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

Dennis J Goad 11501 E Desert Willow Dr Scottsdale AZ 85255 Complainant vs. Ahrens Cadillac/Oldsmobile Inc 1201 Applegate Rd Madison WI 53713 Respondent	COMMISSION'S DECISION AND FINAL ORDER Case No. 20022061

BACKGROUND

On April 17, 2002, the Complainant, Dennis J. Goad, filed a complaint with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, Ahrens Cadillac and Oldsmobile, Inc., terminated his employment because of the Complainant's sexual orientation in violation of the Equal Opportunities Ord. Sec. 3.23(8) Mad. Gen. Ord. The Respondent denied that the Complainant's sexual orientation played any role in the decision to terminate his employment. The Respondent contends that the Complainant's conduct created a problem of a lack of respect for supervisors in the Respondent's workplace.

Subsequent to an investigation, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant on the basis of his sexual orientation (homosexual/gay) when it terminated his employment. Efforts to conciliate the allegations of the complaint were unsuccessful and the complaint was transferred to the Hearing Examiner for a hearing on the complaint.

The parties engaged in routine pre-hearing procedures including discovery. The hearing was initially scheduled to be held on May 3, 2004. Due to a family emergency affecting Respondent's counsel, hearing was moved to July 1, 2004. Subsequent to hearing and to the opportunity for the submission of briefs, the Hearing Examiner, on August 8, 2006, issued his Recommended Findings of Fact, Conclusions of Law and Order. The Hearing Examiner concluded that the Respondent had terminated the Complainant for a legitimate, nondiscriminatory reason, and that discrimination on the basis of sexual orientation played no part in the Respondent's action. The Complainant timely appealed the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order to the Commission.

The Commission provided the parties with the opportunity to submit written arguments in support of their respective positions. Subsequent to the submission of briefs, the Commission met on December 14, 2006 to consider the Complainant's appeal. Participating in the Commission's considerations were Commissioners Bayrd, Brandon, Holmes-Hope, McDonnell, Selkowe, Solomon, Steward, Woods and Zipperer.

DECISION

The Commission adopts the Recommended Finding of Fact, Conclusions of Law and Order issued by the Hearing Examiner on August 8, 2006 and incorporates them by reference as if fully set forth herein. Review of the record demonstrates that the Hearing Examiner's conclusions are fully supported.

ORDER

For the foregoing reasons, the complaint is hereby dismissed.

Joining in the Commission's decision are Commissioners Bayrd, Brandon, Holmes-Hope, McDonnell, Solomon, Steward, Woods and Zipperer. Opposing the Commission's decision is Commissioner Selkowe.

Signed and dated this 26th day of December, 2006.

EQUAL OPPORTUNITIES COMMISSION

Bert G. Zipperer
President

cc: Michael A Whitcomb
William E McCardell

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Dennis J Goad 11501 E Desert Willow Dr Scottsdale AZ 85255 Complainant vs. Ahrens Cadillac/Oldsmobile Inc 1201 Applegate Rd Madison WI 53713 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 20022061

On July 1, 2004, the above-captioned matter came before Madison Equal Opportunities Commission Hearing Examiner Clifford E. Blackwell, III for a hearing on the merits of the complaint. The hearing was held in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd., Madison, WI. The Complainant, Dennis J. Goad, appeared in person and by counsel, Michael A.I. Whitcomb. The Respondent, Ahrens Cadillac and Oldsmobile, Inc., appeared by its representative, D. J. Ahrens, and by its counsel, William E. McCardell.

Based upon the record in this matter, the Hearing Examiner now makes his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. The Complainant is a gay/homosexual male. At the time of hearing, he resided in Arizona.
2. The Respondent, at all times relevant to this matter, operated an automobile dealership with its principle place of business at 1201 Applegate Road within the City of Madison.
3. The Complainant began employment with the Respondent on or about May 12, 1999. He received pay raises and occupied the position of Assistant New Car Sales Manager.
4. The Complainant's sexual orientation was known by the Respondent for much of, if not all of, the Complainant's employment.
5. The Complainant's life partner was also employed by the Respondent. The Complainant and his partner accompanied each other to various social events sponsored by the Respondent both on and off the premises. This included a party of one of the members of the Board of Directors. This person was the mother of the Respondent's Manager, D. J. Ahrens.

6. The Respondent regularly sent employees to attend the National Automobile Dealers (NADA) convention. In 2002, the convention was held in New Orleans, Louisiana. It ran from approximately January 26, 2002 through January 29, 2002.
7. The Respondent sent the Complainant, Rebecca Adler, Bob Larson and several other employees to the convention. Employees attending the convention could take along a friend or family member to enjoy the time. Several individuals, including the Complainant, Adler and Larson went to New Orleans a day or so early.
8. The period before Mardi Gras features street activity including "flashing" to gain strings of beads. Flashing involves pulling up one's shirt or lowering other clothing for the entertainment of those in bars, on balconies, etc. To show their appreciation, bystanders or observers throw strings of beads and other trinkets.
9. The Complainant engaged in flashing the crowd by pulling up his shirt on the day before the convention was to begin. Larson, a heterosexual male, Adler, a heterosexual female, and others did too. In one particular incident, the Complainant lifted his shirt but was encouraged by the crowd to drop his pants. Though the Complainant had no intentions of exposing himself as requested by the crowd, a nearby New Orleans police officer warned the Complainant not to drop his pants or risk arrest.
10. The above described incident was observed from a distance by Adler, her friend, and Larson. They could not hear the discussion between the Complainant and the police officer, but from the general circumstances, Adler believed that the Complainant had, in fact, exposed his genitalia to the crowd.
11. At some point after observing the Complainant and the police officer, Adler lost her purse or identification. The next day she called the Respondent's business office to obtain necessary new identification and tickets. She told whomever she spoke with about "flashing" and said that everyone was doing it. She specifically stated that the Complainant had dropped his pants and that she had exposed her breasts.
12. At about the same time, Adler also spoke with D. J. Ahrens and indicated pretty much the same thing. Though Ahrens did not admonish Adler at that time, it was an item of concern to him. This concern increased as rumors of Adler's and the Complainant's conduct began to circulate in the workplace.
13. Ahrens participated in an informal group of automobile dealership owners to exchange ideas and information about trends and issues of interest to such individuals. In the late fall or early winter of 2001/2002, Ahrens attended such a meeting, the topic of which was the importance of a zero tolerance policy for sexual harassment in the workplace.
14. On January 31, the Complainant and other employees who had attended the NADA convention returned to work. Adler and the Complainant was individually called to Ahrens' office. They were both separately presented with a previously prepared termination statement setting forth the conduct in New Orleans that formed the basis for their terminations. Neither Adler nor the Complainant were given an opportunity to substantially review the termination document or to seek advice from someone else.
15. The Complainant signed the termination document because he was concerned that not doing so would jeopardize wages and benefits owed to him by the Respondent.
16. Subsequent to his termination, the Complainant sought work and after a period of time was employed by Middleton Ford. While the compensation arrangements were different from those at the Respondent's, the Complainant's new employer was happy to have him as were his co-workers.
17. On April 17, 2002, the complaint in this matter was filed. Articles in local newspapers and on local broadcast media began to appear. The Complainant became uncomfortable with the notoriety and felt that it was affecting his relationship with his co-workers at Middleton Ford and his friends and family. Despite his employer's attempts to assist the Complainant, the Complainant felt compelled by his notoriety to quit and decided he needed to relocate to another part of the country and start over. He decided to move to Arizona.
18. While packing to leave the Madison area in July of 2002, D. J. Ahrens visited the Complainant to express his regrets for the Complainant's termination. Accounts of what was said at this meeting are contradictory.
19. On or about September 16, 2002, the Complainant sent Ahrens' mother an angry letter in an attempt to resolve the outstanding complaint. At best, the letter is intemperate in its language and demands. The Complainant sent the letter to Ahrens' mother because she appears to have been referenced as the cause of his termination during the July, 2002 conversation between Ahrens and the Complainant.

CONCLUSIONS OF LAW

1. The Complainant, a gay or homosexual male, is a member of the protected class "sexual orientation" and is entitled to the protection of the Equal Opportunities Ordinance MGO 3.23 et seq.

2. At all times relevant herein, the Respondent was an employer within the meaning of the Equal Opportunities Ordinance and is subject to its requirements not to discriminate.
3. The Respondent's explanation for the termination of the Complainant, that it needed to maintain higher standards of conduct for managers to promote a healthy working environment, represents a legitimate, nondiscriminatory reason for terminating the Complainant after erroneously receiving reports of the Complainant's exposing his genitalia in public in New Orleans.
4. The Respondent did not violate the Equal Opportunities Ordinance when it terminated the Complainant's employment.

ORDER

1. The complaint is hereby dismissed.
2. The parties shall bear their own costs.

MEMORANDUM DECISION

This case presents an interesting application of the analytical approaches for cases of both direct evidence of discrimination and indirect evidence of discrimination. In a claim utilizing direct evidence of discrimination, one applies the evidence to the ultimate question of whether one's protected classes played any motivating factor in an adverse action. United States Postal Service Board of Governor's v. Aikens, 460 U.S. 711 (1983).

Today, however, most claims are presented by utilization of indirect evidence of discrimination. In addressing matters of proof via the indirect route, the Commission utilizes the McDonnell Douglas/Burdine burden shifting approach. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). In this approach, the Complainant must first present sufficient evidence to establish a prima facie claim of discrimination. The basic prima facie claim for a case of discrimination consists of three elements. First, the Complainant must demonstrate that he/she is a member of a class protected by the ordinance. Second, the Complainant must demonstrate that he/she has experienced an adverse action. Finally, the Complainant must be able to draw a connection between the adverse action and his or her membership in his/her protected class.

If the Complainant presents sufficient evidence to establish the elements of a prima facie claim, the burden shifts to the Respondent to present a legitimate, nondiscriminatory reason or explanation for its actions. This is not a burden of proof, but merely one of articulation. Burdine, supra.

Assuming that the Respondent sets forth a legitimate, nondiscriminatory reason for the actions leading to the complaint, the burden shifts back to the Complainant. The Complainant may still prevail in the face of the Respondent's articulated explanation, if he or she can demonstrate that the reason proffered by the Respondent is either not credible or otherwise represents a pretext for a discriminatory motive.

This case has elements of both direct and indirect proof. The direct evidence offered by the Complainant is an alleged admission of discrimination on the part of the Respondent's manager, D. J. Ahrens. According to the Complainant, Ahrens apologized for having to fire the Complainant, but that his mother required it because she didn't approve of his (the Complainant) homosexual lifestyle. This statement was allegedly made in July, 2002, while the Complainant was preparing to move out of Madison.

The Respondent denies that such a statement was made. The record indicates that there were no witnesses to this alleged statement.

If the Hearing Examiner finds the Complainant's allegation credible, it would most likely dispose of the issue of liability. If the Hearing Examiner concludes that either the Complainant's version is not credible or that the Hearing Examiner cannot determine the truth or veracity of the parties with respect to this statement, the claim must be analyzed using the indirect method of proof.

On this record, the Hearing Examiner cannot determine which of the competing versions of this conversation is more likely to be accurate. The Hearing Examiner generally found both sides to be credible within certain limitations. The Complainant was clearly deeply affected by his termination and the subsequent publicity that the event and this complaint generated. However, the Complainant's testimony was subject to exaggeration

and a lack of perspective. There was also a tendency to be unable to see how his own actions may have had adverse consequences.

Specifically, when questioned about the economic damages that he (the Complainant) suffered, he included such items as the cost for tranquilizing cats for his relocation to Arizona, as well as a laundry list of expenses that seemed to have little or no connection with the Respondent's alleged discrimination. Similarly, the Complainant seemed to be unable to see how his significant other's going to the press with the Complainant's allegations would increase his notoriety and raise his public profile. This creates some issues of credibility for the Complainant in the mind of the Hearing Examiner.

Ahrens too generally seemed sincere, but presents himself in a manner that permits the Hearing Examiner to believe that he might have made such a statement. Ahrens appears to be a person who wanted to be well liked by all of his employees. The company seems to have encouraged a loosely professional environment that included relaxed outings and events at the dealership. From his testimony, Ahrens clearly wanted to be friends with the Complainant and his partner. Ahrens testified to several social activities in which he participated with the Complainant, both on and off work. These included going to a bar(s) and inviting the Complainant and his partner to a party for Ahrens' mother.

The final piece of evidence in the record that has a bearing on this specific allegation relates to a letter that the Complainant appears to have sent to Ahrens' mother forcefully encouraging her to settle his claim. It is hardly an exaggeration to suggest that the letter as testified to has the feel of bribery or extortion. This letter was allegedly sent on or about September 17, 2002.

