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

Michael J. Miller 702 Lexington Dr . Waunakee , WI 53597 Complainant vs. Credit Union National Association Inc. 5710 Mineral Point Rd. Madison , WI 53705 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND INTERIM ORDER Case No. 20042175

This matter came before Madison Equal Opportunities Commission, Hearing Examiner, Clifford E. Blackwell, III, for a public hearing on the merits of the complaint beginning on July 11, 2006, and continuing, off and on, through August 18, 2006. The Complainant, Michael J. Miller, appeared in person and by his counsel, Michael R. Fox of Fox and Fox, S.C. The Respondent, Credit Union National Association (CUNA), appeared by its corporate representative, Richard McBride and by its counsel, Lauri D. Morris of Quarles and Brady, LLP. Based upon the record of these proceedings, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Interim Order as follows:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Michael J. Miller, is an adult male, born on September 10, 1960.

2. The Respondent, Credit Union National Association (CUNA), is a nationwide trade association of state-based member credit union leagues and credit unions. The Respondent employs approximately 300 people in offices in Madison , Wisconsin and Washington , D.C.

3. The Respondent's Washington , D.C. office is the base for its governmental relations and lobbying activities on behalf of its member organizations. The Madison , WI office is the center for support and development service offered to its members.

4. The Complainant initially worked for the Respondent between 1993 and 1995. He again worked for the Respondent between 1996 and 2004. He was discharged on September 9, 2004.

5. Over the period of his employment, the Complainant's level of responsibility and profile within the Respondent steadily increased. From 1993 to 1995, the Complainant served at Director of System Planning, selling and facility training for member credit unions. In February, 1996, the Complainant became the Director of New Business Development. He was responsible for generating and developing new business ideas and opportunities.

6. In 1997, the Complainant became Vice President for the Center for Professional Development. He maintained this position although in 2000, his responsibilities grew to accommodate growth in the Respondent's business.

7. In 2002, the Respondent went through a company-wide restructuring as the result of an independently contracted analysis and report. As part of this restructuring, the Complainant's duties and responsibilities were increased. He became responsible for the Respondent's second most profitable product line, Executive Development, along with his responsibilities for marketing and the sales resources associated with those responsibilities.

8. In 2004, at the time of his discharge, the Complainant's title was Senior Vice President for Association Services. In this capacity, the Complainant supervised, directly or indirectly, approximately 90 employees.

9. In 2003, the position of Chief Operating Officer (COO) for the Respondent's Madison office opened when the then COO, Peter Crear, announced his intention to retire from that position. The Complainant reported directly to Crear.

10. To fill the position of COO for the Madison office, the Respondent hired Yvonne Evers of HR Value Group to conduct a search and to make recommendations for the position of COO. HR Value Group is a credit union management resources and executive search consulting firm. Evers had previously worked for the Respondent.

11. Evers met with the Respondent's President and Chief Executive Officer, Daniel Mica. Mica was based in the Washington , D.C. office of the Respondent. Mica wished to change the direction of the Respondent's Madison operations from that followed by Crear. Specifically, he wished to promote a more team-oriented approach and to work more closely with state credit union leagues.

12. The Complainant was one of several individuals who applied for the vacancy. After review of application materials and an initial round of interviews. Evers forwarded a list of finalists to Mica for consideration. The Complainant was not among those named for further consideration.

13. The Complainant was very unhappy about not having his name forwarded for further consideration. He contacted Evers and criticized her interview of him. He complained to co-workers such as Mark Condon. Most importantly, he contacted Mica and Mica's primary assistant, Richard McBride, to seek their intervention and reconsideration of Evers's decision not to forward his name. McBride serves as the Chief Operating officer for the Washington D.C. office. He has worked with Mica in many different capacities over 30 years.

14. Mica and McBride, while believing that the Complainant was a talented employee and a valuable asset to the Respondent, agreed with Evers assessment of the Complainant regarding his lack of maturity and his need for additional "seasoning" before he would be ready for the position of COO. They declined to intervene as requested by the Complainant.

15. Despite the fact that the Complainant would not be a final candidate, he wished to remain a valued employee with the Respondent. In an email to Mica dated December 3, 2003, the Complainant wrote, "I wish I could convince you to reconsider your decision. However, in the end, know that I am fully committed to supporting you and whomever is ultimately named as COO."

16. In late December of 2003, Mica selected John Franklin to be the new COO in the Madison office. Franklin had been the President of the South Carolina Credit Union League until he was fired shortly before his application for the position of COO. Franklin was instrumental in setting up and serving on the Board of Directors of HR Value Group. Franklin began employment as COO in Madison , WI on January 2, 2004.

17. The Complainant was surprised by Franklin 's selection to be COO. He shared his concerns with others in the Madison office in late December, 2003 or early 2004. Despite his concerns, the Complainant was committed to working with Franklin .

18. In the first few weeks of January, 2004, Franklin met with the Complainant and other managers to become familiar with their duties and projects and to layout the direction in which Mica wished the Respondent to head. At one of these meetings, the Complainant alerted Franklin to a developing/continuing problem involving one of the managers who reported to the Complainant. The Complainant told Franklin that Dean Archer had been an abusive and bullying manager towards his employees especially to those who were women. Franklin expressed his confidence in the Complainant's ability to appropriately handle the problem.

19. In February of 2004, Franklin wished to improve Mark Condon's "portfolio" of responsibilities. To accomplish this, Franklin proposed to move "Publications" from the responsibility of the Complainant to

Condon. Condon was the Senior Vice President of Research and Advice. Condon, though the same supervisory level as the Complainant, had far fewer duties or responsibilities justifying his position. Condon and Franklin were friends both in and out of work.

20. The Complainant became aware of Franklin 's proposed transfer when he was called into a meeting with Franklin and Condon. The Complainant objected to the transfer of "Publications", but indicated that a transfer of "Executive Development" might better meet Franklin 's objectives. After discussion, Franklin agreed with the proposal put forth by the Complainant.

21. Though the transfer was proposed in February, it was not completed until early March of 2004. The transfer of responsibility was made with the approval of Mica and McBride. Franklin praised the Complainant for his proposal and his willingness to work for the betterment of the Respondent.

22. By mid-April, 2004, the Complainant became aware of and concerned with racist comments articulated by Franklin . One racist comment was a reference to customer service duties as "nigger work." Another comment occurred in March, 2004 at a lunch where Franklin conveyed a story about investigating an incident during his employment in South Carolina where an African-American male piled wood under a car and ignited it as an example that "black people generally are not very smart."

23. By mid-April, 2004, the Complainant became concerned with sexist comments, references and innuendo that Franklin used during various communications in the office. There were instances where Franklin encouraged the Complainant to pursue sexual relations with current or prospective CUNA board members as well as business contacts. Another instance involved an email from Franklin to a female employee that stated, "put out your tongue and you'll get a big surprise." Franklin also conveyed a story about a previous business associate scolding sales staff for their euphemistic inability to sell "pussy on a troop train."

24. By mid-April, 2004, Miller was also concerned about homophobic comments articulated by Franklin . One concerned a situation in which Mark Condon and Franklin exchanged greetings with a credit union league president, after which Franklin remarked to Condon, "they don't make league presidents like they used to," referring to the fact that the league president is openly gay. Another concerned an inquiry Franklin directed at the Complainant regarding his sexual orientation because he participated in a dinner theatre production.

25. In early 2004, the Complainant shared his concerns about Franklin 's comments with Harley Skjervem, the Respondent's Vice President in charge of Human Resources in the Madison office. Skjervem was also concerned about the inappropriateness of Franklin 's sexual jokes and profane references.

26. On April 22, 2004, Miller reported his concerns regarding Franklin to Judy Cooper, Respondent's in-house legal counsel.

27. After receiving the Complainant's report, Cooper met with Franklin that evening and explained that discriminatory comments are not acceptable. Cooper reported her actions to the Complainant via voicemail on April 23, 2004. Cooper did not alert Mica to Franklin 's discriminatory comments or conduct.

28. The Complainant believed that Cooper should have brought the allegations concerning Franklin to Mica's attention.

29. In early April of 2004, Mica asked all managers to prepare a Succession Plan. A Succession Plan is a document outlining how one's duties or responsibilities should be carried out in the event of a lengthy unexpected absence.

30. The Complainant, on April 28, 2004, completed his Succession Planning document. In returning the Succession Planning document to Mica, the Complainant wrote, "I am very concerned with the direction our Madison operation is headed. I find an emerging culture that has an ever growing current which runs counter to my personal values, character and integrity. These same concerns have been raised to me by peers as well as staff."

31. On April 29, 2004, the Complainant reported his concerns to Mica during a telephone call in response to the comments in the Succession Planning document. The Complainant specifically represented Franklin 's comments as sexist, racist and homophobic.

32. Mica was dismayed to learn of the complaints involving Franklin . He immediately spoke with Franklin about the complaints he had just received. Mica also directed McBride to speak with Franklin about the seriousness with which Mica viewed the complaints.

33. McBride spoke with Franklin as directed by Mica during a break in a meeting held in Georgia shortly after Mica's conversation with the Complainant.

34. It is not clear how Franklin became aware that the Complainant was the individual responsible for the complaint made against him. However, the latest date Franklin must have learned, or concluded, that the Complainant reported Franklin for discriminatory comments was May 20, 2004, when Franklin told Archer not to trust the Complainant under any circumstances. Franklin told Condon that the Complainant had reported Franklin and Archer for their discriminatory conduct.

35. The Complainant had filed a complaint on behalf of Roberta Bischke against Archer with Cooper in late March, 2004. After a brief investigation, it was concluded that Archer had violated several of the Respondent's policies. Condon, who had become Archer's supervisor in late February or early March, developed a plan that, if completed, would preserve Archer's employment.

36. The Respondent addressed the complaints against Franklin , in part by having Franklin issue a public apology in early June, 2004. The Respondent also conducted mutual respect training in the summer of 2004.

37. In response to an inquiry from Allen McMorris, the Complainant mentioned his concerns about Franklin to McMorris, a CUNA board member, during the June, 2004 board meeting held at the Monona Terrace in Madison , WI .

38. The Complainant also reported his concerns about Franklin to Evers during a business trip to the Bahamas in July, 2004. Evers reported Miller's general concerns to McBride and Mica during that same business trip.

39. Despite his public apology and the diversity training conducted by the Respondent, Franklin made additional sexist comments at a ropes course in July of 2004. The Complainant learned about these comments from Tom Decker and David Rohn; the Complainant conveyed his concerns to Skjervem in late July or early August of 2004. In this conversation with Skjervem, the Complainant stated he felt the issues with Archer and Franklin had not been resolved.

40. Franklin made additional sexist comments in the presence of David Rohn regarding a desire for sexual contact with local high school girls.

41. McBride wrote an email to Mica on June 18, 2004, describing poor relations between the Complainant and Franklin and stating, "We may lose Mike . . . I don't think he can get his ego out of the way. He is not supporting John." Another email dated June 28, 2004, from McBride to Mica and carbon copied to Franklin, references the comments the Complainant made in the April 27, 2004 Succession Planning document and suggests Mica should meet with Miller to discuss the situation.

42. Neither Mica nor McBride urged Franklin to take steps to repair the dysfunctional relationship Franklin had with the Complainant as identified in the June 18, 2004 email. Neither Mica nor McBride did other than encourage the Complainant to work more closely with Franklin . No one investigated the basis for the break down in the relationship between Franklin and the Complainant.

43. Subsequent to Franklin's telling Condon that the Complainant was the individual responsible for the complaints against Franklin, Condon, on two separate occasions in June or July, told Vicki Joyal, one of his supervisee's, that the Complainant had done something that would get him fired. In early August,

2004, Condon wrote that either the Respondent would need to fire the Complainant or Condon would have to consider leaving.

44. During the July meeting in the Bahamas , Archer told McBride that the Complainant told Archer to sue the Respondent for unfair treatment. McBride also spoke to the Complainant during this meeting recommending that he should work through his issues with Franklin . McBride also recommended a specific book for the Complainant to read.

45. During the July meeting in the Bahamas , Mica again spoke to Franklin expressing displeasure with Franklin 's prior discriminatory comments.

46. On August 9, 2004, after returning from the conference in the Bahamas , McBride recommended to Mica that the Complainant be terminated. Mica expressed disappointment with the situation and suggested that McBride get more information before Mica would approve the termination.

47. McBride contacted Cooper on August 9, 2004, stating they had no "smoking gun" or other evidence of insubordination to fire the Complainant. McBride directed Cooper to interview Millar, Evers and Condon in order to get more information concerning termination of the Complainant. During Cooper's investigation, Millar reported the Complainant's comments about the Complainant's efforts to get fired. Evers relayed to Cooper her July, 2004 conversation with the Complainant where he reported Franklin 's discriminatory conduct. Condon reported a variety of negative thoughts about the Complainant. Cooper's investigation also indicated Millar and Condon felt the Complainant was not supportive of Franklin .

48. Neither Mica, McBride nor Cooper spoke with the Complainant in an attempt to ascertain the accuracy or veracity of the reports from Millar, Evers or Condon.

49. At no time did the Respondent place the Complainant on notice that he could or would be terminated if his unsatisfactory conduct did not improve.

50. There were other executives who were terminated without prior notice that their conduct should be improved. The Complainant did not commit the same kinds of misconduct that warranted the termination of other executives without notice.

51. The decision to terminate the Complainant was finalized by August 13, 2004. McBride, Mica and Franklin participated in or had influence on the decision making process. Cooper and/or Skjervem prepared Miller's severance package.

52. On September 9, 2004, McBride and Franklin summarily informed the Complainant he was fired. Following that meeting, Cooper and Skjervem met with the Complainant to discuss a possible severance package.

53. At the time of his termination, the Complainant made $153,055.00 per year. He received a package of benefits that was equal to 21% of his base salary. At the end of each year of employment, the Respondent customarily granted employees in the Complainant's range a 6% increase in salary for the following year.

54. In the twenty-two months prior to hearing, the Complainant applied for a total of sixty-three positions from which he received eleven interviews. The Complainant used various communication methods to contact potential employers; he did follow up on some, but not all job applications.

55. The Complainant started a consulting business in Fall, 2004 by the name of Imagine Training Solutions, L.L.C. Prior to hearing, the Complainant earned $30,000.00 in 2004 from this source of self-employment. In addition to his work as a self-employed, independent consultant, the Complainant continued to seek additional employment to replace lost salary and benefits.

56. The Complainant remains self-employed as an independent business consultant.

57. The Complainant, at the time of hearing, was considering the possibility of returning to university to obtain a Master's degree in order to help replace his lost income.

58. It is not clear as of the undersigned date, if the Complainant has managed to replace his lost income and benefits or how long it will take him to do so.

59. As a result of his termination by the Respondent, the Complainant has been excluded from his social group, lost income, lost the opportunity to advance within his chosen employer, lost health insurance and other benefits. The Complainant has experienced emotional distress in having to explain to his son the loss of income, insurance and regular employment.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant exercised a right protected by the ordinance when he complained to a variety of individuals about Franklin 's sexist, racist and homophobic statements.

2. The Respondent is an employer within the meaning of the Equal Opportunities Ordinance and is subject to its requirements and dictates.

3. The Respondent violated the ordinance when it terminated the Complainant for his exercise of a right protected by the ordinance.

4. The record does not demonstrate that absent the Complainant's complaints about Franklin 's comments, conduct and statements that the Respondent would have terminated the Complainant's employment.

5. The Complainant's self-employment as a consultant was undertaken in good faith; on this record, it is a reasonable alternative to seeking other comparable employment.

6. Despite its futility, the Complainant put forth reasonable and diligent efforts to find work following his dismissal from Respondent's employ.

7. The Employment relationship between the Complainant and Respondent cannot be successfully reinstituted due to the level of mutual animosity between them.

8. The Complainant has experienced a level of emotional distress for which he must be compensated in order to be made whole.

9. In order to be made whole, the Complainant must receive the costs and fees associated with his bringing of this complaint.

INTERIM ORDER

1. The Respondent shall cease and desist from any further retaliation against the Complainant.

2. The parties shall, within 20 days of the undersigned date, attempt to stipulate to the level of back pay damages necessary to place the Complainant in as good a position as he would have been absent the Respondent's retaliation, excepting any amounts of actual income received by the Complainant during this period. Back pay shall include benefits calculated at the level of 21% of base salary.

3. If a stipulation pursuant to item 2 above is not reached within the prescribed period, the Hearing Examiner will schedule further proceedings to fix such amounts.

4. Once back pay is established pursuant to either paragraphs 2 or 3 above, the parties shall adjust those amounts by 4% pre-judgment interest for the period from September 9, 2004 until the date upon which back pay is actually paid.

5. Once the period for stipulation of back pay damages specified in paragraph 2 above has lapsed, the Hearing Examiner will schedule further proceedings to determine, what, if any, front pay is appropriate.

6. The Respondent shall pay to the Complainant, no later than 30 days from the issuance of a final order in this matter, $75,000.00 for the emotional distress experienced by the Complainant.

7. Within 15 days of a final order being issued in this matter, the Complainant shall submit a petition for his costs and fees including a reasonable, actual attorney's fee expended in bring this complaint. The Respondent may file any objections to the form or substance of the Complainant's petition within 15 days of its receipt.

MEMORANDUM DECISION

This case presents a claim of retaliation for the exercise of rights protected by the ordinance, but this complaint is not as complicated as it may first seem. The record is more than extensive and runs far afield from the essential issues of the complaint.

For the Complainant to prevail, he must demonstrate by the greater weight of the credible evidence that he exercised a right protected by the ordinance, that he experienced or suffered an adverse employment action and that the adverse employment action resulted, at least in part, from his exercise of a protected right. Flowers v. Charlton Group, MEOC Case No. 20002129 (Ex. Dec. 9/17/02). In determining whether the exercise of a right protected by the ordinance falls within the coverage of the retaliation claim, there must be evidence that the right was exercised in good faith. Also, as is always the case in a discrimination or retaliation claim, the Complainant must have been adequately performing the duties of his job. Id.

The Complainant must carry the requisite burden of proof as to each element. The Complainant carries the ultimate burden to demonstrate retaliation. As with discrimination claims, the Complainant may either utilize proof by direct evidence or use the indirect method set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

In the direct method, the Complainant presents evidence and arguments based upon that evidence and the reasonable inferences stemming from that evidence to support each element of the claim of discrimination. Direct evidence may include statements that on their face evince a discriminatory or retaliatory attitude or can reasonably be understood to demonstrate such an impermissible motive. In the direct method, the Respondent may either attack the sufficiency of the Complainant's evidence or seek to demonstrate another reason for the Respondent's action.

In the indirect method, the Finder of Fact must examine the record to determine if the evidence, including the reasonable inferences to be drawn from that evidence, supports the conclusion that retaliation was, in some part, more likely the reason for the Complainant's termination than was some other nondiscriminatory or nonretaliatory rationale.

In utilizing the McDonnell Douglas/Burdine paradigm, the Complainant must first establish the prima facie claim as noted above. Presuming that the Complainant makes such a demonstration, the Respondent then must offer a legitimate, non-discriminatory/non-retaliatory explanation for its actions. This is not a burden of proof, but merely one of production. Should the Respondent meet this modest burden, the Complainant may still prevail by demonstrating that either the Respondent's explanation is not credible or represents a pretext for an otherwise discriminatory or retaliatory reason.

In some cases, especially those where the parties have had an opportunity to fully litigate the claims of discrimination or retaliation, a broader method may be utilized. U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983). In this approach, the Hearing Examiner may review the record as a whole and reach the ultimate question, that of retaliation or not, without falling back upon the more specific approach of the McDonnell Douglas/Burdine test.

Given the extensive nature of this record including the fact that the record exceeds 2,500 pages, the Hearing Examiner favors the Aikens approach. In utilizing this approach, the Hearing Examiner bears in mind that it is never the Respondent's burden to establish that it did not discriminate or retaliate. The ultimate question in this

complaint is whether the Complainant's exercise of rights protected by the ordinance played any part in the Respondent's decision to terminate his employment.

BACKGROUND SUMMARY

The Complainant, Michael Miller, is an adult male born September 10, 1960. He began work for the Respondent, Credit Union National Association, Inc., in 1993. He continued until some point in 1995. He again worked for the Respondent from 1996 until his termination in 2004.

The Complainant's level of responsibility and profile within the Respondent steadily increased during his tenure. From 1993 to 1995, the Complainant served as Director of System Planning, overseeing, selling and facilitating training for credit union members. When the Complainant returned to employment with the Respondent in February of 1996, he assumed the position of Director, New Business Development, with responsibilities for generating and developing new business ideas. In 1997, the Complainant became Vice President for the Center for Professional Development. In 2000, his responsibilities expanded along with the Respondent's growth. In 2002, a company-wide restructuring was announced in response to an independent study. The 2002 restructuring resulted in increased responsibilities for the Complainant. His final title with CUNA was Senior Vice President of Association Services.

The Complainant was in charge of the Respondent's second largest revenue producing product line, Executive Development, and its marketing and sales resources. At the time of his termination, the Complainant directly or indirectly supervised approximately 90 employees.

The Respondent is a trade association for the credit union industry. It renders services as a lobbyist and provides training, educational opportunities and other products for its member associations. The national headquarters for the Respondent are located in Washington D.C. The headquarters for the member services and operational offices of the Respondent are located in Madison , Wisconsin .

Daniel Mica is the Respondent's Chief Executive Officer. His primary assistant is Richard McBride. The position of Chief Operating Officer (COO) reports to Mica. The Chief Operating Officer's office is located in Madison .

The Complainant had been a long term and successful employee of the Respondent. In 2003, the opportunity to further advance in the company was presented when the Chief Operating Officer for the Madison office, Pete Crear, retired. The Complainant applied for the position, but failed to make the cut for interviews. He was upset by this determination and felt that he had much more to offer. He was reassured by the upper management of the company that he was considered a valuable employee who still had a bright future with the Respondent.

The Respondent hired John Franklin for the position of COO. Franklin had worked in the South Carolina Credit Union League. He also was on the Board of Directors of HR Value Group, the organization that had conducted the search for applicants for the COO position.

Franklin took over the COO position in Madison , Wisconsin at the beginning of January, 2004. As one of his first tasks, Franklin met with the senior managers including the Complainant to let them know of Franklin 's directions and to find out what the managers were doing. At Franklin 's first meeting with the Complainant, Franklin made it clear to the Complainant that the Complainant was highly regarded by the Respondent's management team, including Mica and McBride, and that the Complainant was likely to be Franklin 's eventual successor as COO.

The Complainant told Franklin of his ongoing projects and alerted Franklin to a developing issue involving Dean Archer, a manager with duties under the Complainant. For some considerable period of time, there had been complaints that Archer was abusive towards his employees and especially so towards female employees. The Complainant warned Franklin that Archer's conduct posed a potential source of legal liability for the Respondent. Franklin urged the Complainant to do what was necessary to address the Archer problem.

With the exception of some reorganization of staff and offices and negotiations that occurred around such changes, little of note happened business-wise for the first three and a half months of 2004. While this time seemed to have been a period of adjustment to style and new directions, not all was peaceful.

The Complainant and at least one other manager became aware and concerned about Franklin 's use of sexually explicit language in a business context. There were also instances of racially degrading language and at least one instance of potentially homophobic joking. Both the Complainant and Harley Skervjem, Vice President of Human Resources, were troubled by Franklin 's language and they shared their concerns with each other. Eventually, the Complainant, believing that Franklin 's language created a potentially serious problem for the Respondent, went to Judy Cooper, the Respondent's legal counsel based in Madison . The Respondent's Corporate Counsel was based in Washington , D.C. , but Cooper handled legal matters in the Madison office.

The Complainant expected that after investigation Cooper would take the Complainant's concerns to Mica or McBride. Instead, Cooper chose to speak with Franklin directly. She did so on the evening of April 22, 2004. The next day, Cooper left the Complainant a voice mail message indicating how she had handled his complaint. Among other things, Cooper and Franklin determined that a public apology to the employees of the Respondent would be appropriate. The Complainant was somewhat dissatisfied with Cooper's approach, but did nothing further about his concerns at that time.

Early in April, Mica sent each of the Respondent's managers requests for Succession Plans. A Succession Plan is a document that describes how a transition should occur in the event of the loss of an employee. On or about April 28, 2004, the Complainant submitted his Succession Plan to Mica. In that document, the Complainant expressed his concern for a change in the culture of the Respondent that ran contrary to the Complainant's personal values.

Upon reading the Complainant's comments in the Complainant's Succession Plan, Mica sought to discuss the Complainant's concerns with the Complainant. The record is not entirely clear about how contact was made, but on April 29, 2004, Mica and the Complainant discussed the basis for the Complainant's concerns.

The Complainant told Mica of Franklin's comments and described them as sexist, racist and homophobic. Mica was unhappy that one of his managers was engaged in such conduct. After the discussion with the Complainant, Mica communicated his concerns to Franklin , and also instructed McBride to meet with Franklin and make Franklin aware of how unacceptable his language was. Shortly after McBride and Mica discussed Franklin 's comments, the Respondent held a meeting in Georgia . During a break of activities at this meeting, McBride took Franklin aside and discussed Mica's concerns with him. It is a matter of some dispute whether McBride told Franklin the source of the complaints about Franklin 's language.

