attorney is entitled to compensation at a reasonable rate for the market. Usually this rate is calculated by referring to the attorney's usual and customary rate for the representation of individual clients. Chung v. Paisans, Case No. 21192 (Ex. Dec.-Attorney's fees 09/23/93, Ex. Interim Dec.-attorney's Fees 07/29/93). In other words, an attorney should not be either unjustly enriched or punished for representing a civil rights plaintiff. The Complainant's motion raises the question of how to effectuate this policy where the period of representation covers a period of rising fees for the attorney.

The market rate avoids the issue of a windfall by viewing the attorney/client relationship as a contract between two parties. This means that when an attorney quotes a fee at the beginning of his or her representation that fee will carry throughout their relationship on a given matter. Increases in the attorney's hourly rate do not translate into an increase for representation for a given matter.

In this case, Ms. Kennelly's fee increased from $100 at the beginning of her representation to $110 per hour shortly after her representation of the Complainant began. It then increased again at the end of her representation, this time to $130 per hour.

This record presents the Hearing Examiner with a problem concerning how to adequately compensate the Complainant's attorney without unjustly punishing the Respondent for the passage of time. The vast majority of Ms. Kennelly's time was billed at the rate of $110 per hour. The time sheets presented as part of the motion show only approximately five entries each at the $100 per hour and $130 per hour rates. The time spent at the lowest and highest rates just about average themselves out. For purposes of this case alone, the Hearing Examiner will utilize the $110 per hour rate as a reasonable rate for the period of Ms. Kennelly's representation of the Complainant. The $110 per hour rate is used to calculate the reasonable attorney's fee.

The second concern raised by the Complainant's materials comes in the area of work necessary and reasonable. The Hearing Examiner's review of the time listings revealed two entries that are not related to the present case. On November 1, 1991, Ms. Kennelly shows an entry for drafting a complaint for the Equal Rights Division (ERD). A complaint had already been filed with the Commission at that time. A complaint before the ERD was not necessary to prosecution of the complaint before the Commission. At best, the labor would have been duplicative of the work on the Commission complaint. A second entry is also questionable. On January 21, 1992, Ms. Kennelly shows an entry for a letter to Rouleau. There is no person named Rouleau at the Commission and no person named Rouleau involved in this complaint. The ERD has an investigator named Rouleau. Given the fact that the Complainant had attempted to file a complaint with the ERD, it is logical to believe that the Rouleau referred to by Ms. Kennelly is an employee of the ERD and absent any other showing has nothing to do with the current complaint. These two entries were for a total of .5 hours and the Hearing Examiner has reduced the final number of hours to reflect unnecessary nature of these listings.

Except as indicated above, the Hearing Examiner is convinced that the work performed by Ms. Kennelly was reasonable, necessary and not duplicative. Ms. Kennelly represented the Complainant's interests capably and professionally. Her hourly rate seems modest by the standards of the Madison area. See Chung, supra.

Signed and dated this 20th day of March, 1995.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner