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

Otis Flowers 4810 Tocora Ln Madison, WI 53711 Complainant vs. The Charlton Group 644 Science Dr Ste 301 Madison, WI 53711 Respondent	HEARING EXAMINER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 20002129

This matter came before Madison Equal Opportunities Hearing Examiner Clifford E. Blackwell, III, at public hearing on July 31, 2001. The Complainant, Otis Flowers, appeared by his attorneys Gingras, Cates & Luebke, S.C., by Paul A. Kinne. The Respondent, The Charlton Group, appeared by its attorneys Kasdorf, Lewis & Swietlik, by Michael J. Cieslewicz. On the basis of evidence and briefs submitted, the Hearing Examiner now makes his Recommended Findings of Fact, Conclusions of Law and Order, as follows:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Otis Flowers, temporarily resides in Houston, Texas.

2. The Respondent, The Charlton Group, is an employer with its principal location at 644 Science Drive in Madison, Wisconsin. The Respondent also has locations in other Wisconsin cities.

3. The Respondent is a provider of telemarketing services.

4. The Complainant began working with the Respondent in 1996 as a sales manager.

5. The Respondent encountered financial difficulties and reduced the Complainant's salary.

6. The Complainant left the Respondent and found work elsewhere.

7. In late May 1999, the Complainant was rehired by the Respondent as a sales manager at its Madison call center.

8. The Complainant was transferred to the call center in Monroe, Wisconsin.

9. An employee at the Monroe location used racial epithets in front of the Complainant. The Respondent took prompt and appropriate steps in disciplining the employee.

10. The Respondent paid for the Complainant's commuting expenses.

11. The Complainant interviewed for and received an account manager position with the Respondent in Madison. He started working as an account manager on December 17, 1999.

12. The account manager position was a promotion with increased pay and responsibility.

13. In February 2000, the Complainant received a favorable performance review.

14. In May 2000, the Complainant was offered a production scheduler position, which he accepted.

15. In May 2000, a co-worker referred to the Complainant using the word "boy."

16. In May 2000, the Complainant was told to speak to customers with his "white voice."

17. In June 2000, Rod Schwegel, the Chief Operating Officer for the Respondent, told the Complainant that the only reason the Complainant had been hired was because he was Black.

18. The Complainant told his friend Dr. Jack Cipperly about the comments shortly after each occurred.

19. The Complainant complained to multiple supervisors about the racial comments.

20. On June 20, 2000, the Complainant was absent from work. The Complainant called the Respondent to inform them of his absence.

21. On June 21, 2000, the Complainant left a voice mail message for his supervisor Lori Recker, stating that he would be absent from work that day. The Complainant also said that he had called in sick the previous day. The Complainant mentioned that working for the Respondent might be making him sick and that he needed to do some soul-searching.

22. On June 22, 2000, the Complainant returned to work. He was suspended by John Dragisic, the Respondent's president.

23. On June 23, 2000, the Complainant was terminated.

24. The Complainant's salary as of June 23, 2000 was $34,000 per year.

25. The Complainant looked for work immediately after being terminated.

26. Willmar Electric Service hired the Complainant on August 8, 2000.

27. The Complainant was not able to receive matching contributions to Willmar's retirement plan until one year after his hire.

28. The Complainant suffered emotional damages as a result of being terminated.

29. The Respondent did not terminate the Complainant because of poor performance or attendance problems.

CONCLUSIONS OF LAW

30. The Complainant, Otis Flowers, is an individual entitled to the protection of the City of Madison Equal Opportunities Ordinance, Sec. 3.23, M.G.O. because he exercised rights protected by the Ordinance.

31. The Respondent, The Charlton Group, is an employer subject to Sec. 3.23 (2)(m), M.G.O.

32. The Respondent terminated the Complainant in retaliation for his complaints about racial discrimination, in violation of the Madison Equal Opportunities Ordinance.

ORDER

1. The Respondent is ordered to pay the Complainant $3,923 in back pay, no later than 30 days from this order's becoming final.

2. The Respondent is ordered to pay the Complainant prejudgment interest on the above award of back pay. The calculation of interest shall begin as of June 26, 2000 and shall run until the judgment is paid, at the rate of 5% per annum, compounded annually.

3. The Respondent is ordered to pay the Complainant $7,500 in emotional damages, no later than 30 days from this order's becoming final.

4. The Complainant shall submit a petition for his reasonable costs and fees including a reasonable attorney's fee incurred in connection with this complaint. The petition shall be filed with the Commission within 15 days of this order's becoming final. The Respondent shall have 15 days from receipt of the petition to respond. The Complainant shall have 10 days to reply.

MEMORANDUM DECISION

This case presents a classic dispute of events between an employer and an employee that culminated in a termination. The issue at hand concerns whether the Complainant was terminated in retaliation for complaining to his supervisors about alleged racial comments made by Respondent employees. The Ordinance's protections against retaliation are some of its most important, given the expectation that individuals will enforce their rights as private attorneys general.

In 1996, Otis Flowers (the Complainant) was hired by The Charlton Group (the Respondent) to serve as a teleservices representative. The Respondent is a teleservices provider that plans and executes telephone sales campaigns on behalf of clients.

In 1997, the Respondent met with financial difficulties during the Complainant's tenure. As a result, the Respondent reduced the salary of the Complainant and others. This reduction was not due to poor performance. The Complainant's annual salary was cut from $34,000 to $31,000. The Complainant felt better employment opportunities existed elsewhere and left the Respondent.

After working at K-Mart for almost two years, the Complainant returned to the Respondent on May 27, 1999, as a sales manager. The Complainant's duties involved supervision of 20 teleservices representatives. The Complainant worked at the Respondent's call center in Madison. The Complainant was transferred to the Monroe, Wisconsin call center. Monroe is about fifty miles from Madison. The Complainant drove each day to Monroe from his home in the Madison area. The Respondent helped the Complainant pay for the expense of driving his own car to work. While at the Monroe location, the Complainant was called a racial slur by a subordinate.

An account manager position opened with the Respondent. This position called for more responsibility and a pay increase from the sales manager position held by the Complainant. The Respondent offered the account manager position to the Complainant, which he accepted on November 24, 1999. In February 2000, the Complainant received a positive performance evaluation. The evaluation stated that the Complainant was a team player, that he would receive prestigious accounts because of his success, and his grasp of the job was outstanding.

In May 2000, the Respondent needed to fill its production scheduler position. The position was offered to the Complainant, which he accepted. The position normally paid less than what the Complainant was earning as an account manager, but the Respondent kept the Complainant at his prior salary.

It is at this point where the facts of the case come into serious dispute. According to the Complainant, in May and June 2000, he became the target of racially offensive comments. The Complainant claims that Rod Schwegel, the Respondent's Chief Operating Officer, told him that the only reason the Complainant was hired was because he was Black. The Complainant also asserts that a co-worker, Mike Adams, called him "boy" several times. Adams also referred to African-Americans as "brothers."

At a May 2000 meeting with Schwegel and Lori Recker, his supervisor while as a production scheduler, the Complainant claims he was asked to use his "White voice" when dealing with customers. Schwegel allegedly told the Complainant that he was speaking on the phone with a "big, Black, burly man" and that one could discern the caller's race by his voice. Recker told the Complainant that a client of hers was "Black, too." The Complainant complained about the above comments to various supervisors, including Schwegel, Recker, and John Dragisic, the Respondent's president.

The Respondent denies that any racial comments were made other than the Monroe comment. The Respondent also denies that the Complainant complained about any racial comments. The Respondent instead portrays the Complainant as a problematic employee who was finally terminated after abandoning his duties in order to "soul search."

In adjudicating allegations of employment discrimination, the courts and administrative agencies must examine the record for direct and indirect evidence of discrimination. Rosin v. Rite-Way Leasing Company, MEOC Case No. 19982206 (Comm. Dec. 4/22/02, Ex. Dec. 10/3/01). In the

case of indirect evidence of discrimination, the Commission utilizes the burden-shifting paradigm set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed 2d 207 (1981). In this approach, the Complainant must first set forth evidence that by itself is sufficient to demonstrate a prima facie claim of discrimination. If the Complainant meets this initial burden, the burden shifts to the Respondent to present a legitimate, nondiscriminatory reason for its action. The Respondent needs only to articulate, not prove their offered reasons. If the Respondent presents such an explanation for its action, the burden once again shifts, this time back to the Complainant to demonstrate that the reason proffered by the Respondent is either not credible or is otherwise a pretext for discrimination. The ultimate burden of proof remains with the Complainant to demonstrate each and every element of discrimination including the entitlement to damages and the amount of damages.

The elements of a prima facie case of retaliation include showing that the matter complained of is within the subject matter of the Ordinance, that a complainant had reasonable grounds to complain that a complainant made complaints to appropriate Respondent personnel, and reason to believe the retaliatory action occurred as a result of the complaint. The Complainant satisfies these elements.

First, there is no doubt that a complaint regarding discrimination falls under the purview of the Ordinance. The Complainant must next present evidence that shows that he had reasonable grounds to complain of discrimination. Much of the Complainant's prima facie case requires a finding that his testimony is credible.

In almost all claims of discrimination, there is a question of credibility between the parties. In this case the question of liability depends upon whether the Hearing Examiner believes the testimony of the Complainant and his witness or that of the various witnesses for the Respondent.

Credibility determinations are not necessarily a "winner takes all" proposition. The Hearing Examiner may find that a witness' testimony is credible as to some points and not as to others. Similarly, some witnesses called by a party may be credible, while others are not.

Credibility determinations may be made on the basis of a witness' demeanor, by examining a witness' testimony in light of common sense and experience or both. One might conclude that a witness whose physical demeanor is nervous and evasive is uncomfortable with his or her testimony and therefore should not be given much credibility. Nervousness can be inferred from a witness' jittery movements, unwillingness to look directly at the person questioning him or her or by repeated glances towards counsel or another for support. Testimony delivered with an unusually dry mouth or in very low volumes or in an evasive manner can be signs of a lack of veracity. However, some witnesses, depending upon experience and training can deliver even obviously false testimony without demonstrating any of the outward signals for which the Hearing Examiner might look. Also, simply because a witness displays some or even many signs of nervousness, it does not necessarily mean that he or she is lying or otherwise avoiding the truth.

In the present case, the Complainant's testimony was delivered in a quiet and somewhat hesitant manner. When questioned by counsel for the Respondent, the Complainant was somewhat defensive and occasionally argumentative. From the Complainant's demeanor and his reaction to questioning on the stand, the Hearing Examiner cannot make a clear determination of credibility.

There was little to strongly suggest that the Complainant should be believed over the Respondent, but there was also little to suggest that his reactions were outside of the norm for a party/witness testifying after the passage of some time.

One thing that does give support for a finding of credibility on the part of the Complainant is the testimony of Jack Cipperly. Cipperly is a long-time friend of the Complainant who testified that the Complainant had recounted the Complainant's experiences of harassing statements in the spring of 2000. Though Cipperly is a close personal friend of the Complainant, there was nothing in his testimony or in his demeanor to suggest that he would lie to benefit his friend.

Accepting that the Complainant told Cipperly that he had been the recipient of certain harassing statements, it does not necessarily follow that the Complainant might not have been lying to Cipperly. However, Cipperly clearly believed the Complainant and unless, the Complainant has greater abilities to dissemble than he displayed on the witness stand, it seems unlikely that he lied to Cipperly. It is not the experience of the Hearing Examiner that people lie and conspire with individuals who have assumed a mentor's status in ones life. It seems clear that Cipperly held an important leadership role in the Complainant's life and the Complainant is unlikely to have lied to him.

Cipperly's testimony corroborates the Complainant's testimony on a critical point. This corroboration of the Complainant’s position necessarily casts doubt on the Respondent's denials that the harassment occurred at all. If the Respondent's denials of harassment are less likely because of Cipperly's testimony, an inference can be drawn that its denials that the Complainant notified supervisors of his concerns are not true.

Rod Schwegel's testimony presents some interesting questions for the Hearing Examiner. Schwegel's training and major job experience is as a salesman and supervisor of salespeople. The smoothness and the openness of Schwegel's testimony can either be a reflection of his veracity and his comfort with the truth or be a testament to his ability to "sell" a package or position. The Hearing Examiner finds Schwegel's testimony that he liked the Complainant as a person and that he recruited him to work with the Respondent and took him "under his wing" to be generally credible.

However, Schwegel's denial that the Complainant had experienced any harassment because of his race, that the Complainant did not complain about such harassment and that the Complainant was an affirmatively bad employee needing to be terminated is simply not credible on this record.

In the approximately eight months preceding the Complainant's termination, the Respondent promoted the Complainant from the Monroe office to a position with higher pay and responsibility in Madison, issued its only performance evaluation which described the complainant in glowing terms and sought his assistance to fill a need in their supervisory structure while retaining his salary. These are not the actions of an employer with significant concerns about an employee's performance or future with the employer. Had the Complainant been the type of disruptive and troublesome employee described by Schwegel and other witnesses at the hearing, the Hearing Examiner would have expected to see even a minor degree of documentation of the problems and concerns. In this regard, there is but one item of discipline issued to the Complainant on the day prior to his termination. This has the feel of a last minute attempt to create a record to support an action that has already been decided upon.

With respect to the testimony of Lori Recker and John Dragisic, there was little in their demeanor for the Hearing Examiner to make a determination of credibility. As with Schwegel, the doubts about their credibility arise when examining their explanation for the Complainant's termination in light of the lack of documentation in the Respondent's files. Dragisic particularly damages the Respondent's position when he testified that the Complainant's difficulties as employee began in the last quarter in 1999. Dragisic's testimony flies in the face of the fact that the complainant was promoted in November of 1999 and in February of 2000, the Complainant received an extremely good performance evaluation. There is no evidence to support Dragisic's conclusion that while the company was apparently happy with the Complainant's performance, Dragisic had some knowledge of performance shortcomings on the part of the Complainant. Even if the Hearing Examiner accepts the Respondent's story that the February 2000 evaluation somehow was delayed and actually reflects the Complainant's performance at an earlier time, it appears that it still contradicts Dragisic's assertion that the Complainant's performance began to fall in the last quarter of 1999. How much earlier a period is the February evaluation supposed to reflect?

Given the contradictions in the testimony of the Respondent's primary supervisors, and the lack of documentary support where one would expect a business in the present to have documentation, the Hearing Examiner concludes that the Complainant's testimony is more credible than that of the Respondent.

Given that the Complainant's testimony is more credible than the Respondent's, the Hearing Examiner cannot accept the Respondent's claims that none of the alleged comments were actually said, or remained unreported. Furthermore, the Complainant's claim that he gave notice to the Respondent on the two days alleged to have been no call/no show days is held as being true.

The record indicates that Respondent employees, both colleagues and higher management, made racist comments to the Complainant. These comments range from the nearly innocuous to evidence of blatant tokenism. In a different context, using words such as "boy" or "brothers" or identifying someone as being black might not be the material of discrimination.

However, given the facts there can be no doubt that the comments arise out of unpardonable racial insensitivity. The word "boy" has been uniquely used to demean African-American males for many generations. The same can be said about describing a general group of African-Americans as "brothers." Likewise, being told that one's normal speaking voice is less desirable than mimicry of the voice of another race can only be viewed as disparaging.

The Complainant asserts that Rod Schwegel told him that he was hired only because he was Black. Even if comments like the above were made as jokes, they are inappropriate and potentially actionable under the Ordinance and other civil rights laws.

Next, the Complainant must demonstrate that he complained to the Respondent. The Complainant's testimony at hearing is all the evidence he has to show he reported the discriminatory comments to his superiors. The Respondent counters with a full denial that any such reports occurred. For the purposes of the prima facie case, the Hearing Examiner deems the Complainant to be more credible and so the Complainant satisfies the second element.

Lastly, the Complainant must demonstrate there is reason to believe the retaliatory action occurred because of the discrimination complaint. The Complainant points to the fact that he

received no negative evaluations or written condemnations prior to his complaints. The record shows that the Complainant was part of the team until his complaints set him apart from his non-complaining colleagues. The Complainant was terminated less than one month after his complaints. The timing of the events helps the Complainant satisfy the third element of his prima facie case.

The burden next shifts to the Respondent to articulate a legitimate, nondiscriminatory reason for the termination. The Respondent's burden is one of articulation, not proof. The Respondent successfully fulfills this burden by offering a nondiscriminatory reason for the termination. The Respondent alleges that the Complainant was often late and in June 2000, missed work without calling in. The Commission has recognized that regular attendance is a vital ingredient to a productive workplace. Maas v. Woodman's Food Markets, Inc., MEOC Case No. 21724 (Ex. Dec. 8/4/94); Oviawe v. Madison United Hospital Laundry. Ltd., MEOC Case No. 20723 (Comm. Dec. 8/3/90, Ex. Dec. 9/29/89).

The Respondent also contends that the Complainant's poor performance was a factor in his dismissal. The Respondent produced testimony from supervisors and co-workers that indicated the Complainant possessed a bad attitude, was unwilling to help other employees, and generally performed poorly. The Respondent claims that the Complainant was moved from job to job in order to reduce his contact with other people. Poor job performance may be a legitimate, nondiscriminatory reason for termination. Stinson v. Bell Laboratory, MEOC Case No. 20762 (Comm. Dec. 12/14/89, Ex. Dec. 3/17/89).

When the Respondent satisfies its burden of articulating a legitimate reason for an adverse action, the Complainant may still prevail if he can show the reason is pretextual or is not credible. The Complainant successfully does this by virtue of Respondent documents that reflect well upon the Complainant and the absence of documentation that reflect poorly upon the Complainant.

The Respondent claims that the Complainant's job performance was poor and that in multiple positions, the Complainant demonstrated an inability to work with others. The record indicates that the Respondent believed the Complainant to be an excellent worker. The Complainant received one performance evaluation while with the Respondent, during his tenure as an account manager. The evaluation spoke glowingly of the Complainant's enthusiasm, ability, and willingness to help team members. The record also contains a memorandum and an email from a superior indicating the Complainant to be a positive asset to the Respondent.

The Respondent explains the performance review by indicating that it was written months before its February 2000 date and that the Complainant's performance slipped considerably after the evaluation's true date. Even if the evaluation was written prior to the specified date, it remains unexplained how an employee given unlimited praise could descend into one that merited termination in a brief span of time.

The other factor that shows the Respondent's reasons to be pretextual is the almost complete lack of any documentation in the record that indicates the Respondent was a poor employee. The record contains no negative performance evaluations. The record lacks any documentation of a poor attitude, an unwillingness to help others, and general incompetence that supports the testimony given at hearing. It is unusual and unlikely that an employee with so many problems would not have contemporaneous records demonstrating poor performance.

The only documentation that supports the Respondent's reasons is a Disciplinary Action Form, dated June 23, 2000. This form lists a variety of problems, from the Complainant's lateness, combativeness, and a general inability to perform his assigned duties. The disciplinary form was presented to the Complainant on the same day upon which he was terminated. The timing of the disciplinary form gives it the appearance of a last-minute justification of the Complainant's termination.

The Respondent states that the reason there was no documentation of the Complainant's shortcomings is because the Respondent had no time to write them because of the company's struggle to remain financially viable. An employer's financial situation does not excuse it from maintaining records, especially regarding an area as crucial as employment. Whether or not the Respondent could not spare the time to document employee behavior does not change the fact that there is little credible evidence to support the Respondent's articulated reasons. The Respondent's concern about financial viability serves to supplement the idea that the Respondent sought to terminate the Complainant under manufactured pretense in order to protect itself from possible monetary damages due to a discrimination suit.

Given the favor in which the Complainant seemed to find himself up until the spring of 2000, one must ask what circumstance occurred or changed to result in the Complainant's termination at the end of June 2000. On this record, the one glaring cause of a change in the Complainant's treatment is his complaints of discrimination. While the Respondent's witness deny that the Complainant made such complaints, those denials must be considered to lack credibility and to be a pretext for the Respondent's retaliatory termination. There is nothing in the record to credibly explain the Complainant's change in fortune other than his complaints of discrimination. There are no written warnings of performance concerns, no warnings about attendance other than the one of dubious provenance issued the day before the Complainant's termination. The Complainant's charges of discrimination indicated that he was no longer a member of the team and that he had concerns that could be disruptive to the Respondent. Since some of the people against whom the Complainant made complaints were supervisors, his charges would be embarrassing and potentially expensive to the Respondent. There is no doubt that other employers in a similar situation have taken the exact same action. It is because of that history of action that the ordinance protects employees who report potentially discriminatory conduct.

Moreover, if the Complainant's performance was sub par in a variety of his positions with the Respondent, it remains unexplained why he was given new positions and higher pay rather than any kind of recorded discipline.

While the Respondent is under no strictly legal requirement to provide the Complainant with a warning of potential dismissal, the Hearing Examiner sees the fact that no such warning was given as demonstrating a lack of credibility with respect to the Respondent's proffered reasons. The lack of a warning further demonstrates that the reasons proffered by the Respondent may well be a pretext for an actually discriminatory motive.