This letter creates and presents some interesting issues. In support of the Complainant's position, even overlooking the outrageous demands, it can arguably support the Complainant's position that the earlier conversation with Ahrens occurred. If Ahrens had not told the Complainant that it was Ahrens' mother making the decisions, how would the Complainant know to send his demand to her?

In response to this question, the record reflects that even though Ahrens was the manager, he reported to a Board of Directors, including his mother. It seems clear that Ahrens' mother exercised substantial control over the company's operation. It would be natural for the Complainant to contact Ahrens' mother given her position on the Board. It appears that this fact was known generally at the dealership and the Complainant presents no credible testimony that he did not know of her position.

Given the record as a whole, the Hearing Examiner must find that the Complainant fails to establish that it is more likely than not that the statement he attributes to Ahrens regarding the reason for the Complainant's termination was made. Despite the Hearing Examiner's belief that Ahrens could have made the statement, the Complainant's conduct and tendency to exaggerate create sufficient doubt that is not overcome in the record. Additionally, the possibility that Ahrens could have made the statement falls substantially short of it being more likely than not that he did make it. As stated previously, this determination does not dispose of this complaint. The Hearing Examiner will apply the method of indirect proof to the record.

Before moving to the application of the law, the Hearing Examiner will recount the facts both general and specific.

The Complainantt is a gay or homosexual male. He has made his living for the greater part of his life selling cars. He began his employment with the Respondent on or about May 12, 1999. Over time, he quickly advanced and by the beginning of 2002, he occupied the position of Assistant Manager for new car sales.

The Respondent is or was a car dealership located within the City of Madison. It was managed by D. J. Ahrens. Ahrens wished to operate a professional, but relaxed environment. The Respondent sponsored various social occasions on and off the premises for the employees.

Each year the Respondent sent several employees to the National Automobile Dealers Association (NADA) convention. Sometimes D. J. Ahrens attended and others he did not. In 2002, the NADA convention was held in New Orleans in the later part of January. Ahrens did not attend this particular convention.

Attendance at the NADA seems to have been considered more of a social opportunity with few, if any, work expectations. Spouses routinely were allowed to attend these conventions.

In 2002, the Complainant along with several other employees including Rebecca Adler and Robert (Bob) Larson attended the convention. The Complainant was permitted to be accompanied by his partner and others such as Adler were permitted to take guests.

The convention occurred shortly before Mardi Gras during what is called the Carnival or Mardi Gras season. The streets were crowded and the participants sent to the convention by the Respondent report that people on the streets could receive beads and other trinkets by pulling up their shirts to expose themselves partially or to drop their trousers. This is referred to as "flashing."

In this festive atmosphere, Adler, Larson and the Complainant all took part to some extent in the activities on the streets. Ms. Adler seems to have been particularly enthusiastic.

On January 25, 2002, Adler, her guest and others saw a policeman speaking with the Complainant. The Complainant was being encouraged by the crowd to drop his pants to expose his genitalia. Though he would not have done so anyway, the police officer made it clear that if he (the Complainant) dropped his pants or did not go to his hotel, the City of New Orleans would make a jail cell available to house the Complainant.

Adler and the groups she was with were not close enough to overhear the conversation between the officer and the Complainant. They had not arrived on the scene in time to see what was causing the discussion between the Complainant and the police officer.

Adler came to the erroneous conclusion that the Complainant had, in fact, exposed himself to the crowd and was being warned against any repetition. The Complainant and Adler's group did not meet again to straighten out Adler's misperception. The Hearing Examiner is convinced that the Complainant did not drop his pants or expose himself in public.

That evening, after seeing the Complainant, Adler lost her purse or other identification. The next morning, Adler contacted the Respondent's office in Madison to secure new identification and airline tickets. She was enthusiastic in her description of the events and reported that she had received lots of beads for exposing herself, including her breasts, to the crowds and that the Complainant had dropped his pants for beads. It is not entirely clear with whom Adler spoke, but at some point she spoke with Ahrens and recounted the fun and activities including those to garner beads. Adler, in error, indicated that the Complainant had dropped his pants and exposed his genitalia. Reports of Adler's statements circulated throughout the workplace and were the cause of ribald comments at Adler's and the Complainant's expense.

Ahrens testified that several employees came to him and expressed their amusement over the rumors of conduct at the convention. Ahrens said that he was uncomfortable with other employees' reactions to the reports because of the lack of respect being shown to managers of the company. At the end of the prior year, Ahrens had attended a discussion with other dealership owners about the importance of avoiding complaints of sexual harassment and the need for a "zero tolerance" policy for sexual flavored activity in the workplace.