As noted above, the period from the beginning of the year until April 22, 2004, and especially April 29, 2004, was relatively calm. The two primary exceptions both involve Archer. First, at the end of February, 2004, the office in which Archer worked was transferred from reporting to the Complainant to reporting to Mark Condon. Condon was the Senior Vice President of Research and Advice. Originally a transfer of different units was proposed, but the Complainant demonstrated to Franklin 's satisfaction that the transfer of Archer made more organizational sense. On or about March 23, 2004, the Complainant, with the consent of Bobbi Bishke, filed a complaint about Archer with Cooper. The complaint outlined Archer's mistreatment of his staff and other employees. After a rudimentary investigation, it was determined that Archer had engaged in inappropriate conduct and a plan to deal with the allegations against Archer was developed.

Development of the plan and its implementation fell to Condon who had become Archer's supervisor in February. Presuming that Archer successfully complied with the plan, Archer's employment would not be terminated. The plan included moving Archer's office to a different floor to permit ready observation of his interactions with employees, a temporary freeze in his salary, loss of his supervisory duties and attendance at an external training center to receive an evaluation and coaching on his management style. Archer was also to apologize to his former supervisees.

While these two events had significance for those involved, they did not signal a major disruption in the operation of the Respondent. Though the Complainant was involved to some extent in these events, he was not a major participant beyond filing the initial complaint with Cooper.

After the Complainant made his complaint to Mica on April 29, 2004, he became subject to greater scrutiny and criticism. On or about May 20, 2004, Franklin had learned from someone or had determined on his own that the Complainant was the source of the complaints against him. On or about May 20, 2004, Franklin went to Archer

and told Archer under no circumstances should Archer trust the Complainant. Also, at some point after being chastened by McBride, Franklin told Condon that the Complainant was the source of the complaints.

In early June, 2004, Franklin held two meetings to apologize to Respondent's staff in Madison . However, Franklin 's apologies were so vague that some employees did not know or understand the underlying reason for the apology.

At the June, 2004 Board meeting held at Monona Terrace, the Complainant had a discussion with Al McMorris. McMorris was a member of the Board and was familiar with the Complainant. During this conversation, the Complainant told McMorris that he was unhappy about Franklin 's inappropriate language. McMorris suggested that the Complainant take his concerns to Mica or McBride. The Complainant indicated that he had and that an apology had been forthcoming. However, the Complainant was still upset about the incidents. McMorris had no other suggestion and believed that the Complainant was really unhappy about his not having been promoted to COO instead of Franklin .

In June or July of 2004, Condon joined the group of managers seeking to discredit the Complainant. In her testimony, Vicky Joyal stated that on two occasions Condon told her that the Complainant had done something that would get him fired. Joyal reported to Condon and eventually left the Respondent's employ in 2005 due to reduction in force. There was never any identification to what Condon was referring. Given the timing, a reasonable inference is that he was referring to the Complainant's complaints about Franklin to Cooper and Mica. During cross examination, Condon appears to corroborate Joyal's testimony and indicates that the incident to which he refers was the Complainant's report of Franklin 's conduct. Franklin identified the Complainant as the source of these complaints to Condon in May or early June of 2004.

It should be noted that Condon and the Complainant had not been friendly during their employment with the Respondent. Both were Senior Vice Presidents, but their working relationship had always been rocky. The Complainant criticized Condon and the work of his employees. The Complainant had been more outwardly successful in that he supervised a greater number of employees and was responsible for a greater number of the Respondent's programs and products. It is this imbalance of supervisory responsibility that Franklin wished to adjust when he proposed the transfer of units from the Complainant to Condon in February, 2004. At hearing, Condon was often combative and gave no appearance of liking the Complainant.

Given Condon's feelings for the Complainant, it is more likely than not that Joyal's testimony is true. Condon would seem to be the type of individual who would gladly tell another of the Complainant's misfortune.

By the end of June, 2004, McBride also joined the clamor of those seeking to discredit the Complainant. In a June 18, 2004 email to Mica, McBride stated that we (the Respondent) might lose Miller because he can't get his ego out of the way. There is nothing in this email to indicate in what way or ways the Complainant's "ego" is getting in the way of the company. Wes Millar, Vice President of CUNA Strategic Services, Inc., testified that the Respondent was experiencing the best year of profitability in his memory, a fact generally agreed to by the Respondent. Millar also stated that though the Complainant was less active and connected in meetings that he attended with the Complainant, Millar never observed the Complainant do anything wrong.

McBride's email comes shortly after Franklin 's "public" apology to the staff of the Respondent. This apology was so vague that many staff members were unable to determine for what Franklin was apologizing. Jill Tomalin, the individual who eventually replaced the Complainant after his termination, was upset about the apparent lack of seriousness on the part of the Respondent to address issues such as sexism in the workplace and a growing "good ol' boys" network. The Respondent, in an attempt to try to bring staff together held a series of trainings on the issue of harassment in the workplace, including a "ropes course" to strengthen team building. The "ropes course" was held during the early summer months of 2004. Despite Franklin 's recent public apology to the staff, two employees of the Complainant reported that Franklin made demeaning comments about women and the ropes course. These employees shared these comments with the Complainant who in turn shared them with Skjervem. Along with the Complainant, Skjervem was the member of the management team who had objected to Franklin 's earlier sexist statements.

With this fairly recent evidence of continued misconduct on Franklin 's part, the Complainant and several other employees of the Respondent traveled together to the summer conferences of AACUL and WCOCU held in the Bahamas that year. Due to a number of factors, including weather and booking problems, the group was held

over in Cincinnati for hours. During this layover, the Complainant took part in two brief, but important conversations. It is not clear in which order these conversations occurred.

One of these conversations took place between the Complainant and Yvonne Evers in the waiting area. Evers was the CEO of HR Value Group. She was the individual who was responsible for not recommending the Complainant for an interview during the hiring process for the COO position. She was also the individual who was responsible for forwarding Franklin to the final interview stage.

Evers asked the Complainant how things were going with Franklin . The Complainant gave Evers his honest opinion that Franklin 's sexist, racist and homophobic comments made him a disaster for the Respondent. Evers was shocked by the Complainant's statements and no further discussion of business or other matters occurred.

The other conversation was with Wes Millar. Because the Complainant and Millar had a somewhat unusual conversation several weeks before, Millar asked the Complainant how things were going. The Complainant replied that he (the Complainant) was still there. The Complainant declined Millar's offer to join other employees in the lounge. Millar observed that the Complainant was in a "bad mood."

Millar understood the Complainant's statement that he was still there to be a reference to a comment made by the Complainant to Millar during a meeting several weeks earlier. In that earlier conversation, the Complainant told Millar that he (the Complainant) had been trying to get himself fired, but that it hadn't worked yet. Millar stated that he did not take either statement as a jest despite the unusual nature of the statements for a Senior Vice President.

Almost immediately upon entering the credit union meetings in the Bahamas , Evers reported the Complainant's statements to McBride and eventually to Mica. Evers testified that she felt that she must have made a terribly wrong decision with respect to Franklin . McBride indicated that he and Mica were very happy with the work of Franklin . McBride did not attempt to speak with the Complainant about these statements or any other matter during the meetings beyond normal business. The record is disputed about McBride's limited contact with the Complainant. The Respondent asserts that the Complainant stated that he did not know if he could work with Franklin in the way Mica and McBride dictated. If he couldn't, he should be fired. The plausibility of McBride's testimony in this regard is discussed elsewhere.

The Bahamas meetings took approximately 10 days in late July and early August of 2004. When McBride and Mica returned to the Respondent's offices in Washington , D.C. , McBride went to Mica and recommended the termination of the Complainant. While Mica generally agreed with McBride's recommendation, Mica directed McBride to do some additional investigation to see if the Complainant's employment could be saved.

McBride contacted Cooper and told her of Mica's wishes. At McBride's direction, Cooper interviewed Condon, Evers and Millar around August 9, 2004, and reported back to McBride. It must be said that three less likely individuals to speak in favor of the Complainant could not have been selected.

After conducting the required interviews, Cooper reported back to McBride that there was no evidence that the Complainant had violated any policy, rule or procedure of the Respondent, i.e., "no smoking gun." McBride, after asking Franklin if he wanted to retain the Complainant, still determined that the Complainant must be terminated. On September 9, 2004, McBride came to Madison and told the Complainant of the decision. After a brief meeting with McBride, the Complainant met with Cooper and Skjervem to attempt to work out a severance agreement.

ANALYSIS

What is most striking to the Hearing Examiner when viewing the record as a whole is the rapid and marked change in the Complainant's standing subsequent to his discussions with Mica on April 29, 2004. For the first third of the year, the Complainant was viewed as a "rising star" and "the likely successor" to Franklin . There were no complaints of poor performance or lack of support for Franklin 's or Mica's "master plan." Within a double handful of weeks after the report of Franklin 's indiscretions, Franklin was warning employees not to trust the Complainant and reporting what in all rights should have been a confidential conversation to a peer.

McBride, an individual who viewed the Complainant favorably as late as April, 2004, now believed the Complainant would likely lose his job.

In another five weeks after the Complainant once again expressed his unhappiness with Franklin 's sexist, racist and homophobic language, McBride recommended the Complainant's termination. After a "stacked deck" investigation, including asking for the input of the individual against whom the Complainant had complained, the Complainant was terminated.

The focal point around which this change in fortune revolves is the Complainant's report of Franklin 's discriminatory language to Cooper and to Mica. The record reveals no other critical incident that might cause such a change in attitude. Equally, there does not appear to be an accretion of smaller incidents leading up to the conclusion that the Complainant was working to undermine Franklin 's authority.

The Respondent asserts that the Complainant's statements to Mica form the only potential basis for liability. Given the record, the Hearing Examiner disagrees. The Complainant continued to oppose Franklin 's conduct with critical statements to McMorris in June of 2004 and to Evers and Skjervem in July of 2004. It is the accumulation of these events that leads to the Complainant's termination. However, it is the Complainant's discussion with Mica that appears to start the Complainant down the path to termination.

The Respondent contends that the Complainant's opposition to Franklin 's statements was not the reason for his termination. Rather, the Respondent states that it was the Complainant's inability to accept Franklin as COO and the fact that he (the Complainant) had not been selected that ultimately led to the end of his employment. In the Respondent's view, the seeds of the Complainant's downfall were planted when he reacted so strongly to the news that he had not been selected by Evers to move to the next level of interviews. The Complainant contacted Evers, complained to Condon, and requested the intervention of Mica and McBride all during the fall of 2003. He spoke and met with Mica on several occasions about his disappointment and his belief that he would be able to lead the Respondent with a new vision for the future. In December of 2003, the Complainant met specifically with Mica. Mica stressed the importance of the Complainant being a team player and emphasized his long term prospects with the Respondent.

The Respondent argues that once Franklin began working in the Madison office, the Complainant resisted Franklin 's efforts to reorganize the office. The Respondent emphasizes that as time passed, the Complainant became more and more unhappy with the change in direction taken by the Respondent.

The Respondent produced many different witnesses to support its contention that the Complainant attempted to undermine Franklin 's effectiveness and that the Complainant was not a team player working for the good of the Respondent. These included McBride, McMorris, Condon, Archer, Loether, Tomalin, Decker and Millar. These witnesses testified to a variety of comments and incidents that the Respondent asserts demonstrate a dissatisfied and unhappy employee whose presence provided a distraction and disruption to the operation of the Respondent.

Tomalin and Loether testified to observing the Complainant's attitude in staff meetings and after meetings with Franklin . They stated that the Complainant would be in a bad mood or disappointed. They testified that the Complainant's attitude created dissent. Tomalin and Loether reported to the Complainant prior to the Complainant's termination. Tomalin eventually replaced the Complainant. Both were still employed by the Respondent at the time of hearing.

Tom Decker also testified that the Complainant's attitude towards Franklin deeply affected his attitude towards Franklin and the efforts made by Franklin . Decker testified that he eventually was able to judge for himself that Franklin's policies and initiatives were good for the Respondent and that the Complainant's negative judgment was in error and counterproductive. At the time of hearing, Decker was no longer employed by the Respondent. He was a consultant whose primary clients were in the credit union industry. It appeared that Decker maintained substantial business contact with the Respondent.

Al McMorris testified that the Complainant told him that he (the Complainant) was unhappy with the selection of Franklin as COO and that the Complainant would have been a better selection. On this record, it does not appear that the Complainant stated this outright, but McMorris interpreted the Complainant's unhappiness about Mica and McBride's action because the Complainant felt that he should have been named to the position of COO. McMorris's testimony is premised solely on McMorris's assumptions given the Respondent's position

in this litigation. This conversation with McMorris demonstrates that the Complainant still had objections to Franklin 's comments and felt that not enough had been done.