The ordinance requires the Hearing Examiner to make a proposed Order remedying the effects of discrimination/retaliation if the Hearing Examiner finds that a violation of the ordinance has occurred. M.G.O. 3.23(10)(c)(2)(b). The purpose of the Order is to place the prevailing Complainant in at least as good a position as he or she would have been had the discrimination not occurred. This is called a make whole remedy. The ordinance does not contemplate punishing a

Respondent except as provided for in the civil forfeitures portion of the ordinance. M.G.O. 3.23(10)(c)(2)(b); M.G.O. 3.23 (10)(c)(5)(b).

As with liability, the Complainant carries the burden of proof with respect to each element of damages to which he or she asserts an entitlement. This burden must be met by the greater weight of the credible evidence. In an employment case, the ordinance specifically authorizes awards of back pay and front pay with back pay being limited to a period of two years.

The Commission has regularly awarded prejudgment interest on awards of back pay. Teich v. Center for Prevention and Intervention, MEOC Case No. 20002153 (Ex. Dec. 6/12/02, On Fees 8/5/02). The prejudgment interest component of an award of damages is intended to compensate a prevailing Complainant for the lost opportunity costs associated with back pay. The Commission has utilized five percent compounded annually to compensate for the lost opportunity or time cost of lost wages. It is arguable that it is the Complainant's burden to establish the proper percentage to be utilized. However, the Commission has placed the burden on the Respondent to demonstrate that a rate other than the five percent customarily used is more appropriate.

The Commission has also regularly made awards of damages to compensate prevailing Complainants for the humiliation, embarrassment and emotional injuries often associated with acts of discrimination/retaliation. Morgan v. Hazelton Labs, MEOC Case No. 21005 (Ex. Dec. 4/2/93). Williams and Oden v. Sinha et al., MEOC Case No. 1605 (Comm. Dec. 7/25/96, Ex. Dec. 12/23/96). Commission awards have varied greatly depending upon the specific facts of the claim and proof.

In the present case, the credible evidence demonstrates that the Complainant, at the time of his termination, was making $34,000 per year. He was out of work from June 26, 2000 until August 8, 2000 when Willmar Electric Service hired him. This indicates that he was out of work for six weeks. At a weekly salary of $653.85, this would mean that the Complainant's back pay is $3,923.

The Complainant clearly mitigated his damages by beginning his job search almost immediately after his termination. He was quite successful and found employment in a matter of six weeks and found employment that paid him at least as well as he was being paid by the Respondent. Since the Complainant had no continuing wage loss, front pay is not at issue in the present case.

The Complainant seeks compensation for contribution matches that the Respondent was making to the Complainant's retirement plan. He seeks these payments for the six-week period of his unemployment and for the one-year period after his employment by Willmar Electric Service. Willmar's retirement plan does not match employee contributions for the first year of employment.

While customarily these forms of compensation are the type that the Commission might award in order to assure a make whole remedy, the record in this case is not sufficiently clear to permit calculation of the amounts necessary to make the Complainant whole. There is no certainty that the Complainant would have continued to make contributions to the plan that would trigger the Respondent's obligation to match the Complainant's contribution. Equally, there is nothing in the record demonstrating that the amount to be matched by Willmar bears any relationship to the amount the Respondent might have paid during the same period. Finally, there is no calculation demonstrating what amount of money paid now would compensate the Complainant for the lost matching given the ups and downs in the market and differing rates of return.

The award of prejudgment interest will run from June 26, 2000 until the judgment is paid. As noted above, such an award is necessary to compensate the Complainant for the lost time value of the wages to which he was entitled.

The Commission cannot and does not presume that all persons who had been discriminated or retaliated against experience emotional distress injuries or to the extent that they do, that they experience such injuries to the same degree or in the same manner. In Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. on liability 2/10/93, on attorney's fees 7/29/93 and 9/23/93), the Commission found that the Complainant, though sufficiently annoyed by the discrimination to pursue a complaint before the Commission, had not demonstrated any great degree of injury and accordingly was awarded only $750.

At the other end of the spectrum, in Leatherberry v. GTE Directories Sales, MEOC Case No. 21124 (Comm. Dec. 4/14/93, Ex. Dec. 1/5/93). The Commission awarded the Complainant $25,000 as a result of the testimony provided by the Complainant and her husband about the devastating effect of the Respondent's actions on her and her future prospects in the company. The Commission has made many awards falling between these two extremes. Meyer v. Purlie's Cafe South, ($750) MEOC Case No. 3282 (Comm. Dec. 10/5/94, Ex. Dec. 4/6/94 on attorney's fees: Ex. Dec. 3/20/95); Nelson v. Weight Loss Clinic of America, Inc. et al., ($3,500) MEOC Case No. 20684 (Ex. Dec. 9/29/89); Williams and Oden v. Sinha et al., ($15,000) MEOC Case No. 1605 (Comm. Dec. 7/25/96, Ex. Dec. 12/23/96).