He prepared a statement setting forth the circumstances as he understood them from Ms. Adler's statements. He was prepared to terminate the Complainant, Adler and Larson for their conduct at the convention. Once the group returned to Madison, Ahrens called each of the individuals to his office and asked them if he or she had engaged in the reported conduct. Since the conversations occurred behind closed doors, it is not clear what was said. However, Adler and the Complainant signed the statements or otherwise admitted, in the Complainant's case, without cause, the conduct that had been reported to Ahrens. Adler, a heterosexual female, and the Complainant (a homosexual male) were immediately terminated. Larson (a heterosexual male) was not terminated.

It is with this very general background that the Hearing Examiner examines the claims of the parties. Additional facts will be added when and where necessary.

The Complainant asserts that his termination was motivated by his sexual orientation. In the indirect proof approach, the Hearing Examiner must first look to see if the Complainant has made out a prima facie case of discrimination.

As noted above the prima facie case has three elements. There is no question that the record establishes two of the three elements. The Complainant is a member of the protected class "sexual orientation". He is a gay or

homosexual male. The Respondent clearly knew of the Complainant's sexual orientation prior to his termination.

Second, the Complainant was terminated from his employment. There can be no doubt that such a termination represents an adverse employment action. It is really the ultimate adverse employment action.

What is less immediately certain is whether the Complainant has demonstrated a causal connection between his membership in the protected class "sexual orientation" and his termination. The Complainant points to the fact that Larson was accused of substantially similar conduct, but was not terminated. It appears that Larson is a straight or heterosexual male. This is generally sufficient to demonstrate the type of differential treatment from which a discriminatory motive may be inferred.

The Respondent argues that Larson was not alleged to have displayed his genitalia while the Complainant and Adler were supposed to have bared genitalia. Had the Respondent conducted more of an investigation into the allegations of lewd conduct, this distinction might be more important. The record demonstrates that the extent of the Respondent's investigation was to ask the individuals, under somewhat stressful circumstances, if he or she had done what was alleged. The Complainant testified that he was so surprised and upset by the written allegation and the threat to his retirement funds that he essentially admitted the allegation that he had exposed his genitalia even though he hadn't.

It is important, at this point, to make clear that whether the Complainant actually exposed himself in public is irrelevant. The Hearing Examiner has stated his finding on this earlier. What is relevant is whether the Respondent acted with a good faith belief that the incident had actually occurred.

Under the circumstances set forth in the record, the Hearing Examiner concludes that a reasonable person could conclude that the Respondent's belief was not in good faith.

The meeting at which Ahrens confronted the Complainant was flawed. The Complainant was presented with a document essentially requiring him to admit the alleged conduct and given no reasonable opportunity to review, consider or consult about the contents. Along with a concern about his future and his retirement funds, the meeting between Ahrens and the Complainant upon the Complainant's return from New Orleans was highly coercive and cannot be seen as a true admission of conduct. It does not represent a neutral attempt to investigate allegations of misconduct.

Though Larson seems not to have undergone a similar confrontation by Ahrens, the manner of Ahrens' confrontation of the Complainant and Adler taints the process and gives rise to an inference that the Complainant's sexual orientation may have played a part in the decision to terminate him.

The Respondent argues that Larson is not the proper comparator for this case. Rather, the Respondent points to Adler to indicate that it treated a heterosexual person in the same manner as the Complainant. While the Hearing Examiner finds merit in this contention, at this stage, the difference in treatment between Larson and the Complainant would likely raise an inference of discrimination in the reasonable person's mind.

There is also an implication that the Respondent created and permitted a sexually charged atmosphere in which conduct such as that alleged to have been engaged in by the Complainant was permitted by heterosexuals. In support of this, the Complainant points to several incidents preceding his termination. These include drunken parties, visits by strippers to celebrate the birthday of a co-worker, permitting pornography at the worksite and occasional comments of a sexual nature. The Respondent contends that these represent isolated instances and do not demonstrate an atmosphere where sexual harassment was permitted, encouraged or tolerated. To the extent that any of the individual incidents represent misconduct, the Respondents states that warnings or discipline were issued and further incidents did not occur.