McMorris's testimony about how he came to attribute the Complainant's continued concern to him not getting the COO position is not credible. First, there is no showing that McMorris, in June, 2004, had any reason to make such a leap. He testified that he had heard nothing that would lead him to that conclusion. It must be noted that at the time of hearing, McMorris expected to either be elected President of the Respondent's Board of Directors or to stand for election for that position. As such, McMorris would be expected to adjust his testimony to most favor the Respondent.

Condon and Millar testified, in varying degrees, about their experiences in dealing with the Complainant and observing the Complainant's attitude towards Franklin and Franklin 's selection as COO. Millar's observations were limited and his conclusions drawn from a paucity of data. Condon and the Complainant's long history of animosity and competition do not lend credibility to Condon's descriptions of the Complainant's subversive efforts. However, Condon did give many different examples of how the Complainant's attitude and feelings that he (the Complainant) should have been promoted to the position of COO created division and dissension in the office and operation of the Respondent.

Before turning to the Hearing Examiner's views of the credibility of some of the individuals who testified on behalf of the Respondent, the Hearing Examiner will discuss some of his observations, conclusions and views on the particular arguments set forth by the Respondent. First, in a very practical sense, the ultimate consequences of the Respondent's position lacks real world credibility. Essentially, the Respondent is saying that in a highly competitive world it wants quiet and peace over an aggressive and wide ranging competition. It seems to the Hearing Examiner that the Respondent would wish to foster the Complainant's and other employees' desire to excel and to demonstrate the ability to lead the Respondent in the future. The Hearing Examiner concedes that it may be desirable for a company's upper management to be on the same page; however, this would seem to be a matter of focus more than termination.

Another general observation is that given the record as a whole, the actions of the Respondent do not appear consistent or logical. At the beginning of 2004, the Respondent believed that the Complainant was a valuable member of the Respondent's Management Team. Franklin told the Complainant that Mica and McBride valued his (the Complainant's) contributions and the Complainant was likely to be Franklin 's successor at some point in the future. However, accepting that the Respondent found the Complainant's later actions or statements objectionable, the Respondent took virtually no action to preserve the employment of the Complainant. It did not provide the Complainant with counseling. It did not try to work out any apparent problems between Franklin and the Complainant through any direct meetings. It did not involve the Complainant in any form of progressive discipline. While Mica and McBride may have urged the Complainant to cooperate or work more closely with Franklin , there is no indication of any threat to the Complainant's employment.

The lack of effort to preserve the Complainant's employment is particularly striking in light of the steps taken with respect to Dean Archer. Archer was a manager who reported to the Complainant. Apparently for a significant period of time, Archer was an abusive manager particularly, though not exclusively, with respect to his supervision of women. In March of 2004, after Archer was organizationally transferred to report to Condon, the Complainant went to Cooper on behalf of Bobbi Bischke to file a complaint against Archer. The Complainant, in filing this complaint, asserted that Archer's conduct could pose a threat of legal liability for the Respondent. The Complainant had made Franklin aware of the concerns involving Archer's management at one of the Complainant's first meetings with Franklin in January of 2004.

Cooper transferred the complaint to Marcia Barron for immediate investigation. Barron found grounds to take action with respect to the complaint against Archer.

It fell to Condon as Archer's supervisor to determine whether Archer should be retained or terminated. Condon, in consultation with others, took steps to preserve Archer's employment by establishing a series of requirements including apologies to affected staff, monitoring of his conduct, and evaluation and training by a third party consultant.

Archer's conduct, as reported by the Complainant, could have presented legal liability for the Respondent. Nothing in this record indicates that the conduct in which Complainant was supposed to have engaged rose

anywhere near that level. Despite the more serious potential consequences for the Respondent from Archer's conduct, Archer was given what seems to be more solicitous treatment.

While Archer undoubtedly provided important services to the Respondent, nothing in the record suggests that his position was as important to the success of the Respondent as was the Complainant's position. The Complainant had been assured of his future with the Respondent and his value to Mica and McBride. Despite Archer's lower status relative to that of the Complainant, Archer was retained and given every opportunity to "rehabilitate" himself while the Complainant was summarily terminated.

One might also compare the treatment of Franklin to that of the Complainant. Franklin was accused of conduct that violated both law and Respondent's policy. He was spoken to by Cooper, Mica and McBride and made to apologize to staff. That was sufficient redress of what could have been a serious problem for the Respondent.

On the other hand, the Complainant was engaged in conduct that was not violative of any law and does not appear to violate any policy of the Respondent. He was not given any corrective action or plan. He was simply terminated.

The Respondent contends that the Complainant is not similarly situated to Archer and Franklin. If not similarly situated to, the seriousness of his treatment cannot be properly compared with that of Archer and Franklin. In making this argument, the Respondent seeks to create a niche exclusive to the Complainant.

The Respondent contends that a manager at the level of the Complainant can be treated more harshly than a manager of a lower level such as Archer. Generally speaking, the Hearing Examiner can accept this position. However, when one compares Archer's treatment with that of the Complainant, it must be remembered that Archer was accused of conduct that was arguably illegal and could subject the Respondent to legal liability. On the other hand, the Complainant's conduct was never framed as violating the Respondent's policy or creating any form of liability for the Respondent. No one testified that they observed the Complainant do anything "wrong." (See testimony of Millar and Cooper.)

Additionally, Archer was not considered to be a "rising star" in the corporation. That the Complainant who was destined to "have it all" received more summary and harsher treatment is illustrative of how the Respondent viewed the Complainant's actions after reporting Franklin .

The argument that as a higher level manager, the Complainant was subject to a higher level of scrutiny, is weakened by the fact that Franklin, a yet higher level manager, was also treated more favorably than the Complainant. Franklin 's conduct again arguably created a potential legal liability for the Respondent. He was given an oral reprimand and made to publicly apologize. This seems significantly less onerous than the Complainant's summary termination. The Complainant was not reprimanded and was not made to apologize to Franklin .

With the Complainant firmly placed between Archer and Franklin in the management hierarchy, it seems that the Respondent's arguments about comparison are blunted. It would seem that one should be able to compare him to either or both Archer and Franklin, both of whom received less harsh treatment for what were potentially more serious offenses than ruffling feathers.

The Respondent also contends, in response to an argument of the Complainant, that the Complainant's abrupt termination was not unusual. The Respondent points to three other instances in which Mica terminated high level managers without subjecting them to progressive discipline. These included: Mary Meixelsperger, the Respondent's Chief Financial Officer; H. T. Johnson, a COO; and George Towle, another manager.

The problem with Respondent's argument is that it contends that Mica was not the decision-maker with respect to the Complainant's termination. It argues that McBride was the decision-maker or gatekeeper. If Mica was not the decision-maker, then how he acted with respect to three other employees is irrelevant.

To the extent that Mica was, at least, a part of the decision-making process with respect to the Complainant's termination, the other incidents might be generally relevant, but are distinguishable from the present case. First, with the exception of the incident involving Meixelsperger, the incidents are remote in time. The first two incidents appear to have taken place several years before the incidents that form the basis of this complaint. Second, each of the earlier incidents involve a single extreme situation that demonstrated a direct challenge to

Mica's authority, i.e., use of profane language with staff immediately after having been warned by Mica or providing the Board of Directors with a different financial package/projection after having agreed to another with Mica.

In the present case, there is no evidence that the Complainant challenged Mica's authority in any way, much less in the type of direct manner of these other individuals. The Respondent does not claim that the Complainant made any such challenge, but rather engaged in a lengthy period of conduct that worked to the detriment of the Respondent's general operation. The Respondent's argument simply does not demonstrate that the Complainant was deserving of the treatment he received, especially given his position and history with the Respondent.

Another general concern about the Respondent's contention that it terminated the Complainant for not being a "team player" is the Respondent's admission that there were no problems with the Complainant's production and that his conduct did not violate any policy of the Respondent. As Millar noted, in 2004, the Respondent was having a record year economically. It seems unlikely to the Hearing Examiner that if the Complainant were being as disruptive as claimed by the Respondent, then the Respondent would not have been able to meet or maintain such advances. The record indicates that the Complainant was responsible for the largest number of employees and products for the Respondent. If the Complainant were unable to work successfully with others such as Condon, Millar, Franklin , and many others, it stands to reason that production, income and profitability would have suffered. However, the Respondent acknowledges that the Complainant had done nothing to reduce the Respondent's effectiveness.

The single most obvious method in which the Complainant might have demonstrated himself not to be a team player was his willingness to report Archer and Franklin for conduct that may well have violated the ordinance and other laws. Given the Complainant's opposition to Franklin 's statements, it should not be surprising in the least that the Complainant might believe himself to have been a better selection as COO, and to be unhappy about reporting to someone whom he had reported for the use of racist, sexist and homophobic language. However, despite these understandable feelings, the Complainant continued to work for the good of the Respondent. He engendered deep loyalty in those he supervised, such as Hayes, Loether, Tomalin, and Lovelace, and was able to help the Respondent achieve new levels of profitability.

The Respondent's reliance on the testimony of Loether, Tomalin and Decker is unfortunate. While all three testified about how the Complainant's inability to come into line with Franklin as the COO adversely affected them, their credibility was negated by the revelations on cross-examination of their statements of loyalty and respect for the Complainant sent to the Complainant at the time of his termination. The fact that Loether and Tomalin both remain employees of the Respondent and were directly advantaged by the Complainant's departure does little to boost their credibility in the eyes of the Hearing Examiner. Loether, in particular seemed to be testifying to further her own personal agenda and was too flippantly willing to dismiss her earlier statements that directly contradicted her testimony on direct examination. Tomalin was more sophisticated in her testimony, but failed to counter the effect of her statements praising the Complainant by her later conversion to the side of her current employer.

Given this record, who can blame Loether and Tomalin for following the Respondent's line? The Respondent, in the case of the Complainant, demonstrated little compunction about terminating an employee who had apparently opposed the Respondent's sense of loyalty.

Another problem with the testimony of Loether, Tomalin and Decker is that clearly none of the material discussed by them was a basis for any decision made by McBride, Mica or Franklin . At best, their testimony represents an after-the-fact attempt to justify the Respondent's dismissal of the Complainant. As such, the testimony is inherently unreliable. Given the fact that all three of these individuals have benefited directly from the Complainant's termination, their testimony about what a terrible manager the Complainant was during 2004 is highly suspect.

What rings more true from the testimony of these witnesses are the following examples: Tomalin's concerns about an increasingly prevalent "good ol' boys" network that seemed to be operating since Franklin's assumption of the position of COO; Loether's concern over an email from Franklin that was suggestive and inappropriate after Loether had performed well; Decker's reporting to the Complainant of comments of a sexual nature made by Franklin both before and after the Complainant's termination; and the praise by all three about

the Complainant's skills, abilities and importance to each of them as a mentor and manager made prior and contemporaneously to the Complainant's termination.

Condon and Millar both found themselves in camps opposing the Complainant. Millar long favored an increased role for state credit union leagues because of his background coming from such an organization. While he did not demonstrate the deep personal resentment of the Complainant that Condon did, Millar nevertheless seemed to be very satisfied that a position once held by the Complainant was no longer in favor with the COO and others. That Condon and Franklin were close, both business allies and personal friends, cannot be doubted. Vicki Joyal testified that Franklin and Condon were tied at the hip by which she meant that they frequently spoke together, lunched together and played golf together. To the extent that Condon might be able to help Franklin by damaging the Complainant, the Hearing Examiner has little doubt that Condon would jump at the chance.

McBride was perhaps the most interesting witness of the entire hearing. As Mica's "right hand man," he has a long and distinguished history of serving Mica. This service extended to a point well before Mica's becoming the CEO of the Respondent. This record of service makes it hard to see McBride's testimony in a light other than one intended to further Mica's and the Respondent's interests without reservation.

Despite the clear link between Mica and McBride, McBride was a genuinely likeable witness. The Hearing Examiner believes that McBride has put a spin or gloss to his memory and testimony to fit what he believes best furthers the Respondent's position. In this regard, the Hearing Examiner can accept that McBride might see the Complainant's statements to Evers or McMorris as not being those of a team player. The Hearing Examiner cannot accept, however, that McBride can separate the fact of the statements from their content. Thus, the Hearing Examiner believes that McBride sees the Complainant's protected exercise of rights under the ordinance to be evidence of the Complainant's unwillingness to accept Franklin . That the Complainant would continue to be upset by Franklin's initial statements and those that came in the summer of 2004, and continue to complain about them to those in a position to affect the conduct was likely seen by McBride as disloyalty of a type that could damage the Respondent. Addressing that threat, despite the protected nature of the underlying conduct, the Hearing Examiner believes is what brings us to this point.

McBride's testimony that it was not the complaints about Franklin 's conduct, but rather his recommendation to discharge Miller was made only on the basis of his view that the Complainant could not be a successful member of the management team simply does not ring true. As noted previously, McBride knew of the success of the Respondent in 2004. He had, a few short months before, held the belief that the Complainant might well be the next COO. For McBride not to have attempted some form of reconciliation between Franklin and the Complainant strains the Hearing Examiner's credulity.

One specific allegation against the Complainant must be addressed. At the AACUL meetings in the Bahamas , McBride testified that Archer, during a golf game, told McBride that the Complainant had advised Archer to sue the Respondent over his treatment. Archer further stated that the Complainant offered to put Archer in touch with his (the Complainant's) lawyer.

McBride testified that he was very upset by Archer's statement. There is no indication that McBride did anything to verify such a frankly remarkable allegation against a Senior Vice President. There is no indication that McBride ever asked the Complainant about it or took any other steps to corroborate Archer's claim.

In testifying about the statement at hearing, Archer produced notes that he asserts verify the statement and place it in context. The Hearing Examiner regards Archer with little credibility. Archer nearly lost his job, had to make a public apology, and experienced other serious employment limitations as a result of the Complainant's complaint against Archer in March of 2004. Given Archer's history as an arrogant and bullying manager, the Hearing Examiner finds it entirely likely that Archer created the notes introduced at hearing and made his statement to McBride solely with the intent of sabotaging the Complainant's relationship.

While the record does not conclusively demonstrate that Archer and Franklin and Condon are all personal friends, the fact that Franklin went to Archer at the end of May, 2004 to warn Archer not to trust the Complainant indicates some sort of relationship beyond employment. Accepting that there was some extra relationship between Condon, Archer and Franklin, it is entirely credible that Archer saw an opportunity to damage the Complainant with McBride and he took it. (See testimony of Vicki Joyal.)

That McBride did not make Archer's alleged statement the center of the rationale to terminate the Complainant is an indication that he did not give the statement much, if any credibility himself. It is not credible to the Hearing Examiner that McBride would take such a statement at face value without taking steps to investigate what, if anything, lay behind it.

McBride's testimony represents the cornerstone of the Respondent's defense. The Respondent vociferously contends that McBride was the primary decision-maker and that as of early August, 2004, McBride did not know of the Complainant's protected activity with respect to Franklin . McBride's own testimony belies such a claim. Additionally, given McBride's role and his relationship with Mica, such a contention is not credible.

McBride stated that he had known Mica for over 30 years. During much of that time McBride had functioned as Mica's right hand man. McBride asserted that he did not know about Mica's conversation with the Complainant on April 29, 2004 concerning Franklin 's statements. It is inconceivable to the Hearing Examiner that Mica would not have told McBride about the allegation against the person whom they had hand picked to become COO, and that the individual making the charge against Franklin was the Complainant. When Mica tasked McBride to speak to Franklin to reinforce Mica's own reprimand, it is logical to expect that Mica would tell McBride the source of the complaint so that in working with Franklin , McBride would have all necessary information.

According to his testimony, on June 28, 2004, McBride wrote to Mica and Franklin an email critical of the Complainant. He stated that he did not understand the reference therein to "culture" to refer to the Complainant's complaint of sexist, racist, and homophobic conduct by Franklin . This position cannot be credited by the Hearing Examiner. This testimony includes McBride's admission that he must have learned of the Complainant's complaint from Mica. Also, in reference to the email on June 28, 2004, McBride stated that he thought the complaint had been previously addressed and therefore, the reference to "culture" must not have been to the Complainant's complaint.

For McBride not to have known that it was the Complainant who complained against Franklin would mean that he was the only one of the active participants in the events of 2004 who did not know. Testimony is clear that Mica, Franklin , Condon and Archer all knew. The Hearing Examiner cannot believe that not one person from this list of individuals with whom McBride interacted regularly or during this critical period informed him that it was the Complainant who complained against Franklin .

The Respondent spends much time in its brief attempting to create the impression of significant problems involving the Complainant over Franklin's hire in the period prior to the Complainant's discussion with Mica on April 29, 2004. These efforts represent dissembling and out right improper characterization.

The Respondent's brief is written in such a way as to indicate that the Complainant told Tomalin, Loether and Decker on numerous occasions of the Complainant's belief that Franklin was racist, sexist, or chauvinistic. The testimony is more limited than that. The witnesses did testify that the Complainant discussed with them his views as to some of Franklin 's shortcomings or problems. However, this appears to have been a single incident or, at least, limited in time to the end of 2003 or very beginning of 2004. Similarly, the Respondent uses an incident in February to create the impression that the Complainant was attempting to undermine Franklin 's authority. Franklin was discussing with Condon, in Condon's office, certain reorganizations that he believed might be appropriate. Specifically, Franklin wished to move the Publications Unit from Complainant's supervision to Condon. During the discussion, Franklin saw the Complainant and asked him to join the discussion. The circumstances certainly could be seen as an effort of Condon and Franklin to make decisions without the Complainant.

Though the Complainant was "emotional" or "passionate" about the proposal, he convinced Franklin that it made more sense to transfer Executive Services to Condon's responsibility than to shift Publications. In fact, Franklin , along with the eventual approval of Mica and McBride, not only did as the Complainant suggested but praised Complainant for his suggestion and cooperation.

It seems to the Hearing Examiner that a well paid member of senior management should be expected to provide input into decisions like this. Respondent argues that even though Franklin adopted the recommendation of the Complainant, the Complainant's advocacy of a structure different from that initially proposed by Franklin should be seen as divisive. The Hearing Examiner, and apparently Franklin, see things differently.

The Respondent asserts that Franklin did not name the Complainant as his successor in his (Franklin 's) April 22, 2004 Succession Plan he submitted to Mica. The Respondent argues that Franklin 's omission in this regard reflects concerns Franklin had about the Complainant's ability to occupy the COO position one day.

It is not surprising that in this document, Franklin did not see the Complainant as being ready to succeed him in the position of COO. Had he pronounced the Complainant immediately ready to replace him, it would have called into question Mica and McBride's judgment in naming Franklin to be COO just four months earlier. The fact that Franklin 's Succession Plan tracks almost identically the language of Mica and McBride in choosing Franklin over the Complainant cannot be coincidence. The Hearing Examiner does not find that Franklin 's Succession Plan can be seen as any indication that the Complainant was attempting to undermine Franklin 's authority.

The Respondent contends that on four separate occasions, the Complainant told someone that either he was trying to get fired or he should be fired. Two of these occasions involved Wes Millar and the other two McBride. By arguing that on four separate occasions such statements were made, the Respondent is guilty of overemphasizing a more limited series of events. This is a technique employed regularly in Respondent's briefs.

The circumstances under which the Complainant allegedly told Millar that he was trying to get fired and that he hadn't been successful yet are much more ambiguous than the testimony of Millar would lead one to believe. The effect of Millar's testimony that he couldn't determine if the Complainant was joking is limited by Millar's clear professional differences with the Complainant. Despite Millar's testimony, he was not able to point to any incident or series of incidents that showed the Complainant to be opposing the new direction of the Respondent or any incident in which the Complainant did something wrong. Millar testified that the Complainant told him that the Complainant found it difficult to follow the new direction. However, there was no testimony that he wasn't following that new direction, although it was difficult for him to do so.

Millar's testimony about the Complainant appearing to be unhappy and disconnected in staff meetings does not necessarily lead to the conclusion that the Complainant was seeking to be fired. Equally, Millar's testimony does not really indicate that the Complainant's unhappiness translated into less effective staff or Executive Management Team meetings. Millar never testified that the Complainant was causing difficulties or keeping the company from achieving its goals. In fact, Millar testified that the Respondent was enjoying one of its best years ever.

The alleged statements to McBride are harder to judge. First, McBride's own testimony on many items varied wildly depending on what needed to be said and who was doing the questioning. Given his lack of consistency, it is difficult to know whether to credit the statements he attributes to the Complainant with much in the way of veracity. The Hearing Examiner can certainly understand how someone who is frustrated with a decision might tell a supervisor that he should be fired without really meaning it or challenging that manager to actually fire the employee. It is difficult to judge the degree of seriousness of such a statement without more context and background than is present in this record.

Certainly, the Respondent does not seem to be arguing that it simply gave the Complainant that which he wanted all along. The Respondent's case is premised on the notion that the Complainant needed to be terminated for the good of the organization resulting from his inability to either accept that he didn't reach the final interviews for COO or accept the new directions in which Franklin was taking the Respondent at Mica's instance.

Accepting for the moment that the Complainant did tell McBride in the Bahamas that he (the Complainant) didn't know if he could work with Franklin as McBride wished and that he then should be fired, it seems to the Hearing Examiner that this statement is much like that reported by Millar that the Complainant was having great difficulty accepting the new direction or working with Franklin. In both instances, the Hearing Examiner understands them to be statements of difficulty, but not opposition. It does not appear to the Hearing Examiner that the Complainant's statements, to the extent they actually occurred, can or should be read as an open invitation to terminate his employment.

As with its contention that the Complainant attempted to "poison the well" against Franklin with his subordinates before Franklin even began, the Respondent overstates its proof with respect to the period from May 1, 2004 up to the beginning of the meetings in the Bahamas. Except for the allegations concerning the

Complainant's statements to Evers and Archer's statement to McBride, the record is essentially silent about conduct on the part of the Complainant in July of 2004.

With the finding that the Complainant had done little or nothing to undermine Franklin's authority through April, 2004, that really leaves the eight-week period of May and June, 2004 for the Complainant to have been so disruptive that his termination was justified some three months later. This record does not support the Respondent's position.

There is nothing in the record, upon which the Hearing Examiner could rely to find that in May and June of 2004 that the Complainant was engaged in a campaign to oust Franklin and replace him. Equally, there is little to suggest that the Complainant was opposing, actively or passively, the new direction in which Franklin was taking the Respondent. The Complainant may have disagreed with that direction but the Hearing Examiner would expect someone in the Complainant's position to make his or her concerns known. This critique of policies and direction is essential to sound policy development.

Additionally, much of the "negative" comments to which the Respondent points in the record is directed not at Franklin but other managers such as Condon. Certainly the Respondent is not suggesting that criticism of another vice president or his or her decisions represents conduct intended to undermine Franklin . If that were the case, Condon, Archer or Millar would be at least as guilty as the Complainant.

What is most evident to the Hearing Examiner is that the period of time in which things seem to have become critical for the Complainant in the eyes of McBride and Mica is the period immediately following the Complainant's report of Franklin 's misconduct to Mica. It is also at or shortly after the time when the Complainant's identity was tied to the reports sent to Mica. It is at this time that Franklin, Condon and McBride became most focused on the Complainant. This is during the period of time in which the Respondent was making more money than it had before.

The Respondent asserts that it was not only Condon, Franklin and McBride who had problems with the Complainant during this period. The Respondent points to Loether, Tomalin and Decker. However, as noted before, there is no evidence in the record that any alleged concern of these employees played any role in the Complainant's termination. Decker specifically, during this period, seems to have been a strong supporter of the Complainant, his conversion not coming until after the Complainant's termination.

The Respondent places much weight on the investigation Judy Cooper conducted at the request of McBride in August, 2004. For several reasons, the Hearing Examiner finds this investigation to be little more than window dressing for a decision already reached.

As noted earlier, Condon and the Complainant had long been competitors and did not particularly like each other. In June or July, Condon was reporting to employees that the Complainant had done something severe enough to get himself fired. At the end of July, 2004, he authored a statement in which he indicated that either the Complainant had to go or he (Condon) would have to consider leaving. Given the history between the Complainant and Condon, there is little surprise that Condon would not have been supportive of the Complainant's retention.

Equally, Evers is likely to have held little love for the Complainant. When she did not forward the Complainant's name for an interview in late 2003, the Complainant was extremely critical of Evers and the job that she had done. Also, his statements to Evers at the Cincinnati airport caused her to embarrass herself in her subsequent conversation with McBride. Also, to support the Complainant at that late date would call into question Evers's earlier judgment in failing to forward the Complainant's name for consideration.

The testimony of Wes Millar is quite interesting and somewhat deceptive. Millar's views were supposedly credited highly by Cooper and, hence, McBride because of his even disposition and ability to get along well with many different people. However, the Hearing Examiner finds that much of Millar's testimony is based solely on conjecture and assumption that is not necessarily borne out in the record.

Millar was one of the individuals interviewed in August, 2004 by Cooper at the behest of McBride when McBride was tasked to determine if the Complainant's employment was "salvageable." Millar's conclusion was that the Complainant was probably not salvageable. He reached this determination, according to his testimony, on the basis of two brief conversations with the Complainant and upon Millar's observations of the

Complainant's demeanor in several staff meetings. These conclusions lack any realistic basis and represent the rankest of speculation on the part of Millar.