In the present case, it is difficult to separate the injuries done to the Complainant by the acts of harassment in May of 2000 and his termination in June of that year. On this record, the Complainant is not entitled to damages for the allegedly discriminatory conduct occurring prior to the Complainant's termination because the Complainant dismissed those claims of discrimination prior to hearing. The Hearing Examiner is left with the difficult job of making an award reflecting the emotional distress resulting from the Complainant's termination separate from those injuries or damages suffered prior to termination.

Retaliation is a particularly disturbing form of discrimination. The law, and often an employer's policies, encourages individuals to call discrimination and other forms of unfair treatment to the employer's attention or to file complaints with appropriate agencies in order to allow prompt action to correct problems and to maintain a safe and productive working relationship. When an employee does exactly what is expected or required of him or her and then is abruptly punished for that conduct, it creates an atmosphere of distrust of authority and the system that shakes an individual to his or her core.

While discrimination may in some circumstances be almost unintentional, it takes deliberate action and intent to retaliate. This targeting of an individual, particularly while that employee already feels under attack, creates long lasting injuries that money can only slightly recompense.

In this case, The Complainant was already feeling attacked as evidenced by his days off and the telephone message he left in the days immediately before his termination. He indicated that he thought the conditions at work might be making him sick and he needed to do some soul searching. It is in this already stressed atmosphere that the Complainant was terminated for doing what he was expected to do.

Given the totality of the circumstances, the Hearing Examiner would be inclined to make an award of $15,000 to compensate the Complainant for the harassment and his retaliation. However, given the Complainant's dismissal of the harassment claims, the Hearing Examiner is compelled to reduce the award to $7,500. This does not reflect a straight or automatic reduction for dismissal of the claims of harassment. The Hearing Examiner finds that the record in this matter supports an award of $7,500. Though the Complainant's testimony on this point was neither eloquent nor exhaustive, it did convey to the Hearing Examiner the degree of the Complainant's pain and humiliation at having been treated as he was.

The Complainant seeks an award of punitive damages for the Respondent's conduct. The Commission has made awards of punitive damages in the past in very limited circumstances. Ossia v. Rush, MEOC Case No. 1377 (Ex. Dec. 6/7/88); Balch v. Snapshots, Inc. of Madison, MEOC Case No. 21730 (Ex. Dec. on liability 10/14/93, on damages 12/9/93). Amendments to the ordinance since those decisions cast significant doubt on the Commission's authority to make such awards.

Even if the Commission has such authority, the Complainant's burden of proof rises from the greater weight of the evidence to the higher clear and convincing standard. On this record, the Hearing Examiner cannot conclude that the Complainant has met this higher burden of proof to demonstrate that punitive damages are appropriate. It is the Hearing Examiner's opinion that retaliation claims because of their deliberate and intentional nature come close to meeting the standard for intentional or malicious conduct. However, this record lacks any evidence upon which a finder of fact could determine an appropriate award that would prevent a reoccurrence of retaliation or serve to warn other similarly situated employers not to retaliate against employees exercising rights protected by the Ordinance.

Finally, reasonable attorney's fees and costs are appropriate awards in this instance. Teich v. Center for Prevention and Intervention, MEOC Case No. 20002153 (Ex. Dec. 6/12/02, On Fees 8/5/02); Oviawe v. Madison United Hospital Laundry. Ltd., MEOC Case No. 20723 (Comm. Dec. 8/3/90, Ex. Dec. 9/29/89); Gardner v. Wal-Mart Vision Center, MEOC Case No. 22637 (Ex. Dec. on Attorney's Fees 6/1/01). The Complainant will be asked to make a specific claim for a reasonable attorney's fees and costs at a later date.

For the foregoing reasons, the Hearing Examiner concludes that the Respondent terminated the Complainant in retaliation for complaining about racial discrimination, in violation of the Madison Equal Opportunities Ordinance.

Signed and dated this 17th day of September, 2002.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

CEB:15