On this record, there seems little doubt that the Respondent encouraged the employees to enjoy working for the Respondent. That can be seen through the Respondent's sending employees to the NADA convention and various social events held on and off the premises. That those occasions sometimes got out of control does not demonstrate that the Respondent encouraged or sanctioned such conduct. It does appear that some employees took liberties with the relaxed atmosphere encouraged by the Respondent. However, the record indicates that the Respondent took reasonably prompt remedial action where necessary. If there were repetitions of incidents such as strippers at birthday parties, they do not appear on the record.

It should be remembered that the complaint in this matter alleges discrimination in the Complainant's termination, not in his working conditions. The demonstration of a workplace with relaxed social standards can only have relevance to an argument regarding pretext or a lack of credibility on the part of the Respondent. In theory, the Respondent might be seen as less credible if it cites as a reason for termination conduct that it has otherwise condoned in the workplace. This may have greater applicability in a later stage of analysis, but does have some applicability in determining whether the Complainant has presented a prima facie claim.

When viewing the record as a whole, the Hearing Examiner must conclude that the Complainant has presented sufficient evidence and argument to establish a prima facie claim of discrimination. The difference in treatment between the Complainant and Larson, including their treatment upon their return to work after the NADA convention, raises an inference that the Complainant's termination resulted, at least in part, from his sexual orientation. There are several important as yet unresolved and undiscussed issues that could, in a different light, affect this conclusion. However, the Hearing Examiner intends to follow the pattern of analysis set forth in the burden shifting paradigm.

The Complainant, having demonstrated a prima facie claim of discrimination, the Hearing Examiner now must determine whether the Respondent articulates a legitimate, nondiscriminatory reason for the Complainant's termination. In reviewing the record, one must bear in mind this is merely a burden of articulation and not one of proof. Burdine, supra.

The Respondent states that he terminated the Complainant not because of his sexual orientation, but because the conduct in which he was alleged to have engaged in New Orleans created a lack of respect in the general workplace for the management and specifically, Adler, the Complainant and Ahrens as managers. Ahrens also testified that he had a greater appreciation for the problems and potential liabilities relating to sexual harassment and sexually explicit conduct in the workplace after attending a meeting of other dealership owners.

While one might argue with the manner in which the Respondent attempted to implement a greater concern for a harassment-free workplace, the Hearing Examiner finds that the Respondent's proffered explanation represents a legitimate, nondiscriminatory explanation for the Complainant's termination.

It is important in any organization for the workers/employees to have respect for the managers above them. For an organization such as a business to fail to promote an environment that encourages respect for and a healthy working relationship between line workers and their supervisors/managers is likely to encourage a dysfunctional work place.

This is not to say that employees have to admire or worship their supervisors/managers. The environment should be one of mutual support and respect. Such working relationships support efficiency and a willingness to work together.

An atmosphere where some employees are viewed as privileged creates resentments and a lack of cooperation. This lack of functional support can raise costs and reduce efficiency.

From the Respondent's perspective, to permit the Complainant to remain created the risk of creating a workplace where Adler and the Complainant were perceived to be favored and not subject to the rules of conduct expected of all employees. Managers are frequently held to higher standards of conduct. It is one of the responsibilities of being a manager.

The Respondent, having presented a legitimate, nondiscriminatory reason for its termination of the Complainant, the Hearing Examiner now turns to the question of whether the Complainant has demonstrated a reason to doubt the Respondent's credibility or to otherwise view its explanation as a pretext for a discriminatory motive. It is not sufficient to merely demonstrate that the Respondent's proffered explanation is a pretext. It must be a pretext hiding a discriminatory motive. Saint Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). In making such a determination the Hearing Examiner will review the record as a whole and not limit himself to arguments about credibility.

The Hearing Examiner will approach the issues of credibility or pretext somewhat obliquely. It seems appropriate, given the extent of the record, to address the ultimate issue in this case directly. In doing so, the Hearing Examiner will also, inevitably, address the final step in the burden shifting approach.

The record indicates that the Complainant's sexual orientation was known for a considerable period of time during his employment if not for the entirety of the time with the Respondent. During that time, the Complainant was highly successful and received pay increases and promotions. As part of the Complainant's employment, he and his partner attended various social occasions including, at least, one at the home of Ahrens' mother. Though somewhat controverted, it appears that Ahrens liked the Complainant and his partner and socialized with them outside of work on several occasions. Given this successful employment, the ultimate question is, "What occurred in New Orleans to change the employment relationship and was the Complainant's sexual orientation a factor in that conduct?" On this record, the Hearing Examiner concludes that the Complainant's sexual orientation was not a factor in the conduct that led to his termination.