Millar testified that in June or early July of 2004, the Complainant stopped by Millar's office for a meeting. In response to an inquiry about how the Complainant was doing, Millar states that the Complainant told him that he (the Complainant) was trying to get fired, but it hadn't worked yet. Millar believed that the Complainant had not said this in jest, but is unable to offer any information that might have led to such a remarkable statement. Other than this statement, the meeting was apparently unmemorable.

Several weeks later, Millar and the Complainant, as well as several other employees of the Respondent, were traveling to the summer conferences held in 2004 in the Bahamas . This is the same trip on which the Complainant told Evers of Franklin's discriminatory statements and the Complainant's displeasure with the situation. Given the last contact between the Complainant and Millar, Millar asked how things were going. The Complainant told Millar that he (the Complainant) was still there. Millar observed that the Complainant was in a "bad mood."

Millar also testified that he knew that the Complainant had not been in favor of close business relations with state credit union leagues. This was an approach favored by Mica and Franklin . From the Complainant's past opposition to state credit union leagues, Millar draws the conclusion that the Complainant would not be able to accept the Respondent's new direction under Franklin , a direction that would favor Millar.

Millar testified that he observed that the Complainant was less animated and connected in staff meetings and felt this had to be because of the Complainant's failure to support a new reality involving state credit union leagues. However, Millar did not testify that he heard the Complainant rebuked or criticized in any way. The problem with Millar's testimony is that while it was apparently sincerely given, it reflects little in the way of understanding of what was truly happening.

First, Millar testified that in the early summer of 2004, the Respondent was enjoying the most profitable and productive period in his memory. It seems unlikely to the Hearing Examiner that such business advances could have come about with one of the Respondent's primary Senior Vice Presidents actively working against the interests of the company. Millar suggests that the Complainant was less than enthusiastic about Mica's and Franklin 's business vision, but fails to point to any evidence that the Complainant was doing anything to "sabotage" such a vision. In fact, Millar testified that he had not seen the Complainant do anything inappropriate at all.

Second, Millar's observations with respect to the Complainant's statements about trying to be fired seem hollow. If a colleague of the Complainant's stature told the Hearing Examiner that he was trying to get himself fired, the Hearing Examiner would certainly want to know more about such a statement, if the Hearing Examiner did not take it as a joke. Millar only states that he did not understand it to be in jest. Given the record as a whole, it is impossible for Millar to have had any understanding of the context in which such a statement was made. For example, the Hearing Examiner could easily understand such a statement to be an ironic comment on the Complainant's complaints against Franklin 's conduct. Millar professed no knowledge of this situation, however. He did not explain why it was not a jest other than to point to the Complainant's past opposition to a business model including state credit union leagues.

Third, Millar, in his testimony, equates the Complainant's "bad mood" during the trip to the Bahamas in late July, 2004 with dissatisfaction over Franklin 's business decisions. This conclusion is reached despite nothing in the conversation about business direction. Millar apparently does not credit the delays and reassignments of airplanes to be a sufficient reason for the Complainant's "bad mood." Millar does not nor could not attribute the Complainant's "bad mood" to the Complainant's dissatisfaction with Franklin 's personal conduct rather than an opposition to business direction. Further, Millar had no knowledge of what had transpired with the Complainant prior to his conversation. He did not know if there might be a personal or family reason for the Complainant's "bad mood."

Millar tries to convey that he and the Complainant were friendly colleagues with a substantial history together. However, the Hearing Examiner hears an undercurrent of satisfaction on the part of Millar in the Complainant's termination. It is clear that based upon his background and his testimony that Millar had long favored a more inclusive business approach involving state credit union leagues. It is a reflection of Millar's own employment history that he would hold this belief. He also seemed to have begrudged the Complainant's success in

following a different business model that he (the Complainant) and the company as a whole were following as the result of an analysis and study paid for by the Respondent in 2000. That the Complainant was able to embrace and prosper under this business model speaks only to his own drive and business skills. It is interesting to note that despite Millar's belief that the Respondent was not giving adequate attention to opportunities with state credit union leagues, Millar was not fired or isolated in any manner.

Given this analysis of Millar's testimony and earlier statements, the Hearing Examiner cannot credit Cooper's or McBride's reliance on Millar as reasonable. That Cooper found Millar to be inherently credible is undercut by the obvious shortcomings in Millar's statements. For Cooper and McBride to utilize this collection of suspect statements to support the Complainant's discharge calls into question their veracity and judgment.

The Respondent has consistently asserted that the Complainant's effort to utilize the Complainant's opposition to Dean Archer's conduct towards women employees is irrelevant to the claim of retaliation. The Hearing Examiner, after hearing the entire record, agrees that Archer's conduct does not provide a basis for liability under this complaint.

Franklin knew of the Complainant's concerns about Archer and the Complainant's part in bringing Archer's negative conduct to light. There is nothing in the record, however, to tie that knowledge or information to McBride or Mica, both of whom seemed to have parts in the decision to terminate the Complainant.

Despite the lack of evidence connecting the Complainant's opposition to Archer's conduct with the Complainant's termination, much of the testimony is illustrative on issues of credibility and the negative atmosphere in which the Complainant was working at the end, an atmosphere not solely of his own making.

SUMMARY

In summary, with respect to liability, the Hearing Examiner finds that the Complainant's continuing objections to Franklin 's sexist, racist and homophobic comments played a motivating role in his termination. Although the Complainant was disappointed with the decision to hire Franklin as COO, a disappointment he shared with others, he worked in the first three or four months of 2004 to be the team player that Mica and McBride expected while trying to assure that his views and experience were taken into account in shaping the future of the Respondent. When Franklin 's use of sexist, racist and homophobic language became more than he could accept, the Complainant took his concerns to Cooper and included them in his Succession Plan. Mica spoke with the Complainant about his concerns and learned of Franklin 's inappropriate language.

Mica spoke with Franklin and directed McBride to speak with Franklin in Georgia about the degree of seriousness with which Mica took Franklin 's indiscretions. It is likely that McBride knew at this point that the Complainant was the source of the complaints.

As Franklin and others became aware that the Complainant was the source of the complaints to Mica, they began to be increasingly critical of the Complainant and his lack of support for Franklin .

While the Complainant was the recipient of this new level of criticism, he continued to do his job and to be concerned about Franklin 's continued use of inappropriate language. Even after Franklin had apologized to Respondent's staff in early June, he reportedly made inappropriate sexual remarks at a company sponsored ropes course designed to promote diversity and respect among the workforce.

With these incidents fairly fresh, the Complainant and others attended 10 days of meeting in the Bahamas . On the way to the meetings, the Complainant told Evers of Franklin 's comments and that Franklin represented a disaster for the Respondent. Evers reported elements of her conversation with the Complainant to McBride and Mica.

McBride, upon returning to the office after the Bahamas meetings, recommended to Mica that the Complainant be terminated. Mica felt that an additional investigation should be done to make sure that termination was warranted. McBride asked Cooper to question three individuals who held no love for the Complainant about the Complainant's employment. Though Cooper, echoing McBride's own words, reported that there was "no smoking gun" against the Complainant, she agreed he probably should be terminated. After consulting with

Franklin , the individual against whom the Complainant had complained, McBride and Mica with the "acquiescence" of Franklin terminated the Complainant almost a month later.

The Respondent's assertions that McBride didn't know that the Complainant had complained are simply not credible given the level of trust and communication between Mica and McBride. Also, the flow of information between and among Franklin , Condon, Mica and McBride make it highly unlikely that McBride remained ignorant of the source of the complaints against Franklin .

The Respondent experienced unprecedented growth and profitability during 2004. During this economic boom, the Respondent asks the Hearing Examiner to accept that the Complainant was such a disruptive and contentious influence that he had to be terminated for the good of the Respondent. On this record, the main aspect in which the Complainant was disruptive was that he complained about Franklin 's conduct and language.

In reaching this conclusion, the Hearing Examiner does not believe that the Complainant was an angel. It is difficult for the Hearing Examiner to understand why the Complainant did not take appropriate action with respect to Archer's conduct months before he went to Cooper and complained on behalf of Bischke. The Complainant's efforts to gain an additional interview for COO in 2003 appear to have been beyond those that one would expect from an employee. The Complainant may not have always been a "ray of sunshine" in staff meetings. However, these items fail to draw a convincing picture of someone who was determined to stand in Franklin's way at all turns and costs.

It is true that the Complainant might have chosen a less confrontational route to show his displeasure with Franklin 's comments and language. Perhaps some discussion occurred before the Complainant went to Cooper. If so, the record is silent with respect to this. Despite the existence of other roads to satisfaction, the Complainant was not compelled to follow those routes. That he chose to complain and to continue to complain to the powers that be at the Respondent is not something for which the Complainant can be legally faulted.

The Respondent appears to be a workplace with an unusually high level of internal fighting and personality conflicts. It clearly is a work place that rewards loyalty and seems to punish those who are no longer in favor. Much of the testimony of employees presented by the Respondent is motivated by this culture. That Mica, perhaps, wished to eliminate this aspect of the Respondent's culture is laudable; however, Mica's efforts do not appear to have extended to this litigation.

Given that the Hearing Examiner applies the "in part" test instead of that of "substantial evidence," this record supports a finding that the Respondent was motivated to terminate the Complainant in part because of his exercise of his right to oppose a discriminatory practice on the part of Franklin . The Respondent falls short of convincing the Hearing Examiner that McBride did not know of the Complainant's objections or that the Complainant's conduct required his termination.

DAMAGES

Having found that the Respondent terminated the Complainant, at least in part, because of his exercise of rights protected by the ordinance, the Hearing Examiner now turns to the issue of damages. When there is a finding of discrimination, the Hearing Examiner must recommend an order that makes the Complainant whole. To be made whole, the Complainant must be placed in the same position he would have been had the act of discrimination or retaliation not occurred. In order for the Complainant to be placed in the same position he would have been had the Respondent not terminated him, the Complainant needs to have the income he lost replaced along with the benefits to which he would have been entitled from the date of retaliation to the date of this decision. The "back pay" component must be adjusted by pre-judgment interest. Pre-judgment interest takes into account the lost opportunity cost of the Complainant's lost income. The Complainant should be entitled to reinstatement to his position with the Respondent to prevent future economic losses unless it is impractical to do so. If it is impractical for the Complainant to return to employment with the Respondent, the Complainant should receive an award of front pay for the period of time necessary to gain employment sufficient to replace his lost wages with the Respondent.

The ordinance also contemplates an award of non-economic damages. MGO Sec. 39.03(10)(c)(2)(b). See also Nelson v. Weight Loss Clinic of America, Inc., MEOC Case No. 20684 (Ex. Dec. 09/29/89); Leatherberry v.

GTE, MEOC Case No. 21124 (Comm. Dec. 04/14/93; Ex. Dec. 01/05/93); Carver-Thomas v. Genesis Behavioral Services, Inc., MEOC Case Nos. 19992224 and 20002185 (Ex. Dec. 01/25/06). The non-economic damages are to compensate a prevailing Complainant for injuries done to his or her dignity and rights. They are to compensate the Complainant for the embarrassment, humiliation and emotional distress of retaliation and/or discrimination.

Finally, a prevailing Complainant is entitled to an award of his or her costs and fees incurred in bringing a complaint before the Commission including a reasonable attorney's fee. Courts have long held that to further the purposes of social legislation such as the ordinance, it must encourage individuals to enforce their rights by bringing complaints of discrimination. They will not be encouraged to do so if they are saddled with the expense of paying their own attorney along with the costs of litigation. Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W. 2d 482 (1984).

In determining damages for retaliation, the Hearing Examiner is faced with a threshold question. In some circumstances, the courts at the federal level have applied what is known as the "mixed motive" analysis. Price Waterhouse v. Hopkins , 490 U.S. 228 (1989). In this analysis, if discrimination or retaliation is found, the trier of fact may also determine whether the Respondent has proven that in addition to the impermissible factor employed by the Respondent, the Respondent also had a legitimate, non-discriminatory factor that served as the basis of its action. In other words, did the Respondent, in addition to its retaliatory motive for terminating the Complainant, have a legitimate, non-discriminatory reason for terminating his employment? In the mixed motive analysis, the fact of the legitimate, non-discriminatory motive does not relieve the Respondent of culpability for its termination of the Complainant, but may act to reduce the damages due as a result of the act of discrimination or retaliation.