While the Complainant asserts that the Respondent's proffered reason is not credible or represents a pretext for discrimination, he fails to present sufficient credible evidence to overcome the inference of a lack of a discriminatory motive raised by his lengthy employment with the Respondent. Had the Complainant's sexual orientation been a negative issue for the Respondent, the Hearing Examiner would expect that either the Complainant would have been terminated earlier in his employment or there would be more substantial evidence of a workplace, especially management, that was hostile to his sexual orientation. The evidence is to the contrary. The Complainant's partner was hired to work at the Respondent's dealership. This would seem to be inconsistent with a workplace that was hostile to gays.

There is no record of complaints filed by the Complainant or his partner alerting the Respondent to issues surrounding their sexual orientation. While there was testimony that both the Complainant and his partner experienced some level of harassment on one or two occasions, there is no evidence that either felt sufficiently uncomfortable with the circumstances of their employment to file any form of written complaint. Additionally, the record reflects that to the extent that any incident of harassing behavior was called to the attention of the Respondent, the incident was addressed promptly and there were no repetitions by a given employee.

As noted previously, the Complainant attacks the Respondent's credibility with the allegation that Ahrens admitted the act of discrimination in a private conversation with the Complainant. In addition to the reasons for not relying on this testimony stated earlier, the Hearing Examiner concludes that Ahrens' mother knew of the Complainant's sexual orientation from his attendance at a party during which he was accompanied by his partner. The record does not demonstrate any adverse action taken against the Complainant subsequent to the party and prior to the trip to New Orleans. Again, the Hearing Examiner would expect evidence that the Complainant's terms and conditions of employment would have suffered had a discriminatory attitude on the part of Ahrens' mother been a motivating factor.

In an earlier portion of this decision, the Hearing Examiner indicated that for purposes of the prima facie analysis, the fact that Larson was not terminated raised an inference of discrimination. At this stage, the Hearing Examiner finds that a more appropriate comparison is made with Adler. There is no credible allegation on this record that Larson did anything more than raise his shirt in New Orleans. Though factually incorrect, all Ahrens knew when he reached his decision to terminate both the Complainant and Adler was that they had exposed genitalia and breasts in New Orleans. While such conduct neither offends or shocks the Hearing Examiner, the Hearing Examiner is willing to believe that such public conduct on the part of two of the Respondent's managers might be viewed as extreme and undesirable. In this light, the comparison with Adler, a heterosexual female, is more appropriate than that to Larson. With Adler and the Complainant receiving similar, if admittedly harsh, treatment, no discrimination can be demonstrated.

Given this record as a whole, the Hearing Examiner must conclude that the Complainant has failed to meet his burden of proof to establish that his sexual orientation was any motivating factor in his termination. Though the Respondent's efforts at creating a harassment-free environment and one where his managers have the respect of the employees may have been flawed, this record supports that explanation for the Complainant's termination more than the motive of discrimination.

The Hearing Examiner has no doubt that the circumstances of the Complainant's termination and its aftermath have greatly affected the Complainant. In this regard, the Hearing Examiner believes it is appropriate to indicate that much of the damages sought by the Complainant would have not been awardable even if there was a finding of discrimination. Specifically, the damages related to the Complainant's relocation to Arizona could not be the subject of an award. On this record, it appears that the Complainant found employment at another automobile dealership in the Madison area, Middleton Ford. However, due to the interest in this complaint created when the complaint became public, the Complainant felt uncomfortable at work and

determined that a fresh start elsewhere was required. While this may have been the Complainant's belief, the record fails to demonstrate that such a relocation was objectively required or appropriate. Nothing in the record indicates that the Respondent attempted to interfere with the Complainant's reemployment or that it took any steps leading to the public embarrassment testified to by the Complainant. There is no indication that the Complainant's new employer or his co-workers did anything to make the environment uncomfortable for the Complainant. In fact, the record indicates that the Complainant's new employer was very supportive of the Complainant. Given the record, even if discrimination had been found, the Hearing Examiner could not award any of the Complainant's relocation expenses or the wage loss resulting from his relocation.

For the foregoing reasons, the Hearing Examiner orders the complaint dismissed.

Signed and dated this 8th day of August, 2006.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

cc: Michael A Whitcomb
William E McCardell