In Wisconsin , the courts have not addressed the mixed motive test in the context of a retaliation claim, but have done so in a discrimination complaint. Hoell v. LIRC, 186 Wis. 2d 603, 522 N.W.2d 234 (Ct. App. 1994). In adopting the mixed motive analysis, the appellate court indicated that when the Respondent was solely motivated by an impermissible reason in acting against an employee, the employee is entitled to the full range of damages available. Where the Respondent acts with permissible and impermissible motivation, the Complainant may be entitled to the full range of damages if the Respondent would not have taken the action in question absent the impermissible factor. Finally, if the Respondent demonstrates that it would have terminated the Complainant because of the permissible factor regardless of the impermissible factor, the Complainant would be entitled to only a cease and desist order and attorney's fees. Id. at 609-10.

The Commission has not clearly committed to the use of mixed motive analysis. In part, this is because the Commission has presumed that the factors considered in mixed motive analysis are to some extent subsumed in the "in part" analysis for purposes of determining liability. Morgan v. Hazelton Labs, MEOC Case No. 21005 (Ex. Dec. 04/02/93).

It is not presently required for the Hearing Examiner to determine whether the mixed motive analysis is appropriate or not. On this record, the Hearing Examiner cannot determine that the Respondent would have terminated the Complainant absent its retaliatory motive. On this record, things changed so dramatically for the Complainant after he reported Franklin 's use of discriminatory language that it is difficult to separate what may have been the Complainant's discontent with the proposed changes in corporate direction from unhappiness over Franklin 's language and the arguably publicly uncertain response to the complaint.

The Complainant may certainly have left the employment of the Respondent on his own. He had considered other positions while still employed with the Respondent. He was not happy as much of the testimony in this matter tends to show. However, Mica's statement that until the day he left, the Complainant was still his choice to lead the Respondent after the person they hired does not indicate the likelihood of termination. Even McBride, whose testimony tended to change as frequently as a wind vane in a frontal boundary, stated that if Franklin had opposed the Complainant's termination, he (McBride) and Mica would have probably talked things out and permitted the Complainant to stay. These are not statements showing that the Complainant would have been terminated absent the retaliatory motive. Given the failure to terminate Archer for a potentially more serious offense, this record falls substantially short of demonstrating that the Complainant would have been terminated absent the retaliatory motive.

Given this uncertainty about the Complainant's fate absent the retaliatory motive, the question of mixed motive need not be addressed. However, if mixed motive analysis is appropriate, the fact that the Respondent fails in

its burden to demonstrate that the Complainant would likely have been terminated even absent the retaliation, the full range of damages would be available to the Complainant. See Price Waterhouse, 490 U.S. at 228; Hoell, 186 Wis. 2d at 603.

Turning to the issue of back pay, the Complainant is entitled to the wages he lost as a result of the Respondent's act of retaliation. These damages are reduced by the wages the Complainant actually made or reasonably could have made during the period for which the damages are calculated. Then, the damages are increased by an amount of pre-judgment interest to compensate for the loss of use of the wages. However, the Complainant's wages may be reduced or eliminated if there is evidence demonstrating by a preponderance of the evidence that the Complainant failed to take reasonable steps to mitigate his wage loss.

In the context of these calculations, the Complainant's wage loss not only includes his salary, benefits and bonuses, but the corresponding increases in these compensation areas. Such as with other elements of a damages claim, these amounts must be proven by a preponderance of evidence.

The Respondent contends that the Complainant is entitled to no wage loss or other damages because the Respondent asserts that the Complainant has failed to demonstrate retaliation. In its brief in chief, the Respondent only argues that the Complainant is not a prevailing party and thus, not entitled to damages. However, in its reply brief, the Respondent fully addresses the issues regarding a claim for damages.

The order of proof on back pay generally is that the Complainant puts forth evidence of wage loss and evidence that he has taken steps to mitigate his damages. The Respondent may challenge the calculation of the wages lost and/or put forth evidence that the Complainant has failed to take steps to mitigate his damages. Steinbring v. Oakwood Lutheran Homes, MEOC Case No. 273 (Comm. Dec. 3/10/83, Ex. Dec. 2/11/82); Cronk v. Reynolds Transfer & Storage, MEOC Case No. 20022063 (Comm. Dec. 3/5/2007, other citations omitted); Harris v. Paragon Restaurant Group, Inc. et al., MEOC Case No. 20947 (Comm. Dec. 2/14/90, 5/12/94, Ex. Dec. 6/28/89, 11/8/93, other citations omitted).

The testimony of what the Complainant was making at the time of his termination was somewhat disputed. However, the Respondent called Megan Hawkos in an attempt to set that amount along with the level of benefits the Complainant received. For the period from September 9, 2004 until the end of that year, the Complainant would have made approximately $46,000 in wages. This amount would have been adjusted by benefits in the amount of approximately $9,660 or 21% of the wages. In 2005, the Complainant's base salary would have been approximately $162,000. This was his 2004 salary increased by an anticipated 6% bonus as per the testimony of Hawkos. This amount would have been adjusted by benefits in the amount of approximately $34,000. The Complainant's wages must be offset by the wages he actually received from other employment. The record reflects that in November of 2004, the Complainant began a consulting business to assist in offsetting his wage loss. In 2004, this effort brought in $30,000 worth of income. The record does not contain information for determining income from the consulting business for 2005 as tax records were not available at the time of hearing.

The Complainant's base salary would have been increased by an additional 6% bonus for 2006, but beyond that, the amount of further increases becomes speculative.

Before proceeding further with these calculations, the Hearing Examiner will turn to the Respondent's major argument with respect to wage loss damages. The Respondent contends that the Complainant has failed to take reasonable steps to mitigate his damages and therefore, is not entitled to any back pay award. The Complainant asserts that he has acted reasonably to replace his lost wages and should not be faulted for taking the steps that he has.

The Respondent makes two primary assertions regarding the Complainant's efforts to replace his lost income. First, the Respondent claims that the Complainant has not been sufficiently diligent in seeking employment to warrant an award of damages for wage loss. Second, the Complainant's calculation of his wage loss is too speculative to support his claimed damages.

Generally speaking the burden on the Complainant to mitigate his damages is relatively low. Case law clearly places the burden on the Respondent to demonstrate a failure to reasonably attempt to mitigate damages. Steinbring v. Oakwood Lutheran Homes, MEOC Case No. 2763 (Comm. Dec. 3/10/83, Ex. Dec. 2/11/82). See also Baker v. John Morrell & Co., 263 F. Supp. 2d 1161 (N.D. Iowa 2003), aff'd 382 F. 3d 816 (8th Cir. 2004)

(additional citations omitted) (excellent discussion of case law relating to the duty to mitigate and attendant burdens).

Given the record as a whole, the Hearing Examiner concludes that the Complainant has taken reasonable steps to attempt to mitigate his damages stemming from the Respondent's retaliation. The Complainant has applied, over time, for a number of positions, locally and elsewhere to replace his lost income. In addition, he has, while applying for other positions, attempted to open and operate a consulting business to replace income while he continues to job search. He further intends, in addition to operating a business and applying for positions, to undertake a Master's degree program in Madison to better position himself to replace his lost income. Had the Complainant only pursued a degree program or started his consulting business, the Hearing Examiner may well have found such to be an inadequate effort. However, in combination with the number of applications sent by the Complainant for other positions, the Hearing Examiner finds that the Complainant has undertaken a reasonable effort to mitigate his damages.

The Respondent contends that the Complainant's efforts fall short of a reasonable effort and to a great extent represent a sham. The Respondent finds fault with the Complainant's organization of and operation of a consulting business, his return to gain an additional degree and most of all, the number and types of jobs for which the Complainant applied. The Respondent misses the mark with these objections.

The Respondent seeks to hold the Complainant to a higher standard of mitigation than required by law. The Respondent would have the Complainant spending every waking hour submitting application to every remotely possible position and doing nothing else to replace the Complainant's lost income. This is not the standard. As reported in the cases cited above, the Complainant must make a "reasonable" effort to replace his lost income. On this record, the Hearing Examiner concludes that the Complainant has made this reasonable effort.

Both parties, in an attempt to deal with the mitigation issue, rely upon the testimony of expert witnesses. The Respondent called Leslie Goldsmith while the Complainant relied upon Kevin Schutz. To be sure, both experts had additional aspects to their testimony.

The problem with expert testimony in this area is that it generally invades the job of the Hearing Examiner. Whether it is Goldsmith stating that the Complainant did not do what a reasonable job seeker should have done or Schutz testifying that the Complainant did all he could, it is up to the Hearing Examiner to determine whether the Complainant's efforts met the legal standard for a reasonable attempt to mitigate his damages. (The Hearing Examiner also views Dr. Dennis Dresang's expert testimony as impermissibly infringing upon the Hearing Examiner's province as finder of fact and applier of law.)

Goldsmith's testimony lacked the precision necessary for it to be useful to the Hearing Examiner in making a determination relating to mitigation. He spoke in generalities and was unable to identify what it was that would make a particular position suitable for the Complainant or not.

There was much testimony about Exhibit 63. This exhibit was a compilation of positions culled from the Credit Union Times. The exhibit was compiled by Xavier Santistevan, a paralegal in the employee of counsel for the Respondent. Santistevan had no particular training in vocational searches and received direction only from counsel and with his own guesses about the Complainant's interests or qualifications. The Respondent wished to use this exhibit to demonstrate the plethora of positions that were available and for which the Complainant failed to apply. The Hearing Examiner admitted this exhibit to the extent that there was testimony about its individual entries.

The difficulty with this kind of exhibit is that it does not really relate back well to the Complainant's particular circumstance. For instance, Goldsmith testified about certain entries as being ones for which the Complainant might be qualified. However, there was no testimony about whether it would be a position in which the Complainant might be interested or the likelihood of the Complainant obtaining the position even if he applied for it. Merely saying that it is a position for which the Complainant might be qualified fails to move the inquiry out of the range of speculation into relevant testimony.

Santistevan testified that he included positions in various states either on the recommendation of counsel or because, the Complainant had, in his own exhibit, Exhibit 62, listed a position for which he had applied in a given location. However, Santistevan and Goldsmith essentially had to admit that they did not have any knowledge of why the Complainant might have applied for any given position in any particular location. As

Complainant's counsel pointed out on cross-examination, if the Complainant had applied for a position in South America , Santistevan would have included other similar listings even though he did not know why the Complainant might have applied for the one he hypothetically had.

The Respondent also attacks the Complainant's decision to seek a Master's degree in Business. The Respondent states that the Complainant has excellent credentials and the Respondent should not be required to pay for the Complainant to enhance his credentials. Schutz testified that he believed that a degree would enhance the Complainant's ability to recoup his lost wages. The Respondent's expert, Goldsmith, did not think that such a step was called for. In this kind of battle between experts, the Hearing Examiner finds it appropriate to fall back upon the respective burdens of proof. It is the Respondent's burden to demonstrate a lack of mitigation. If there is no particular reason to believe one side's expert over the other's, the side with the burden fails to establish its position by the requisite degree. That is the case in the present circumstance.

As noted above, the Complainant's Exhibit 62 demonstrates a lengthy, though perhaps not exhaustive job search. If that was all with which the Hearing Examiner was left to determine mitigation, it is not clear that the Complainant would have met his burden. However, it is far from certain that this would be the conclusion. When the Hearing Examiner looks at the Complainant's additional efforts to replace income through starting up a consulting business, the Hearing Examiner is convinced that the Complainant has acted reasonably to mitigate his damages. He has remained open to outside employment, but has taken steps to secure an income flow for the support of his family. It is perhaps not the way that the Hearing Examiner would have done so, but it does not appear to be an unreasonable strategy.

Given the record in this matter and the limitations of time, the Hearing Examiner finds the record incomplete for firmly setting the level of back pay losses. This is particularly true as the record did not have income values for 2005 or 2006 as of the time of hearing. Accordingly, the Hearing Examiner will utilize the technique used by the Equal Rights Division of the Department of Workforce Development (ERD)(DWD). The Hearing Examiner directs the parties to exchange information within 20 days of the date of this Memorandum with an eye towards determining proper income offsets for the years 2005, 2006, 2007 and for 2008 to the date of this Memorandum. If at the end of 20 days the parties cannot reach a stipulation as to back pay damages, the Hearing Examiner will schedule further proceedings to establish them.

Once back wage damages are fixed, the amounts will be adjusted by pre-judgment interest. Pre-judgment interest is applied to compensate a prevailing Complainant for the lost opportunity cost associated with his or her deferred income.

The primary question is what rate of interest should be utilized in fixing the rate to be applied to back wages. In the past, the Commission has opined that 12% was appropriate, using the then current prime rate. Reviewing courts have found this not to be the correct measure of interest. Hilgers v. Laboratory Consulting, Inc., MEOC Case No. 20277 (Comm. Dec. 11/18/85, 11/10/86, 3/29/89, Ex. Dec. 4/11/85, 7/12/85); Laboratory Consulting, Inc., v. Hilgers and MEOC and City of Madison , 85 CV 6300 (Dane County Cir. Ct. 8/20/86); Hilgers v. Laboratory Consulting, Inc. and MEOC, and Laboratory Consulting, Inc. v. MEOC and City of Madison, 86 CV 6488 and 86 CV 6673 (Dane County Cir. Ct. 8/24/87); Hilgers v. Laboratory Consulting, Inc. and MEOC, and Laboratory Consulting, Inc. v. MEOC and City of Madison, No. 87-2266 (Ct. App. 12/22/88). The Commission settled on 5% for a number of years. However, in the latest application of this principle, Cronk v. Reynold's Transfer and Storage, Inc., MEOC Case No. 20022063 (Comm. Dec. 3/5/2007; Ex. Dec. 8/29/2006, other citations omitted), the Commission accepted the stipulation of the parties to a pre-judgment rate of interest of 4%. As this is the most recent case applying prejudgment interest, the Hearing Examiner, absent evidence to the contrary or an agreement of the parties, will use that percentage for the rate of prejudgment interest in the present matter.

The Hearing Examiner now turns to "equitable" remedies. The first and most appropriate is reinstatement. Where the goal is to place a prevailing Complainant back in the position he or she would have been in except for the act of discrimination or retaliation, the best approach is to award the Complainant the position that has been lost. Such a remedy results in the Complainant receiving the wages and benefits and other privileges of employment that he or she lost and provides them with security in the future.

However, courts have long recognized that reinstatement, despite being preferable, is not always possible. The circumstances that brought about the complaint or the emotions of litigation can work to make reinstatement impractical or inadvisable. Where conditions mediate against reinstatement, courts have, turned to the concept

of “front pay.” This is a stream of monetary damages from the Respondent to the Complainant that is intended to, for a reasonable period of time, replace income that has been lost and to give the Complainant the opportunity to replace that income.

The threshold question here is whether the Complainant can be reinstated to his position or an equivalent position with the Respondent. On this record, the Hearing Examiner concludes that it is not practical for the Complainant to be reinstated.

There are several factors that lead the Hearing Examiner to this conclusion. First, the positions of the parties have changed substantially over the period of the litigation. The Complainant has, in part, committed himself to development and growth of a consulting business. Leaving this enterprise to return to employment with the Respondent may be costly and not entirely desirable. Also, the Respondent has promoted and filled the Complainant’s position with Jill Tomalin. To require the Respondent to remove Tomalin from this position might create difficult scenarios of employees “bumping” one another to make room for the Complainant and Tomalin. This would tend to create friction and make the work environment even more difficult. Tomalin was promoted to the Complainant’s position, presumably without reference to her participation in this litigation. As such to require her to vacate the position so that the Complainant can be reinstated would be inequitable and work an uncalled for hardship on Tomalin.

Given the testimony of the parties at hearing, the Hearing Examiner cannot find that the Complainant could be easily reintegrated into the workplace. The obvious animosity between Condon, Loether, Archer and others and the Complainant is likely to keep the Complainant from developing the trust and respect necessary to a successful enterprise. Equally, those who testified on behalf of the Respondent are likely to be unable to “revise” their attitudes about the Complainant expressed during the hearing.

The years of employment for the Complainant with the Respondent and his expertise and knowledge mediate in favor of reinstatement; however, the Hearing Examiner believes that the other factors including the animosity generated by this litigation prevent reinstatement from being a reasonable remedy. Much of the testimony at hearing reflected a level of antagonism between the parties that is inconsistent with reinstatement. This air of confrontation carries through to the parties post-hearing briefs. The fact that the Hearing Examiner had to admonish counsel on several occasions during the hearing of this matter is just a further reflection of the difficulties that would be posed by reinstatement.

With reinstatement not being possible, the Hearing Examiner must examine whether “front pay” is required or even appropriate. Front pay is that component of damages that is intended to replace a prevailing Complainant’s lost wages until he or she is able to replace them after he or she has reasonably mitigated his or her wage loss. Essentially, back pay covers the Complainant’s loss from the date of discrimination or retaliation until the issuance of a decision. Front pay covers the lost wages from the date of the decision until wages are fully replaced so long as the Complainant is making reasonable efforts to replace his wages.

At this point, the record is incomplete with respect to the issue of front pay. There was much testimony especially from the Complainant’s expert on how to calculate an appropriate front pay award. However, the Hearing Examiner lacks necessary figures for the level of the Complainant’s current income. If his consulting business has been more successful than at first, much of the wage loss may be moot at this point. Similarly, if the Complainant has altered his professional goals or obtained additional employment, calculation of these damages would be unnecessary and even inappropriate. Without a more complete record, the Hearing Examiner is unable to judge whether front pay is appropriate at this time and if so, in what amount. The Hearing Examiner will hold the record open pending the parties submissions on the Complainant’s income for his back pay calculation. The Hearing Examiner will then schedule additional proceedings to obtain additional data for determining damages. Were the Hearing Examiner to attempt to fashion all remedies at this time, the Hearing Examiner would necessarily engage in speculation rather than fact finding and application of facts found in the record.

The Hearing Examiner now turns to the issues surrounding a damage award for emotional distress injuries. The Commission has interpreted the provisions of MGO sec. 3.23(10)(c)(2)(b) (currently 39.03(10)(c)(2)(b)) to not only permit, but to require an award for such damages as part of the Commission’s duty to make a prevailing Complainant whole. This is not an exercise in punishment of the discriminating Respondent, but reflects an attempt to help undo the effects of discrimination for the Complainant.

Damages for emotional distress, humiliation or embarrassment are like any other element of a claim and must be proved by presentation of competent evidence. The standard for this proof is by the greater weight of the credible evidence. However, in most cases, proof need not be made by expert testimony. The testimony of the Complainant is generally sufficient to establish entitlement to and the degree of damages. Chomicki v. Wittekind, 128 Wis. 2d 188, 381 N.W. 2d 561 (Ct. App. 1985).

Over the past 20 years, the Commission has made awards for emotional distress damages ranging from $50.00 in Wilker v. Bermuda's Night Club, MEOC Case No. 3221 (Ex. Dec. 7/10/89) to $25,000 in Leatherberry v. GTE Directories Sales Corp., MEOC Case No. 21124 (Ex. Dec. 1/5/93). To a great extent, the differences in the level of award reflect the impact and the extent of the testimony about how the Complainant was affected by the Respondent's acts of discrimination. In Wilker, it appears that there was little testimony by the Complainant about how deeply he was affected by denial of the opportunity to obtain two drinks for the price of one at a "women's night" special sponsored by the Respondent. In Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. liability 2/10/93), the Complainant was awarded only $750.00 because she was more angry and offended by the Respondent's action than bothered or hurt by the discrimination.

At one end of the monetary damages scale, the Complainant in Leatherberry described poignantly the impact that the Respondent's discrimination had upon her, her family and her life. The Complainant was subjected to explicit racial slurs from her supervisor and mentor. When she complained to those higher in the company who should have been supportive of her, she was ignored and essentially told to accept her treatment. The Complainant's treatment was so disturbing that she constructively discharged herself from employment instead of continuing to bear the discrimination. The Complainant was forced to give up a career to which she had dedicated her professional life. She testified about how she was troubled and how the discrimination made her feel ill. She lost sleep and withdrew from her loved ones. The Complainant's testimony was substantially corroborated by testimony of her husband.

In Carver-Thomas v. Genesis Behavioral Services, Inc., MEOC Nos. 19992224 and 20002185 (Ex. Dec. 1/25/06), the Hearing Examiner awarded $15,000.00 to Complainant for emotional distress damages. The Hearing Examiner found that while the Complainant experienced a period of intense emotional distress the record did not indicate that it was particular lengthy. The Complainant was the only witness and did not give substantial detail of how the Respondent's discrimination affected her relationships with others or her view of herself. While these are not necessarily markers of emotional distress, they are factors that are often considered in making such awards.

In Laitinen-Schultz v. TLC Wisconsin Laser Center , MEOC Case No. 19982001 (Ex. Dec. 7/1/2003), the Hearing Examiner awarded the Complainant $15,000 for her emotional distress stemming from the Respondent's discrimination. The Complainant, who had a congenital hip condition, was constructively discharged after her supervisor accused the Complainant of trying to use her disability to further her employment with the Respondent. The Complainant also attempted to apply for a position that would have represented a promotion, but was not selected under circumstances that might cause one to believe her disability was a factor. Both the Complainant and her husband testified about the impact of the Respondent's discrimination upon her, her health and her family. Mediating against a larger award was the Complainant's relatively quick return to public life in an election for the local school board. Also, the Complainant did not return to the workforce for a number of months, not because of the effects of discrimination upon her, but because she decided to spend the summer with her children. As in Carver-Thomas, the Complainant experienced an intense, but relatively short period of emotional distress after the discrimination and this affected the amount of the award for emotional distress.

In the present case, the Complainant, as in Carver-Thomas, was the only witness on the issue of emotional distress. However, the Complainant's testimony was much more detailed. The Complainant described his shock at being dismissed. The culture of the place of work at the Respondent's office was one of a close family. The Complainant discussed his distress at being told, in effect, that he was not wanted in this "family" any more. Also, the Complainant's co-workers and colleagues made up the majority of his social circle. With his termination, the Complainant was effectively "shunned" by his social group. These are powerfully adverse assaults on one's dignity.

As in Leatherberry, the Complainant was deprived of a career that he had pursued successfully for many years. He was acknowledged to be one of the Respondent's stars and a likely successor to Franklin . The

Hearing Examiner accepts that to have the years of work expended and the promise of future acknowledgement taken away does substantial violence to one's self esteem and confidence.

The Complainant testified about the emotional impact upon him as he tried to explain to his young son why he (the Complainant) was not at work during the day. Also, especially distressing was the loss of the Complainant's health insurance policy and the difficulties that caused his family.

In addition to the impact of his termination on him and his family, the Complainant testified about his concern for friends and acquaintances who remained employed by the Respondent. The Complainant's subordinates, at least initially, were extremely loyal to the Complainant. (See the testimony of Vicki Hayes and Plumer Lovelace.) The Complainant experienced anxiety for the continued employment of these individuals as well as for friends such as Vicki Hayes and Plumer Lovelace. While the Hearing Examiner makes no findings as to the nature of Hay's and Lovelace's termination, a reasonable person in the Complainant's position could understand their terminations to have resulted from their loyalty to the Complainant.

All these factors make for a heavy and complex burden on the Complainant. When combining these factors with the length of time out of equivalent employment, the Hearing Examiner is convinced that the Complainant has experienced substantial emotional distress, humiliation and embarrassment from being terminated by the Respondent.

Determining what award of damages will adequately compensate a prevailing Complainant for emotional damages or injuries stemming from discrimination is more an art than a science. In making such awards, the Hearing Examiner reviews the history of such awards made under the ordinance in the past. In addition, there is a significant element in weighing one's personal experiences and comparing them to those of the Complainant. Finally, one must try to quantify the totality of the record regarding the impact of discrimination on the Complainant and assess how badly the Complainant suffered as a result of the discrimination.

After review of the record and after substantial thought and consideration, the Hearing Examiner determines that an award of $75,000 will compensate the Complainant for his emotional distress. The Hearing Examiner acknowledges that in some ways a dollar award is inadequate to repair the injuries experienced by discrimination. However, such awards are one of the tools available to the Hearing Examiner to attempt to place the Complainant in the position he would have been had the discrimination/retaliation not occurred. The Hearing Examiner emphasizes that this award is not intended to be punitive in nature, but is rather remedial. Given a corporation the size of the Respondent, a punitive award would have to be substantially larger than $75,000 to have any punitive or deterrent effect.

The Hearing Examiner is aware that this award is three times the previous highest award in Leatherberry. There are substantial differences in the records between these cases that support the higher award. First is the relative levels of employment. The Complainant was a Senior Vice-President with the realistic hope of becoming the company president at some point. Although the Complainant in Leatherberry had put in a number of years and had advanced within the company, she was not at the same level of responsibility or compensation; also she was not the primary source of income or insurance for the family. Also, she did not have to explain to an impressionable child the reasons for a lack of funds or why his parents are sad or not at work.

In fixing the amount of the award in the present case at the level of $75,000, the Hearing Examiner is assessing the injuries done to this Complainant and not attempting to say that his injuries are three times worse than those experienced by the Complainant in Leatherberry or that they are five times worse than those experienced in Carver-Thomas or Laitinen-Schultz. The Hearing Examiner references those decisions for the factors used in reaching those awards rather than how the evidence was applied to those factors. The factors and evidence and experience of the Complainant in the present case are different from those in the prior cases. While some factors may be present in this case and the older ones, it the totality of factors and evidence that lead the Hearing Examiner to this award.

CONCLUSION

To the foregoing reasons, the Hearing Examiner enters the above interim order.

Signed and dated this 16th day of May, 2008.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner