EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD, ROOM 523
MADISON, WISCONSIN 53703

David Norris 1490 Martin St. Madison, WI 53713 Complainant vs. Cost Cutters of Madison 1001 Fourier Dr., Suite 200 Madison, WI 53717 Respondent	COMMISSION DECISION AND ORDER EOD Case No. 20052134 EEOC Case No. 26B-2005-00078

BACKGROUND

On August 25, 2005, the Complainant, David Norris, filed a complaint with the Madison Equal Opportunities Commission (now the Department of Civil Rights, Equal Opportunities Division). The complaint charged that the Respondent, Cost Cutters of Madison, discriminated against him on the bases of his race, color, age, sex and status as a student when it terminated his employment. The Respondent denied that it discriminated against the Complainant in any manner.

Subsequent to an investigation, an Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant as alleged in the complaint. Efforts at conciliating the complaint were unsuccessful. After conciliation failed, the complaint was transferred to the Hearing examiner for further proceedings.

On March 17, 2006, the Hearing Examiner issued a Notice of Pre-Hearing Conference that was received by both parties. As evidenced by a signed return receipt, the Respondent received the Notice of Pre-Hearing Conference on March 21, 2006. At the time and date set for the Pre-Hearing Conference, 9:30 a.m. on March 30, 2006, the Complainant appeared without counsel. The Respondent did not appear by either a corporate representative or by counsel. After waiting for 30 minutes, the Hearing Examiner took under advisement the Complainant's motion for a default judgment. The Hearing Examiner indicated that he would issue an Order to Show Cause why a default judgment should not be entered for the Respondent's failure to appear.

On March 31, 2006, the Hearing Examiner issued an Order to Show Cause requiring the Respondent to demonstrate good cause for its failure to appear on or before April 10, 2006. The Respondent did not submit any material in accordance with the Order to Show Cause during the period provided in the order. Counsel for the Respondent did submit an explanation for its failure to respond and a general explanation for the Respondent's failure to appear at the Pre-Hearing Conference prior to the Hearing Examiner's issuance of a decision with respect to the Order to Show Cause and the Complainant's Motion for Default Judgment. However, the Respondent's submission was mailed and received after the date provided in the Order to Show Cause.

Subsequent to the Respondent's submission, the Hearing Examiner grant to the Respondent the opportunity to call witnesses and to submit an explanation for both the Respondent's failure to appear at the Pre-Hearing Conference and to timely respond to the Order to Show Cause.

An evidentiary hearing was held on June 27, 2006. On May 11, 2006, the Hearing Examiner issued a Decision and Order granting a default judgment to the Complainant. The Hearing Examiner found that the Respondent had not demonstrated good cause for its failure to appear and that there was an inadequate explanation for the failure of the Respondent to timely respond to the Order to Show Cause, but that was an issue that might be best resolved between the Respondent and its counsel.

Though the Hearing Examiner's Decision and Order did not provide for the opportunity to appeal, the Respondent filed an appeal. On July 3, 2007, the Commission determined that it did not wish to address the Respondent's appeal until all potential issues including damages had been decided.

The parties were given the opportunity to conduct discovery. On December 13, 2007, the Hearing Examiner held a hearing on damages. Subsequent to the filing of written argument, on June 24, 2008, the Hearing Examiner issued a Recommended Findings of Fact, Conclusions of Law and Order awarding the Complainant damages for back pay and emotional distress. The Respondent timely appealed the decision on damages and pursuant to the Commission's earlier decision on remand, the Respondent appealed the Hearing Examiner's issuance of a default judgment.

On January 21, 2009, the Commission issued an Interim Decision and Order remanding the record back to the Hearing Examiner for further proceedings. The Commission concluded that the Hearing Examiner's use of the "good cause" standard for determining whether the Respondent had adequately demonstrated that it should not face a default judgment was erroneous. The Commission remanded the record to the Hearing Examiner for application of the "excusable neglect" standard to the Respondent's explanation for its failure to appear at the Pre-Hearing Conference or to timely respond to the Hearing Examiner's Order to Show Cause.

The Hearing Examiner subsequently issued a Decision and Order on Remand applying the excusable neglect standard to the Respondent's non-appearance and late

response. In addition, the Hearing Examiner considered the Wisconsin Supreme Court's recent decision setting forth the majority's view of the "extraordinary circumstances" test applicable when deciding whether to vacate a default judgment. The Hearing Examiner concluded that a default judgment is still the proper remedy and that the Respondent has not demonstrated excusable neglect, good cause or extraordinary circumstances justifying vacation of that judgment. The Respondent timely appealed this decision.

On December 6, 2013, the Commission's Appeals Committee met to hear oral arguments by the parties and consider the Respondent's appeal. Taking part in the Committee's deliberations were Commissioners Weier, Rudd and Bolles.

DECISION

Wisconsin courts have consistently reaffirmed that the law views default judgments with disfavor and prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues. Hedtcke v. Sentry Ins. Co., 109 Wis. 2d 461, 469, 326 N.W.2d 727 (1982). Default judgments constitute "the ultimate sanction" and therefore "ought to attract close scrutiny on appellate review." Miller v. Hanover Ins. Co., 2001 WI 75, ¶ 31, 326 Wis. 2d 640, 785 N.W.2d 493. The party seeking relief from a default judgment must demonstrate that its inaction resulted from "excusable neglect." Alternatively, the defaulting party may also demonstrate that "extraordinary circumstances" favor granting relief. Id. at ¶ 41.

Excusable neglect is "that neglect which might have been the act of a reasonably prudent person under the same circumstances." Hedtcke, 109 Wis. 2d at 468. It is "not synonymous with neglect, carelessness or inattentiveness." Id. In determining whether the party seeking relief has demonstrated excusable neglect, the tribunal "should consider whether the moving party has acted promptly to remedy the default judgment, whether the default judgment imposes excessive damages, and whether vacatur of the judgment is necessary to prevent a miscarriage of justice." Mohns, Inc. v. Tcf Nat. Bank, 2006 WI App 65, ¶ 10, 292 Wis. 2d 243, 714 N.W.2d 245. Although prompt action alone is not a substitute for a demonstration of excusable neglect, it may give plausibility to the justifications given for the neglect. See Hedtcke, 109 Wis. 2d at 477.

In this case, Stacy Carroll, an employee of the Respondent, mistakenly conflated the voluntary conciliation meeting and the mandatory pre-hearing conference as part of the same process, and believed that both were voluntary. She mistakenly believed it was the Respondent's choice not to attend the pre-hearing process. She realized her mistake after receiving the Hearing Examiner's Order to Show Cause threatening sanctions, and then she immediately forwarded it to Respondent's attorney. These actions constitute a reasonable response in light of Ms. Carroll's understanding of the situation. A reasonable layperson could mistakenly conclude that two communications arriving close in time to one another pertained to the same voluntary process rather than two completely distinct processes—one mandatory and the other voluntary.

Once it became apparent that she may have been mistaken, she took prompt action to forward the matter to the attention of Respondent's attorney. Given the brief amount of time within which a response to the Order was due—"only a few days" according to the Hearing Examiner's May 11, 2007, Decision and Interim Order—Ms. Carroll did not have reason to believe that further inquiry was necessary. Ms. Carroll could reasonably conclude that Respondent's attorney would respond to the Order in a timely manner and that contacting counsel more than once within such a very brief period of time was not necessary given that the deadline was already fast approaching. The Commission finds that these actions constitute excusable neglect under the circumstances of this case.

The Commission would reach the same conclusion under the "extraordinary circumstances" set forth in the Wisconsin Supreme Court's recent decision in Miller v. Hanover Ins. Co., 2010 WI 75, 326 Wis. 2d 640, 785 N.W.2d 493.[1] The Miller test directs tribunals to consider five factors when determining whether it is appropriate to grant relief from a default judgment:

1. Whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant;
2. Whether the defaulted party received the effective assistance of counsel;
3. Whether the relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of decision the particular case on the merits outweighs the finality of judgments;
4. Whether the defaulting party has a meritorious defense, and
5. Whether there are intervening circumstances making it inequitable to grant relief.

Respondent's nonappearance and delayed explanation were not the result of conscientious, deliberate and well-informed choices. Ms. Carroll mistakenly conflated two distinct processes due to a reasonable misunderstanding, and Respondent's attorney failed to timely respond because he was out of the office. This lapse appears also to have deprived Respondent of the effective assistance of counsel. The first two factors therefore favor granting relief.

Further, there has been no consideration of the merits in this case and there is a strong interest weighing in favor of deciding them. Entry of a default judgment in an employment discrimination case carries significant potential negative consequences, reputational, financial, legal and otherwise. The stakes are high for both parties. Given the courts' preference to afford litigants a day in court wherever possible, the Commission finds that the third factor in Miller favors granting relief.

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[1] The Commission agrees with the hearing examiner's observation that the "extraordinary circumstances" test set forth by the majority in Miller "would seem present in most cases of default." This view coincides with Justice Bradley's concurrence in Miller, criticizing the majority view: "By converting the holistic inquiry about 'extraordinary circumstances' into a formulaic five-part test, it transforms ordinary cases into 'extraordinary' ones and undermines the finality of judgments." Id. at ¶ 63. The Commission finds Justice Bradley's concurrence persuasive on this point. Nevertheless, the Commission is constrained by the majority decision in Miller which strongly favors Respondent's position in this case.

Respondent has also raised a potentially meritorious defense in this case. Complainant asserts that Respondent discriminated against him based on his race and other factors by failing to train him adequately then firing him. Respondent asserts that it terminated Complainant based on customer complaints and false representations made in the application process. The Commission does not prejudge which position is more credible. It appears simply that Respondent has raised a legitimate, non-discriminatory justification for its decision, which may amount to a meritorious defense if proven true.

Regarding the final factor, whether intervening circumstances make it inequitable to grant relief, the Commission is aware of no such circumstances.

The parties agree that a pre-hearing conference is akin to a circuit court scheduling conference. Typically they serve to establish deadlines, and define the issues to be addressed at the hearing on the merits. They are often helpful but are not mandatory under the MEOC Rules. Failing to appear at a pre-hearing conference—while plainly improper and inadvisable—is not analogous to failing to appear at a merits hearing or to answer a complaint in circuit court. Complainant's counsel recognized this distinction and candidly agreed at oral argument that defaulting a party for its inadvertent failure to appear at a scheduling conference would likely not occur in circuit court. The Commission finds that consistency with analogous circuit court practice is desirable.

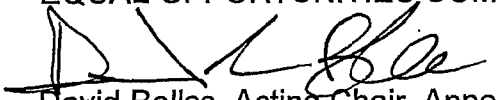
Rule 7.61 grants the tribunal a range of sanctions short of default to address a party's failure to comply with an order. Indeed Rule 7.61 contains no mention of default judgments. Rule 7.616 does grant the tribunal "authority to render any remedy necessary to achieve justice between parties." These sanctions could include issuing a rigid scheduling order without input from the non-appearing party or precluding the party from presenting evidence or calling witnesses. The Commission cannot conclude, however, that entry of a default judgment in this case is necessary to achieve justice between the parties. Respondent's brief delay in addressing its non-appearance and responding to the Order to Show Cause does not warrant the ultimate sanction of default.

ORDER

For the foregoing reasons, the Commission reverses the Hearing Examiner's order of default judgment and remands the complaint to the Hearing Examiner for further proceedings consistent with this Decision and Order. The Commission further orders that the Hearing Examiner conduct a hearing on the merits limited to the question of liability no later than 60 days after the date of this order.

Signed and dated this 12th day of March, 2014.

EQUAL OPPORTUNITIES COMMISSION



David Bolles, Acting Chair, Appeals Committee

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

David Norris
PO Box 1385
Madison WI 53701-1385

Complainant

vs.

Cost Cutters of Madison
1001 Fourier Dr Ste 200
Madison WI 53717

Respondent

HEARING EXAMINER'S DECISION AND ORDER ON REMAND FROM COMMISSION

CASE NO. 20052134

EEOC CASE NO. 26BA500078

BACKGROUND

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failure to respond and a general explanation for the Respondent's failure to appear at the Pre-Hearing Conference prior to the Hearing Examiner's issuance of a decision with respect to the Order to Show Cause and the Complainant's Motion for Default Judgment. However, the Respondent's submission was mailed and received after the date provided in the Order to Show Cause.

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On January 21, 2009, the Commission issued an Interim Decision and Order remanding the record back to the Hearing Examiner for further proceedings. The Commission concluded that the Hearing Examiner's use of the "good cause" standard for determining whether the Respondent had adequately demonstrated that it should not face a default judgment was erroneous. The Commission remanded the record to the Hearing Examiner for application of the "excusable neglect" standard to the Respondent's explanation for its failure to appear at the Pre-Hearing Conference or to timely respond to the Hearing Examiner's Order to Show Cause.

DECISION

This has been an extremely difficult matter for the Hearing Examiner to resolve. The arguments of both parties are excellent and the standards, while stated clearly, lack any precise guidance for their application. However, case law has developed over the intervening period and the Hearing Examiner must incorporate additional standards in performing his analysis.

The Hearing Examiner admits that, in practical terms, he sees little difference whether the actions of the Respondent in twice failing to meet requirements established by the Hearing Examiner are characterized as "good cause" or "excusable neglect." It is the Hearing Examiner's understanding that the "good cause" standard identified by the Commission as

having been used in the Hearing Examiner's May 11, 2007 Decision and Order represents a more stringent standard than that of "excusable neglect." However, "excusable neglect" is the standard dictated by the Commission in its January 21, 2009 Decision and Order.

Excusable neglect is "that neglect which might have been the act of a reasonably prudent person under the same circumstances." Hedtcke v. Sentry Ins. Co., 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982). "It is 'not synonymous with neglect, carelessness or inattentiveness.'" Id. "It is not sufficient that the failure to answer in a timely manner be unintentional and in that sense a mistake or inadvertent, since nearly any pattern of conduct resulting in default could alternatively be cast as due to mistake or inadvertence or neglect." Mohns, Inc. v. TCF Nat'l Bank, 2006 WI App 65, ¶9, 292 Wis. 2d 243, 249, 714 N.W.2d 245, 248 (Wis. Ct. App. 2006) (quoted source and internal quote marks omitted).

The Hearing Examiner first applies this definition to the conduct of the Respondent in failing to appear for the Pre-Hearing Conference set for March 30, 2006.

Stacey Carroll, the Respondent's Human Resources manager and the individual who had been the primary contact, testified that prior to receiving the Notice of Pre-Hearing Conference, she had been receiving duplicate copies of all the correspondence and found that confusing. According to Ms. Carroll, she indicated to a Commission Investigator/Conciliator that the Respondent did not want to participate in efforts to conciliate the complaint and asked the Investigator/Conciliator if it was necessary for her to participate. She was told that she did not have to participate in efforts to conciliate the complaint. However, it is inconceivable that the Investigator/Conciliator would not have indicated that further proceedings would be held for which the Respondent would need to participate. However, that precise testimony is not in the record.

What are in the record are copies of the notice to the parties that conciliation had failed and that the matter was being transferred to the Hearing Examiner for further proceedings. The next document in the Commission file after that notification is the Notice of Pre-Hearing Conference. As previously noted, the second page of the Notice of Pre-Hearing Conference, which the Respondent received on March 20, 2006, indicates in capital letters that a failure to appear may result in an order disposing of the case. This warning is not limited by its language to either party and is calculated by the emphasis to alert both parties to the need for their appearance at the Pre-Hearing Conference.

Ms. Carroll avers that she did not understand that she needed to appear at the Pre-Hearing Conference based upon her earlier discussion with the Investigator/Conciliator and that the language of the Notice of Pre-Hearing Conference confused her.

The question facing the Hearing Examiner is whether the actions of Ms. Carroll are those of a reasonably prudent person given the circumstances. The Hearing Examiner cannot find that they are.

First, as noted above, the need to appear for the Pre-Hearing Conference and the possible consequences for a failure to appear are capitalized in order to bring the importance of those words to the attention of the reader. While perhaps more could be done, as is, a reasonably prudent person should understand that the capitalized portion of the Notice of Pre-Hearing Conference reflects something important and out of the ordinary.

Second, even if the requirement to appear was confusing to Ms. Carroll, a reasonably prudent person would not, in the opinion of the Hearing Examiner, sit back to await further developments, but would seek information to remove the source of confusion. Ms. Carroll did not contact the Hearing Examiner nor did she contact the Investigator/Conciliator with whom she had dealt earlier. To do nothing in the face of her confusion demonstrates a failure to undertake reasonably professional steps to identify why the language in the Notice of Pre-Hearing Conference is highlighted in the manner that it is.

Third, the Notice of Pre-Hearing Conference is quite clearly from an individual, the Hearing Examiner, with whom Ms. Carroll had not previously dealt. A reasonably prudent person would, at a minimum, inquire of this new person what the Respondent's obligation might be. However, Ms. Carroll did not make an inquiry of anyone at the Department of Civil Rights or apparently anyone else, including her own attorney.

Given the record as a whole, the Hearing Examiner cannot conclude that the Respondent acted as a reasonably prudent person when it failed to appear at the Pre-Hearing Conference in this matter. The explanations for the Respondent's failure demonstrate neither good cause nor excusable neglect. Rather, they demonstrate a failure to act professionally or in the best interests of the Respondent.

Subsequent to the Hearing Examiner's decision on May 11, 2009 in this matter, the Wisconsin Supreme Court addressed the general policy question of default judgments in Miller et al. v. The Hanover Insurance Co., et al, 2010 WI 75 (Wis. 2010). While this decision is in the context of a default in a circuit court matter covered by the Rules of Civil Procedure, it seems only prudent to attempt to apply the Supreme Court's principles to the realm of administrative actions.

The Court begins by stating three general principles which it finds in Wis. Stats. 806.07(1)(a) through (h) (2011). First, it determines that as a remedial statute, section 806.07(1) is due a broad reading to effectuate the purposes of the provision. Second, the Court divines an intent to, wherever reasonably possible, afford litigants a day in court and a trial on the issues. Third, it asserts that defaults are disfavored as being the ultimate sanction. While the Court seems to strongly hint that defaults should whenever possible be avoided, it does pay lip service to the notion of finality and indicates that reviews of motions to open a default judgment should not be so broad as to erode the concept of finality.

The Court requires that, despite evaluating whether there is a specific reason for upholding a default judgment such as failure to demonstrate excusable neglect, the Hearing Examiner conduct an additional investigation to determine whether the demands of justice dictate that the default be lifted. The Court indicates that only extraordinary circumstances justify the review it determines as being required under section 806.07(1)(h) and that the burden rests on the party seeking relief to demonstrate that such extraordinary circumstances exist.

The Court in Miller writes, "A court appropriately grants relief from a default judgment under para. (1)(h) when extraordinary circumstances are present justifying relief in the interest of justice." 2010 WI 75, ¶35 (citing M.LB. v. D.G.H., 122 Wis. 2d 536, 553, 363 N.W.2d 419 (1985)). "[E]xtraordinary circumstances are those where 'the sanctity of the final judgment is outweighed by the incessant command of the court's conscience that justice be done in light of all the facts.'" Id. (citing Sukala v. Heritage Mut. Ins. Co., 2005 WI 83, ¶12, 282 Wis. 2d 46, , 698

N.W.2d 610 (Wis. 2005) (quoting Mogged v. Mogged, 2000 WI App 39, ¶13, 233 Wis. 2d 90, 607 N.W.2d 662 (Wis. Ct. App. 1999))) (further internal quotations and citations omitted).

To determine whether extraordinary circumstances exist, the Miller Court uses the language of section 806.07(1)(h) to set forth a list of five factors that should be considered. The factors include, but are not limited to, the following:

> "whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief" 2010 WI 75, ¶36.

It is the belief of the Hearing Examiner that in most cases of default, these factors will weigh in favor of the party seeking relief from a default judgment. In the present matter, it would seem that the record mediates finding that all these factors favor the Respondent.

It seems unlikely that any Respondent or Defendant would consciously choose to have a default judgment entered against it. There is nothing in the record demonstrating that the Respondent in the present matter thought about the consequences or took any time to consider what might happen should it not appear at the Pre-Hearing Conference in this matter. However, that is the problem of this record. The Respondent does not appear to have considered much with respect to its obligations.

It is clear that the Respondent's actions in not appearing at the Pre-Hearing Conference were not the result of active advice from counsel. No responsible counsel would advise a client to default. However, it is clear that the Respondent could have sought the advice of counsel before failing to appear and did not so consult with counsel.

Nobody has had the opportunity to hear the merits of the Complainant's claim. It is only after the fact that the Respondent wishes the opportunity to present its case.

The Respondent has contested the claims of the Complainant at each stage of the process. If the facts presented at the evidentiary hearing held on June 26, 2006 are demonstrated at a later hearing, the Respondent would have a potentially successful defense. However, at this stage, it is impossible to judge whether the Respondent's defense would carry the day or not.

The final factor is whether anything during the intervening period would make reopening of the default judgment inequitable. Other than the passage of time, the Hearing Examiner knows of nothing that might trigger this factor.

As noted above, the Miller Court derives these factors from the language of section 806.07(1)(h). However, there is nothing in these factors that of themselves would limit application of these factors to matters tried before a court. Given the general principles discussed by the Court in Miller, the Hearing Examiner assumes that they might be equally applied in the administrative context.

Despite the Supreme Court's clear indication that it favors the opening of defaults wherever reasonable to do so, the Miller Court fails to make clear how it intends its "interests of justice" analysis to be utilized in the context of everyday litigation. This shortcoming was identified by the Court of Appeals in Bank v. BV Nicolet, LLC, 2012 WI App 73 (Wis. Ct. App. 2012) (unpublished). In particular, the Court of Appeals indicates that the "interest of justice" factors must be balanced against other equities present in the record. Additionally, the Court of Appeals recognized that the Supreme Court in Miller did not indicate whether its analysis of the five interest of justice factors was quantitative, i.e., one must find three of the five factors in order to find that extraordinary circumstances exist.

As noted above, the Hearing Examiner does not find that the Respondent's explanations for its failure to appear at the Pre-Hearing Conference demonstrate excusable neglect. Ms. Carroll, on behalf of the Respondent, received the Notice of the Pre-Hearing Conference and, accepting that she was confused by the language of that document, failed to take any reasonable steps to clarify the Respondent's obligations and figuratively sat on her hands to await developments. Having determined that the Respondent failed to demonstrate excusable neglect, the Hearing Examiner reviewed the file to determine whether there were any extraordinary circumstances that might additionally require relief from the default as indicated in the Miller case.

While the factors identified by the Miller Court seem to mediate in favor of the Respondent, the Hearing Examiner is hard pressed to determine that under the circumstances of this record that there is a demonstration of extraordinary circumstances. Rather, to the Hearing Examiner, the circumstances of this matter appear to be relatively typical for a default. The factors identified in Miller from Section 806.07(1)(h) would seem present in most cases of default. Given the Court's dictate not to eliminate the goal of finality by an overly strenuous application of the interest of justice factors, the Hearing Examiner simply cannot conclude that there are any extraordinary circumstances warranting relief from the default in the interests of justice.

In the context of an administrative action, the Department has adopted a strict view where a Complainant fails to appear at a Pre-Hearing Conference. See generally Hamidi v. Dreamweavers, Inc., MEOC Case No. 20112071 (Ex. Dec. 08/16/12); Lawler v. Madison Metropolitan School District, MEOC Case No. 20102194 (Ex. Dec. 07/20/11); Velazquez-Aguilu v. Abercrombie & Fitch, Case No. 03398 (Comm. Dec. 07/20/99; Ex. Dec. 03/30/99). It would appear inequitable to hold Respondents to a less stringent standard for appearance than the Department holds Complainants. In both circumstances, the party who fails to appear is given the opportunity to demonstrate a reasonable explanation for the failure to appear. If the moving party fails to demonstrate an adequate reason for the failure to appear, the party loses the opportunity to present its case or its defense. For both sides, the loss is substantial and represents a form of ultimate sanction.

The Court in Sukala indicates that extraordinary circumstances are present when the sanctity of the final judgment is overwhelmed by the insistent command of the tribunal's conscience that justice is done in light of all of the facts. 2005 WI 83, ¶12. In the present matter, the Department's interest in affording both protected and regulated parties the same opportunity is not outweighed by the Respondent's desire to be relieved of a judgment triggered by its own failure.

The Hearing Examiner now turns to the question of the Respondent's failure to timely respond to the Order to Show Cause. Subsequent to the Respondent's failure to appear at the Pre-Hearing Conference, the Hearing Examiner issued an Order to Show Cause giving the Respondent the opportunity to demonstrate excusable neglect or good cause for its failure to appear. The Order to Show Cause was received by the Respondent and was forwarded to the Respondent's attorney for response. The Order required a response on or before April 10, 2006. According to the Respondent, the Order to Show Cause was sent to its corporate counsel along with several other routine matters. The Order to Show Cause and the other unrelated matters were timely received by the Respondent's counsel. However, the Respondent's usual counsel, Steven Nording, was absent from his office on a brief vacation. Once the Respondent sent the materials to its attorneys for response, it took no further action and did not inquire of its attorney to see what response might be required.

When Nording returned from vacation and reviewed the materials sent by the Respondent, he discovered the lapsed Order to Show Cause. Nording contacted the Department and was directed by the Administrative Assistant to the Director. The Director informed Nording that he should file a written explanation and response. Nording did that by facsimile transmission and by a hard copy mailed to the Department.

There are two questions presented by these circumstances. First, do they represent excusable neglect for the failure to timely respond to the Order to Show Cause? Second, if the actions of the Respondent's attorney do not demonstrate excusable neglect, are those actions imputable to the Respondent?

The failure of Respondent's counsel to professionally and timely respond to matters entrusted to him does not represent excusable neglect. Utilizing the tests from above, excusable neglect is not simple neglect, mistake, carelessness or inadvertence. As the Hearing Examiner understands the testimony of Nording at the June 26, 2006 evidentiary hearing, the materials were forwarded to his office by the Respondent, but it does not appear that anyone in his office was assigned to review matters in his absence. While the Hearing Examiner does not know whether to essentially leave one's office without making arrangements to review incoming material for time sensitive matters represents malpractice, it strikes the Hearing Examiner as unprofessional and negligent on the part of Nording. If someone was supposed to review the materials and did so incompletely or inaccurately, that fact is not clear on the record. Correspondence tracking is an important function in any professional office. That Nording acted quickly to minimize the impact of his office's failure does not necessarily relieve it of responsibility or eliminate culpability for the initial failure.

The second question is whether the actions of the Respondent's attorney can or should be imputed to the Respondent. The Court of Appeals in Zander v. Bidard addresses this question directly. 337 Wis. 2d 426; 805 N.W.2d 734 (Wis. Ct. App. 2011). While recognizing that not every defalcation on the part of an attorney should be imputed to the client, it does synthesize three factors for determining when they should be. Essentially, where the attorney was selected in a reasonable manner, the client reasonably relied upon the attorney and where the client made some inquiry in the matter which is the subject of a default, the court determines that the attorney's actions should not necessarily be imputed to the client. Id.

In determining in Zander that the lawyer's failure to timely file an answer should be imputed to the clients, the court determined that the clients had not inquired of the attorney

about the status of the matter pending before the lawyer. Id. In the present matter, the facts mirror this circumstance.

Once the Respondent received the Order to Show Cause, it forwarded the papers to its counsel. It should be noted that the Respondent bundled the Order to Show Cause with a number of other routine legal matters. It does not appear from the record that the Respondent placed any particular emphasis on the Order to Show Cause or took steps to draw the attention of its attorney to the Order to Show Cause. There is nothing in the record indicating that the Respondent made any effort to contact its attorney as the date for response drew close. Equally, there is no indication that once the date for response to the Order to Show Cause passed without apparent action from its attorney that the Respondent contacted its attorney to inquire about the status of the Order to Show Cause.

Given the standards set forth in Zander and the record as a whole, the Hearing Examiner concludes that Nording's failure to timely respond to the Order to Show Cause should be imputed to the Respondent. Had the Respondent shown any particular interest in the processing of the Order to Show Cause, the Hearing Examiner might be persuaded not to impute the failures of Nording's office to it. However, it appears to the Hearing Examiner that the Respondent's level of interest reflects a continuing lack of concern for its part in the Department's complaint process.

The Hearing Examiner concludes that the Respondent and its counsel fail to demonstrate excusable neglect with respect to the failure to respond to the Order to Show Cause in a timely manner. To the extent that mistake or inadvertence does not establish excusable neglect, the record establishes mistake or inadvertence at best and negligence at worst. The Hearing Examiner feels it is important to note that even if the Respondent's counsel had not failed to timely respond, the material that Nording submitted after the fact, does not necessarily demonstrate that the Respondent could demonstrate excusable neglect for the failure to appear at the Pre-Hearing Conference. Nothing in the record indicates that Nording's material does more than repeat the facts already considered here by the Hearing Examiner.

The Hearing Examiner does not understand the "interests of justice" factors outlined in Miller to be particularly applicable to this point in the analysis. The only extraordinary circumstances presented in the record seem to be that an otherwise reliable and responsible attorney failed to timely respond to a matter forwarded to him. That this likely would not have happened had he not been on vacation hardly seems extraordinary to the Hearing Examiner. The factors as outlined in Miller appear to more applicable to an unrepresented party than to one at the time of representation or to the actions of counsel. The only factors which may have some bearing at this stage are those related to whether a tribual has heard the merits of the Respondent's claim or whether the Respondent has a possibly meritorious defense. Both of these factors would weigh in favor of the Respondent. However, as noted previously, when balancing the equities of these factors against the principle of treating Complainants and Respondents equally, the Hearing Examiner is hard pressed to find that there are interest of justice factors that require relief from a default judgment for this Respondent.

There is no doubt that the Respondent feels aggrieved by imposition of the default judgment in this matter. However, had the Complainant failed to appear at the time of the Pre-Hearing Conference, the Hearing Examiner has no doubt that the Respondent would push with equal vigor for imposition of the ultimate sanction, dismissal of the Complainant's complaint. This would be without any regard for whether the Complainant might have a meritorious claim.

Part of the delay in the Hearing Examiner's resolution of this matter is considerable soul searching about whether some lesser sanction might have accomplished the Department's goal for fairness between the parties and deterrence for future failures to appear or to respond to Department orders. Deterrence is not limited to the parties in the present matter, but applies equally to parties in the future.

For example, in Rhyne v. Kelley Williamson Mobil, MEOC Case No. 20092086 (Ex. Dec. 03/30/11), the Respondent failed to file an answer to the Notice of Hearing. The Complainant, late in the process, filed a Motion for Default Judgment. The Hearing Examiner found that the Respondent had defaulted in its duty to file an answer but rather than entering a default judgment, permitted the hearing to proceed, limiting the Respondent's ability to put on witnesses.

The primary difference between the present matter and Rhyne is that the Complainant did not move for judgment until both sides had participated fully in preparation for hearing. In that circumstance, the Hearing Examiner found that the Complainant was not entirely without knowledge of the Respondent's position and defenses. In the present matter, the Complainant moved for default judgment immediately and action was required that reflected a balanced approach by the Department. To permit the Respondent to proceed under circumstances which would have resulted in dismissal had the Complainant been the defaulting party, does not result in the same equities as in Rhyne.

Given the additional guidance available to the Hearing Examiner since his May 11, 2007 decision and the opportunity to consider alternatives to the original default judgment, the Hearing Examiner concludes that a default judgment is still the proper remedy and that the Respondent has not demonstrated excusable neglect, good cause or extraordinary circumstances justifying vacation of that judgment.

As this matter is on remand to the Hearing Examiner from the Commission, the Hearing Examiner will return this matter to the Appeals Committee for further proceedings. During the pendency of this matter, the Equal Opportunities Commission established an Appeals Committee to decide appeals to the Commission. Accordingly, further matters should be addressed to the Appeals Committee.

Signed and dated this 25th day of January, 2013.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Nicholas E Fairweather
Robert J Kasieta

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

David Norris 1490 Martin St Madison WI 53713 Complainant vs. Cost Cutters of Madison 1001 Fourier Dr Ste 200 Madison WI 53717 Respondent	COMMISSION'S DECISION AND INTERIM ORDER ON RESPONDENT'S APPEAL FROM HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER AND DECISION AND ORDER ON DEFAULT JUDGMENT Case No. 20052134 EEOC Case No. 26BA500078

BACKGROUND

On August 25, 2005, the Complainant, David Norris, filed a complaint with the Madison Equal Opportunities Commission (now the Department of Civil Rights Equal Opportunities Division). The complaint charged that the Respondent, Cost Cutters of Madison, Inc., discriminated against him on the bases of his race, color, age, sex and status as a student when it terminated his employment. The Respondent denied that it discriminated against the Complainant in any manner.

Subsequent to an investigation, the Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant as alleged in the complaint. Efforts at conciliating the complaint were unsuccessful. After conciliation failed, the complaint was transferred to the Hearing Examiner for further proceedings.

On March 17, 2006, the Hearing Examiner issued a Notice of Pre-Hearing Conference that was received by both parties. As evidenced by a signed return receipt, the Respondent received the Notice of Pre-Hearing Conference on March 20, 2006. At the time and date set for the Pre-Hearing Conference, 9:30 a.m. on March 30, 2006, the Complainant appeared without counsel. The Respondent did not appear by either a corporate representative or by counsel. After waiting for 30 minutes, the Hearing Examiner took under advisement, the Complainant's motion for a default judgment. The Hearing Examiner indicated that he would issue an Order to Show Cause why a default judgment should not be entered for the Respondent's failure to appear.

On March 31, 2006, the Hearing Examiner issued an Order to Show Cause requiring the Respondent to demonstrate good cause for its failure to appear on or before April 10, 2006. The Respondent did not submit any material in accordance with the Order to Show Cause during the period provided in the order. Counsel for the Respondent did submit an explanation for its failure to respond and a general explanation for the Respondent's failure to appear at the Pre-Hearing Conference before the Hearing Examiner issued a decision with respect to the Order to Show Cause and the Complainant's Motion for Default Judgment.

Subsequent to the Respondent's submission, the Hearing Examiner granted to the Respondent the opportunity to call witnesses and to submit an explanation for both the Respondent's failure to appear at the Pre-Hearing Conference and to timely respond to the Order to Show Cause.

An evidentiary hearing was held on June 26, 2006. On May 11, 2007, the Hearing Examiner issued a Decision and Order granting a default judgment to the Complainant. The Hearing Examiner found that the Respondent had not demonstrated good cause for its failure to appear and that there was an inadequate explanation for the failure of the Respondent to timely respond to the Order to Show Cause, but that was an issue that might be best resolved between the Respondent and its counsel.

Though the Hearing Examiner's Decision and Order did not provide for the opportunity to appeal, the Respondent filed an appeal. On July 3, 2007, the Commission determined that it did not wish to address the Respondent's appeal until all potential issues including damages had been decided.

The parties were given the opportunity to conduct discovery. On December 13, 2007, the Hearing Examiner held a hearing on damages. Subsequent to the filing of written argument, on June 24, 2008, the Hearing Examiner issued a Recommended Findings of Fact, Conclusions of Law and Order awarding the Complainant damages for back pay and emotional distress. The Respondent timely appealed the decision on damages and pursuant to the Commission's early decision on remand, the Respondent appealed the Hearing Examiner's issuance of a default judgment.

On December 11, 2008, the Commission met to consider the Respondent's appeal. Taking part in the Commission's deliberation were Commissioners Benford, Braunginn, Bustamante, Enemuoh-Trammell, McDonell, McDowell, Walsh and Zipperer. Commissioner Morrison recused himself from any consideration of the appeal.

DECISION

The record in this matter is extensive and the parties have taken full opportunity to present their respective positions both on the issue of default, as well as on the issue of damages. The Commission resolves the current appeal on the issue of default only, not the issue of damages. The Commission reserves its right to address the issue of damages in the future, if necessary.

In determining that a default judgment in the present matter was warranted, the Hearing Examiner applied the standard for default set forth in Mohns, Inc. v. TCF National Bank, 2006 WI APP 65, 714 N.W.2d 245. In Mohns, the defendant failed to file an answer and failed to demonstrate good cause for its failure. The Respondent contends, among other things, that this is not the standard under which this matter should be determined. The Respondent argues that it is more appropriate to apply a test for failure to comply with an order of a tribunal. This standard is set forth in Trispel v. Haefer, 89 Wis.2d 725, 279 N.W.2d 242 (1989) and Gaertner v. 880 Corp., 131 Wis.2d 492, 389 N.W.2d 59 (Ct. App. 1986). The Complainant asserts that the Hearing Examiner used the appropriate standard and that the default judgment should stand.

In analyzing the appropriate standard, the Commission first reviewed the Rules of the Equal Opportunities Commission for guidance. The issue of default appears in two generalized circumstances. First, if a party fails to appear at the time of hearing, a default judgment may be entered unless the defaulting party can demonstrate good cause for his, her or its failure to appear. Commission Rules No. 8.7-8.9.

The second general area concerns situations where a party fails to comply with an order of the Hearing Examiner. These circumstances seem to most generally occur in discovery disputes. With respect to the second area of defaults, the Rules do not give guidance as to the standard to be applied. Rather, the Rules outline the sanctions to be imposed for such a failure. Commission Rules No. 7.6, 7.102.

The Commission sought to determine whether the circumstances as presented in this matter more closely resembled those of a failure to appear at the time of hearing or a failure to comply with an order of the Hearing Examiner. The outcome of this analysis dictates the Commission's resolution of this matter.

The Commission finds that the circumstances, as stated in this record, are more closely analogous to those of a failure to comply with an order of the Hearing Examiner. There are two separate points of default indicated in the record. First, there is the Respondent's failure to appear at the time of the Pre-Hearing Conference. Second is the Respondent's failure to timely respond to the Order to Show Cause. The second of these defaults, on its face, can be described as a failure to comply with an order of the Hearing Examiner. The Hearing Examiner directed an action by a certain time and the Respondent did not comply.

The first default, the failure to appear at the Pre-Hearing Conference, has elements of both a failure to appear and a failure to comply. It is true that the Notice of Pre-Hearing Conference indicates, in capitalized letters, that a failure to appear may result in an order disposing of the complaint. In this manner, the Respondent's failure is more closely like the failure to appear at the time of hearing. However, the Notice of Pre-Hearing Conference is an order of sorts to appear for a proceeding that is more ministerial in nature than a proceeding that, under typical circumstances, adjudicates the rights of the parties.

Given the nature of the proceedings, the Commission concludes that, under the current Rules of the Commission, the failure to appear for a Pre-Hearing Conference is more closely related to the failure to comply with an order of the Hearing Examiner.

The Commission in making this determination looks to the rules for a standard for judging the seriousness of the Respondent's actions and the potential consequences for its failure to appear. However, as noted above, the Rules of the Commission are silent as to the standard by which the Respondent's actions and explanations should be judged. Accordingly, the Commission turns to case law and the practice of other bodies as revealed in that case law.

In the Trispel and Gaertner cases, the courts applied the test of whether the defaulting party could state a "clear and justifiable" reason for the failure to comply with a requirement of the court. The standard of a "clear and justifiable" reason is equated with that for demonstrating "excusable neglect". Hedtcke v. Sentry Insurance Co., 109 Wis.2d 461, 326 N.W.2d 727 (1982). In this context, excusable neglect is that which might be demonstrated by a reasonably prudent person in the same or a similar circumstance. It is this standard the Commission finds should be used by the Hearing Examiner in determining the issue of whether a default judgment is warranted.

The Commission could take the findings of the Hearing Examiner and apply its own judgment as to whether the actions and explanations of the Respondent meet this standard. However, as the Commission sits as an appellate body, it finds that it is more appropriate for this matter to be remanded to the Hearing Examiner to make an independent determination of whether the Respondent's explanation demonstrates a clear and justifiable reason for both instances of default. In remanding this complaint for further proceedings, the Commission is cognizant of the length of time that this matter has taken to date. It reluctantly recognizes that additional time will pass. The Commission urges the parties and the Hearing Examiner to take all appropriate steps to expedite the necessary proceedings and determinations to resolve this matter. In remanding this complaint to the Hearing Examiner, the Commission does not pre-judge the outcome of the Hearing Examiner's analysis. It is clear that there are many potential outcomes depending upon the decisions made at various points in the proceedings. The Commission remains ready to hear whatever appeals that may come its way concerning this matter.

ORDER

For the foregoing reasons, the Commission remands the complaint to the Hearing Examiner for further proceedings consistent with this Decision and Order.

Joining in this decision are Commissioners Benford, Braunginn, Bustamante, Enemuoh-Trammell, McDonell, McDowell, Walsh and Zipperer. No Commissioner opposed this action of the Commission. Commissioners Bayrd, Morrisson, Solomon and Woods took no part in this action.

Signed and dated this 21st day of January, 2009.

EQUAL OPPORTUNITIES COMMISSION

Bert G. Zipperer President

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

David Norris 1490 Martin St Madison WI 53713 Complainant	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACTS, CONCLUSIONS OF LAW

vs. Cost Cutters of Madison 1001 Fourier Dr Ste 200 Madison WI 53717 Respondent	AND ORDER ON DAMAGES Case No. 20052134

This matter came before Hearing Examiner, Clifford E. Blackwell, III, for a hearing on damages in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd. on December 13, 2007. A default judgment on the issue of liability was issued by the Hearing Examiner on May 11, 2007. Appearing for the Complainant, at the hearing on damages, were the Complainant, David Norris, in person and his attorney, Nicholas Fairweather of Cullen Weston Pines and Bach LLP. The Respondent appeared by its Corporate Representative, Rebecca Bryant, and its attorney, Robert Kasieta of the Kasieta Legal Group, LLP. Based upon the record in this matter, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order with respect to damages

RECOMMENDED FINDINGS OF FACT

1. The Complainant, David J. Norris, is a black, African American male. His age was not specified at hearing. He was a participant as a student or apprentice in a cosmetology training program operated by the Respondent in 2005.

2. The Respondent, Cost Cutters of Madison, Inc., is an employer within the City of Madison and operates a number of salons and a training program intended to help applicants become licensed to work at its salons.

3. On or about July 25, 2005, the Complainant began working at the Respondent's salon located at 1171 N. Sherman Avenue, Madison, WI.

4. The Respondent terminated the Complainant's employment on or about August 9, 2005.

5. The Complainant had been a licensed cosmetologist and instructor in the State of Illinois in the 1980's. He worked in those capacities for several different salons. Upon leaving Illinois, the Complainant did not seek to re-enter the field of cosmetology until he submitted his application to the Respondent in the summer of 2005.

6. At the time of his termination, the Complainant was paid approximately $7.00 per hour and had the opportunity for commissions on the sales of certain products. The Complainant worked approximately 40 hours per week for the Respondent. Commissions were tied to the productivity of employees. Prior to his termination, the Complainant had not been entitled to any commissions resulting from products sold at the salon where he worked.

7. Immediately after his termination, the Complainant sought employment to replace his lost income. Within approximately 10 days of his termination, the Complainant found employment through Labor Ready, an employment service with an office in Madison. His compensation from employment through Labor Ready was at least $7.00 per hour. He generally worked at least 40 hours per week once he began work through Labor Ready.

8. After approximately nine months of employment through Labor Ready, the Complainant began work at the Daybreak Café, a food service operation located in governmental office buildings. The Complainant took this new position to attempt to advance himself and to secure more stable working hours and conditions. While employed at Daybreak Café, his wages were $8.00 per hour. He worked for at least 40 hours per week while employed at the Daybreak Café.

9. Subsequent to leaving the Daybreak Café, the Complainant went to work for UW Housing as a housekeeper. He maintained this employment until October 25, 2007, at which time his employment was

terminated for the Complainant's alleged breech of security requirements relating to his employment. At all times during his employment with UW Housing, the Complainant's wages exceeded those he would have received in employment with the Respondent, ranging between $9.00 and $10.00 per hour. The Complainant worked at least 40 hours per week during his employment with UW Housing.

10. At no time, since his termination by the Respondent, has the Complainant sought employment in a salon or as a cosmetologist.

11. At the time of his termination, the Complainant was unhappy and somewhat disappointed. He expressed that he felt anger over his termination. The Complainant also expressed that he was depressed, manic, agitated and frustrated as a result of his termination.

12. In the months after his termination, the Complainant did not seek medical or psychological help or treatment. The Complainant has a history of mental health issues and problems with substance abuse. The Complainant testified that he experienced a relapse of his substance abuse problems which he attributed to his termination. No timeframe was stated for this relapse. In September of 2006, the Complainant was hospitalized at Meriter Hospital for a psychiatric event/problem for four to five days.

13. The Complainant has filed other claims of discrimination before and after the filing of this complaint. One such complaint was against UW Housing for discrimination surrounding his employment and termination. Another complaint was against Madison Gas and Electric for employment that ended shortly before the Complainant applied for a position with the Respondent. These other complaints were settled. The Complainant declined to disclose the terms of the settlements because of requirements of confidentiality.

14. The Respondent no longer trusts the Complainant to be able to fulfill the duties of a cosmetologist and does not want him back as an employee.

15. The Complainant has demonstrated an ability to find comparable employment and has not demonstrated an interest in returning to cosmetology.

CONCLUSIONS OF LAW

1. Entry of a default judgment does not relieve a prevailing Complainant from the requirement to demonstrate each element of damages claimed by the Complainant.

2. A prevailing Complainant is entitled to damages that will "make him whole" if he proves those damages by the greater weight of the credible evidence.

3. The Complainant sufficiently mitigated his economic damages by seeking and obtaining employment that paid an amount that was at least equal to that which he was making while employed by the Respondent.

4. A Complainant is competent to testify about the extent and nature of his or her emotional distress resulting from an act of discrimination.

5. A Complainant, unless otherwise qualified, is not competent to testify to a medical diagnosis or the medical cause of an injury or condition.

ORDER

1. The Hearing Examiner's Decision and Order on Default Judgment, dated May 11, 2007, is adopted and incorporated by reference as if fully set forth herein.

2. The Respondent shall pay to the Complainant back pay in the amount of $448.00 no later than 30 days from the date on which this order becomes final.

3. The Respondent shall pay to the Complainant prejudgment interest on the award of back pay to be calculated at the rate of 4% per year, simple interest, to run from August 9, 2005 until the date upon which

the back pay award is paid.

4. The Respondent shall pay to the Complainant the amount of $3,000.00 as compensation for his emotional distress, humiliation and embarrassment resulting from the Respondent's termination of his employment. Such amount shall be paid within 30 days of this order becoming final.

5. Within 30 days of this order becoming final, the Complainant shall submit a petition for his reasonable costs and fees expended in pursuit of this matter including a reasonable attorney's fee. The Respondent may submit any objections to the Complainant's petition within 15 days of its receipt.

MEMORANDUM DECISION

The procedural history of this matter is unusual. A default judgment was entered by the Hearing Examiner on May 11, 2007. This default stemmed from the Respondent's failure to appear at a Pre-Hearing Conference scheduled for March 31, 2006. The Respondent also failed to timely respond to an Order to Show Cause issued by the Hearing Examiner after the Respondent's failure to appear at the Pre-Hearing Conference.

The Respondent objected to the entry of a default judgment on the issue of liability and sought an appeal to the Commission over the default judgment. The Commission, on July 3, 2007, remanded the complaint to the Hearing Examiner stating that it would entertain the Respondent's appeal only when the issue of damages had been decided and all issues were final.

On December 13, 2007, the Hearing Examiner held a hearing on the issue of damages. Both parties presented testimony and subsequently submitted written arguments in support of their respective positions.

What strikes the Hearing Examiner as unusual is that both parties, through the testimony presented on December 13, 2007, and in their post-hearing briefs, seem to want to argue the issue of liability once again. The Hearing Examiner has issued his ruling on liability and has not been presented with any compelling reason why he should or must vacate his earlier determination. Given the procedural stance of this complaint, the Hearing Examiner declines to re-open the issue of liability. The parties may make their arguments on that point when procedurally appropriate.

In general, damages stemming from a claim of employment discrimination fall into three kinds: economic, non-economic and injunctive. Economic damages are those necessary to replace the lost income often experienced by someone who has been discriminated against. Non-economic damages are those necessary to compensate one who has been discriminated against from the emotional injuries that can flow from an act of discrimination. Injunctive damages or relief are intended to prevent future loss, economic or non-economic, from the act of discrimination. The Hearing Examiner will address each of these forms of damages as they apply to this complaint.

Based upon this record, economic damages relate to back pay, entitlement to commissions and out-of-pocket expenses expended by the Complainant. For the most part, the record with respect to these claims is sketchy. Perhaps the best documented claim is that for back pay.

While employed by the Respondent, the Complainant was paid $7.00 per hour. He generally worked 40 hours per week. This testimony was not contradicted by the Respondent's one witness.

Generally, proof of back pay damages follows a fairly predictable pattern. First, the Complainant sets forth his pay and hours. He then demonstrates the efforts he undertook to find employment to replace his lost wages (mitigation of damages). If the Respondent does not believe the Complainant has acted reasonably in attempting to mitigate his loss, the Respondent puts forth evidence of how the Complainant has failed or the steps he could have taken to reduce his loss. Steinbring v. Oakwood Lutheran Homes, MEOC Case No. 2763 (Comm. Dec. 3/10/83, Ex. Dec. 2/11/82); Miller v. CUNA, MEOC Case No. 20042175 (Ex. Dec. 5/16/08).

In the present case, the Complainant's testimony establishes his income and hours. He testified that once terminated, he immediately went to sign up for unemployment compensation and undertook the study and job search required by the job service. As a result of his diligence, the Complainant began working through a temp service, Labor Ready, within 10 days of his termination. During the period of his employment through Labor

Ready, the Complainant made $7.00 an hour and generally worked 40 hours per week. This by itself demonstrates an adequate effort to mitigate his damages.

The Complainant further testified that after several months of working through Labor Ready, he took a position at the Daybreak Café. This was a food service job working at a location in a state office building. The Complainant was paid $8.00 per hour and worked 40 hours per week while employed at the Daybreak Café.

The Complainant testified that he left Labor Ready because he wished to find employment that provided him with some potential for advancement. He also wanted a more stable source of employment. These represent legitimate reasons for leaving employment with Labor Ready and do not diminish the Complainant's efforts to mitigate his wage loss, especially given that the position to which he moved paid him more than he was making at either the Respondent's salon or through Labor Ready.

From this record, it is not clear how long the Complainant worked at Daybreak Café. However, at some point in 2006 or early 2007, the Complainant left employment at Daybreak Café and went to work at UW Housing performing general housekeeping duties. With UW Housing, the Complainant was paid $9.83 per hour and worked 40 hours per week. Again, the move from Daybreak Café to UW Housing does nothing to demonstrate a lack of mitigation on the part of the Complainant. He worked the same number of hours for a higher wage than that paid by the Respondent and higher than either of his previous employers.

The Complainant's employment with UW Housing came to an end on October 25, 2007, when the Complainant was terminated after losing a master key or keys. The loss of these keys created a security concern for UW Housing.

As of the date of hearing, the Complainant was unemployed. He had not found employment since being terminated from UW Housing.

This record affects the Complainant's claim for back wages in several important ways. First, it clearly establishes that the Complainant substantially mitigated his damages as required by the law of damages. It also sets forth a record demonstrating that the Complainant's wage loss is minimal. Finally, it establishes that the Respondent has no continuing responsibility for back pay.

First, the Complainant's uncontested testimony demonstrates that he found comparable employment within 10 days of his termination by the Respondent. Given a 40-hour working week with the usual time off for weekends or other days off, the Complainant was out wages for 64 hours at the rate of $7.00 per hour. This would indicate a wage loss of $448.00 for the period before the Complainant found new employment.

Second, the Complainant appears to have been more or less continuously employed from on or about August 19, 2005 through October 25, 2007. Since this employment was at a wage equal or greater to that which the Complainant would have been paid by the Respondent, the Complainant has no wage loss for which this body can award compensation for that period.

Third, the Complainant's final employment was terminated for an act of negligence on the part of the Complainant. He apparently was accused of losing a key or key that created a security risk for his employer. Had the Complainant been terminated for a reason not of his responsibility, the Respondent might still be liable for the Complainant's wage loss subsequent to the termination of the Complainant's employment with UW Housing. However, the Complainant's apparent culpability in his termination acts to cut off the Respondent from further liability.

The second potential claim for economic damages relates to the Complainant's testimony that he had some possibility of receiving commissions on hair care and other products for whose sale the Complainant was responsible. The problem with this potential claim is that it is clear that in the Complainant's approximately two weeks of employment with the Respondent, he had not been entitled to any commissions. Also, the Respondent's commission policy is not clear and to determine whether it would apply to the Complainant, or under what circumstance it might apply to the Complainant, would require the Hearing Examiner to speculate about the level of the Complainant's performance had the Complainant not been terminated. The Hearing Examiner may not engage in such speculation without running afoul of the requirement that the Hearing Examiner's determination be supported by fact or reasonable inference from the record. The Hearing Examiner can make no award based

upon a claim for lost commissions.

The third area in which there could be a claim for economic loss relates to costs incurred by the Complainant for treatments relating to his hospitalization in 2006. The Complainant contends that this hospitalization was required because of emotional distress relating to his termination by the Respondent. This claim presents several factual problems for the Hearing Examiner and the discussion of the issues relating to proof necessarily stretch between the discussion of economic and non-economic losses. The Hearing Examiner will defer the primary discussion of this claim to the portion of this memorandum dedicated to the discussion of non-economic damages.

The Hearing Examiner does feel compelled to note, however, that the Complainant's documentary evidence relating to this claim was withdrawn after objection to its admission was made by the Respondent. This is particularly true with Exhibits 4, 5 and 6 relating to the amount charged to the Complainant for the services relating to his hospitalization. The Complainant did not testify separately about these charges. In other words, there is no factual support in the record for making an award of the out-of-pocket expenses incurred by the Complainant relating to his hospitalization in September of 2006.

One issue relating to economic damages not raised by either party is that of pre-judgment interest. Pre-judgment interest is normally applied to back pay awards to compensate a prevailing Complainant for the lost opportunity cost associated with a loss of income. Such awards run from the date upon which the wages would/should have been paid absent the act of discrimination until the award is actually paid.

The rate of interest to be applied in the calculation of prejudgment interest is generally in the discretion of the Hearing Examiner. Steinbring v. Oakwood Lutheran Homes, MEOC Case No. 2763 (Comm. Dec. 3/10/83, Ex. Dec. 2/11/82). The record in this matter is devoid of any evidence from which the Hearing Examiner can define an appropriate rate of interest. Accordingly, the Hearing Examiner will make reference to the rate used in two relatively recent decisions of the Hearing Examiner. In Cronk v. Reynolds Transfer and Storage, MEOC Case No. 20022063 (Ex. Dec. 8/29/06, all other citations omitted), the parties stipulated to use of a rate of interest of 4% for calculating pre-judgment interest. In Miller v. CUNA, MEOC Case No. 20042175 (Ex. Dec. 5/16/08), the Hearing Examiner "borrowed" the stipulation of the parties in Cronk to order a pre-judgment interest rate of 4% in that case. Knowing of no reason to deviate from that rate of interest, the Hearing Examiner will utilize the same rate of interest in the present matter.

The Hearing Examiner now turns to the claim for non-economic damages. These encompass damages for the emotional injuries and the damages done to one's dignity as a result of discrimination. These damages are subject to proof as are any other element of a claim of discrimination. Miller v. CUNA, MEOC Case No. 20042175 (Ex. Dec. 5/16/08) (numerous cases cited and discussed regarding subject matter).

The Complainant seeks a substantial award of damages for his claim of emotional distress related to his termination. The Complainant premises his damage request primarily on the assertion that his termination by the Respondent caused him to relapse in prior conditions of mental or emotional illness and substance abuse. He points to his hospitalization for five days in September of 2006 as evidence of the effect of the termination upon him.

The Complainant was the only witness on the issue of his emotional distress. The testimony given by the Complainant is slim and without definition. When asked about his reaction when Barb Popham told him of his termination, he stated that he was surprised and disappointed. These are not uncommon reactions to one's termination from employment and do little to illuminate any feelings of discrimination.

Later, the Complainant was asked about how he felt about his termination. He stated that he was depressed, manic, agitated and frustrated. Nothing in the record gives context to these observations of the Complainant. There is no indication whether these reactions were short lived, lasted for days, weeks or months or continued to the date of the hearing. Neither was there testimony about how these emotions affected the Complainant's life, his ability to interact with others, maintain employment or other social relationships or how they may have affected his personal view of the world and his place in it. In short, the Complainant's testimony gives little guidance to the Hearing Examiner in how the level of award sought by the Complainant might be supported by the record.

The Complainant did testify that he has a history of mental health and substance abuse problems. It is the Complainant's belief that his termination resulted in a relapse of these problems and ultimately in his

hospitalization for psychiatric problems in September, 2006.

This testimony of the part of the Complainant poses problems for the Hearing Examiner. While a Complainant is perfectly competent to testify about the affects of discrimination on him, a Complainant, absent qualification as an expert, cannot testify to the medical cause of an illness or health-related condition. In other words, the Complainant may feel or believe that his relapse resulted from his termination, but the Hearing Examiner may not make a finding that it did without appropriate testimony from a doctor or other medical professional with credentials to provide such an opinion. Had the Complainant testified that his doctor told him of her opinion, it would be better than the Complainant's untrained belief.

Accepting that the Complainant's personal belief might have some probative value in general, the specifics of this complaint raise doubts. The Complainant's hospitalization occurred approximately 13 months after his termination. This seems an unusually long period of time for the reaction to the Complainant's termination to support the causal connection claimed by the Complainant. It is in this type of circumstance that either additional testimony from the Complainant about the events of the intervening months or the testimony of a medical professional about such triggering causes would be helpful. Absent such support, the Hearing Examiner cannot conclude that there is likely a causal connection between the Complainant's termination and his relapse and subsequent hospitalization. The lack of causal connection is hinted at by the Complainant's testimony that he left employment with Labor Ready because he wished for an opportunity for more advancement and more stable hours. Though the Complainant was not clear about when he left his employment at the Daybreak Café, he did indicate that he was not happy in that employment. Given the timeline indicated in this record, the Complainant was likely experiencing that dissatisfaction about the time or shortly before his hospitalization.

With this sketchy, confusing and incomplete record, the Hearing Examiner must determine what award, if any, will make the Complainant whole. The Hearing Examiner accepts the idea that an act of discrimination will almost inevitably create feelings of embarrassment, humiliation and distress. However, simply because injury is almost presumed, it does not mean that each claim is sufficient to support a large or substantial award. Meyer v. Purlie's Café South, MEOC Case No. 3282 (Ex. Dec. 4/06/94, other citations omitted); Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. 2/10/93, other citations omitted); Wilker v. Bermuda's Night Club, MEOC Case No. 3221 (Ex. Dec. 7/10/89). The present case appears to be motivated by a sincere feeling of discrimination on the part of the Complainant. This would be distinguished by the claim in Chung in which the Hearing Examiner made a nominal award because the Complainant appeared to be more angry than distressed by the Respondent's treatment. However, the present matter falls very short of the testimony and evidentiary record in cases in which much larger awards of emotional distress damages were made. See Miller, MEOC Case No. 20042175 and cases cited therein. The facts and record herein seem more closely aligned with Gardner v. Wal-Mart Vision Center, MEOC Case No. 22637 (Ex. Dec. 6/03/01, other citations omitted).

In Gardner, the Hearing Examiner awarded the Complainant $2,500.00 for her emotional distress. The Complainant was the only witness to testify and she described her emotional state as being "devastated." She did not describe how she was devastated beyond indicating that she was worried about telling her husband of her termination.

In the present case, the Complainant's description of the affects upon him are little different from those in Gardner. He testified that he was "depressed, manic, agitated and frustrated." As with Gardner, the Complainant lacks the vivid detail essential to a larger award such as in Chung.

Given the sparseness of this record, the Hearing Examiner finds that an award of $3,000.00 is adequate to redress the Complainant's emotional distress. This amount is somewhat higher than that in Gardner and reflects the degree to which the Complainant's testimony appeared to affect him as he recounted the events of his termination.

In comparing this award to other higher awards, the Hearing Examiner is most affected by the lack of description and corroboration of the Complainant on this record. While it is true that awards in Miller and Carver-Thomas were made solely on the basis of the Complainant's testimony, but in those cases, the testimony was much more descriptive of the injury than in the present case. In the present matter, the Complainant merely describes his reaction to termination and his view of the Respondent's discriminatory treatment in seven or eight words. This is insufficient to convey the impact of the Respondent's actions upon him and his life.

The final area of damages to be examined is equitable or injunctive relief. In the context of a discrimination claim,

this is generally an order for reinstatement or an award of front pay. Given the record in this matter, neither is appropriate.

In most claims of employment discrimination, the reviewing body will consider awarding a prevailing Complainant reinstatement to a position or its equal. The effect of such an award is to prevent future economic losses and to secure the benefits of the job desired by the Complainant. In cases where awarding the position is not practical or possible, reviewing courts or bodies have the option of awarding front pay. Front pay is a stream of income for a reasonable period of time that is intended to compensate a prevailing Complainant until he or she can replace the lost income from the job he or she had or would have had with the Respondent. An award of front pay is an equitable award and is subject to the sound discretion of the court or reviewing body.

In the present case, the Hearing Examiner does not believe that an order requiring the Respondent to reinstate the Complainant is supported by the record. Though the Complainant contacted the Respondent shortly after his termination to seek re-employment, he has shown no desire for reinstatement since that early effort. In the Complainant's post-hearing brief the Complainant makes no request for reinstatement. The record makes it clear that the Complainant has done nothing to attempt to find employment in a salon in the hair care industry since his termination. The Complainant did not actively pursue positions in the salon or hair care industry prior to applying for the position with the Respondent.

The Respondent demonstrated no interest in re-employment of the Complainant. Litigation of this matter seems to have hardened the position of the Respondent with respect to employment of the Complainant and any such employment seems destined for failure.

Given the Complainant's lack of interest and the Respondent's apparent hostility, the Hearing Examiner will not order reinstatement. It would be an exercise in futility in the mind of the Hearing Examiner to place the Complainant back into a position in which failure seems assured.

For essentially the same reasons, the Hearing Examiner will not award the Complainant front pay. First, the Complainant does not lay any foundation for such relief. There is nothing in this record to indicate that the Complainant wishes to return to the salon or hair care industry. Second, the Complainant has demonstrated an ability to adequately replace his lost income, if not to exceed his earning capacity with the Respondent. Third the period of the Complainant's employment with the Respondent does not indicate that such an award is appropriate.

For the foregoing reason, the Hearing Examiner awards the Complainant $448.00 in back pay to be adjusted by prejudgment interest to run from August 9, 2005 until the award is paid. The Hearing Examiner also awards the Complainant $3,000.00 in compensatory damages for emotional distress, embarrassment and humiliation. The Hearing Examiner will also order the payment of the Complainant's attorney's fees and costs in order to make the Complainant whole. The Hearing Examiner will not require the Respondent to rehire the Complainant, nor to pay him any amount of front pay.

Signed and dated this 24th day of June, 2008.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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

David Norris 1490 Martin St	

Madison WI 53713 Complainant vs. Cost Cutters of Madison 1001 Fourier Dr Ste 200 Madison WI 53717 Respondent	DECISION AND INTERIM ORDER Case No. 20052134

BACKGROUND

On August 25, 2005, the Complainant, David Norris, filed a complaint with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, Cost Cutters, discriminated against him in employment on the bases of race, color, sex, age and because of his status as a student in violation of the Madison Equal Opportunities Ordinance Mad. Gen. Ord. 3.23 et seq. The Respondent denied the allegations of the complaint.

Subsequent to an investigation, a Commission Investigator/Conciliator issued an Initial Determination on March 7, 2006, concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant as alleged in the complaint. Efforts at conciliation were unsuccessful. The complaint was transferred to the Hearing Examiner for further proceedings.

The Hearing Examiner scheduled a Pre-hearing Conference for March 30, 2006. The Complainant appeared, but the Respondent did not. On March 31, 2006, the Hearing Examiner issued an Order to Show Cause why a default judgment should not be entered. The Respondent failed to respond to the Order to Show Cause in the time specified by the Order. The Respondent did respond after the time set in the Order, and provided an explanation for its failure to timely respond.

Subsequent to the Respondent's submission, it requested the opportunity to submit testimony in support of its position that a default judgment should not be granted. On June 27, 2006, the Hearing Examiner held the requested hearing. The parties submitted briefs subsequent to the hearing.

On May 11, 2007, the Hearing Examiner issued a Decision and Interim Order entering a default judgment on the issue of liability and indicating that further proceedings on the issue of damages would be scheduled. Before the Hearing Examiner scheduled further proceedings, the Respondent filed an appeal of the Hearing Examiner's Interim Order. The Hearing Examiner's Decision and Interim Order made no provision for appeal, and the rules of the Commission are silent on such an appeal. The Hearing Examiner stayed further proceedings so that the Commission could determine whether it wished to hear the Respondent's appeal at this point or hear it after all other proceedings were complete. On June 14, 2007, the Commission considered the question of the appeal.

DECISION

As the rules of the Commission do not control this matter, the Commission concludes that whether to permit appeal of the Hearing Examiner's Decision and Interim Order at this time rests within the Commission's sound discretion. In considering this issue, the Commission recognizes that both positions, appealed now or after further proceedings, have some merit.

In favor of considering the Respondent's appeal now, there may be a savings in time and in complexity should the Commission determine that the Hearing Examiner should not have entered a default judgment. However, to fully judge such economies would require the Commission to make a "prejudgment" of the likelihood of success on the part of the Respondent's appeal. To make such a judgment now may have an impact on the Commission's ultimate consideration which might be prejudicial to one party or the other.

In favoring of allowing the appeal only after the record is complete, i.e., after a hearing on damages, is the

Commission's desire to have all issues decided before undertaking its consideration of the issue. The Commission, where possible, finds that it can best address appeals once there is a complete record.

In determining that it will hear the Respondent's appeal once the record is complete, the Commission does not intend to minimize the potential for additional time and expense for the parties. It recognizes that should the Respondent prevail on its appeal of the default judgment, one possible scenario could have the complaint remanded for a hearing on the issue of liability or for further findings on the issue of default. It is true that a hearing on liability, if held, could result in a vacation of an award of damages made prior to consideration of the Respondent's appeal. In recognizing that these scenarios are possible, the Commission finds that such possible outcomes are outweighed by the need for the Commission to have as complete a record before it when considering the arguments of the parties.

The Commission sees no prejudice to the positions of the parties by not considering the Respondent's appeal at this time. The potential added expense to the parties cuts against both and is, to some extent, inherent in such proceedings. The Respondent loses nothing with respect to its rights by being required to complete the process before being allowed to appeal the entry of default judgment.

ORDER

Accordingly, the Respondent's appeal is stayed and the complaint is remanded to the Hearing Examiner for further proceedings on the issue of damages.

Joining in the Commission's action are Commissioners Bayrd, Holmes-Hope, Howe, McDonell, Morrison, Selkowe, Solomon, Walsh and Zipperer.

Signed and dated this 3rd day of July, 2007.

EQUAL OPPORTUNITIES COMMISSION

Bert G. Zipperer,
President

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

David Norris 1490 Martin St Madison WI 53713 Complainant vs. Cost Cutters of Madison 1001 Fourier Dr Ste 200 Madison WI 53717 Respondent	DECISION AND INTERIM ORDER Case No. 20052134

BACKGROUND

On August 25, 2005, the Complainant, David Norris, filed a complaint with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, Cost Cutters of Madison, Inc., discriminated against him in his terms and conditions of employment and terminated his employment on the bases of race, color, sex, age and because of his status as a student. The Respondent denied discriminating against the Complainant, and alleged that it terminated him from an apprentice program for a failure to progress.

Subsequent to an investigation, a Commission Investigator/Conciliator, on March 7, 2006, issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant as alleged in the complaint. The complaint was transferred to conciliation. Efforts at conciliation proved unsuccessful. Initially, neither party wished to conciliate. The Complainant then indicated a willingness to discuss conciliation, but the Respondent declined the opportunity. The Investigator/Conciliator, on or about March 14, 2006, then certified the complaint to the Hearing Examiner for a hearing on the merits of the complaint.

On March 17, 2006, the Hearing Examiner issued a Notice of Pre-Hearing Conference. The Pre-Hearing Conference was scheduled for March 30, 2006 at 9:30 a.m. in Room LL-120 of the Madison Municipal Building. The Respondent received the Notice of Pre-Hearing Conference as evidenced by a return receipt dated March 20, 2006 signed by Stacey Carroll.

At the time of the Pre-Hearing Conference, the Complainant appeared in person and without counsel. The Respondent did not appear at the scheduled time nor within the next 30 minutes. The Respondent had not contacted the Hearing Examiner or anyone else at the Commission prior to the scheduled time to ask that the time be changed or to indicate that it could not appear at the scheduled time.

The Complainant made an oral motion seeking judgment by default for the Respondent's failure to appear at the Pre-Hearing Conference. The Hearing Examiner took the motion under advisement, and indicated that he would issue an Order to Show Cause why a default judgment should not be entered for the Respondent's failure to appear.

On March 31, 2006, the Hearing Examiner issued an Order to Show Cause as indicated at the Pre-Hearing Conference. The Order to Show Cause gave the Respondent ten (10) days to provide a written explanation setting forth good cause for its failure to appear. The Order was received by the Respondent on April 5, 2006 as evidenced by a return receipt. The Respondent did not file a written response as required by the Order to Show Cause.

On April 14, 2006, Attorney Steven J. Nording contacted the Commission on behalf of the Respondent. Nording indicated that due to his being out of the office and due to a clerical error, he had just become aware of the Order to Show Cause. The Commission employee with whom Nording spoke indicated that he should put an explanation and request for additional time in writing. Nording faxed such a writing to the Commission on April 14, 2006, and mailed a copy that was received by the Commission on April 17, 2006.

After several unsuccessful attempts at scheduling, a hearing was held on June 27, 2006. The Respondent presented an oral explanation and testimony in supplementation of the April 14, 2006 letter from Nording.

The Respondent put forth several arguments in support of a request to essentially reopen the complaint, and to excuse the Respondent’s failure to appear at the Pre-Hearing Conference and to timely respond to the Order to Show Cause. Essentially, as to the failure to appear, the Respondent contended that its failure was attributable to confusion about the process and its responsibilities. As to the failure to respond, the Respondent stated that it timely sent a request to act to its attorney, but through no fault of anybody involved herein, a response was not generated until April 14, 2006.

The Complainant contends that nothing in the record demonstrates any good cause for the Respondent's failure to either appear at the Pre-Hearing Conference or to timely respond to the Order to Show Cause. The Complainant seeks a default judgment on the issue of liability and a hearing on the issue of damages.

DECISION

The Respondent essentially argues that it did not intend to default and its failure to appear at the Pre-Hearing Conference was due to excusable confusion on the part of the responsible individual. As for the failure to timely respond to the Order to Show Cause, the Respondent contends that it acted reasonably by forwarding the Order to its attorney for response and that it should not be penalized for an error committed by the attorney. The Respondent's attorney contends that he really did nothing wrong and tried to repair the problem as soon as he became aware of the Order to Show Cause.

In addition to its "excusable neglect" argument, the Respondent asserts that the remedy of a default judgment is too harsh for the circumstances. The Respondent is unable or unwilling to indicate what remedy might be appropriate, however.

Stacey Carroll, the Respondent's informal Human Resources Director, stated that the Respondent was receiving numerous documents around the time of the conciliation. She found these documents confusing.

The Respondent did not wish to participate in the conciliation process. To this end, Carroll asked the Investigator/Conciliator if she had to attend a conciliation conference or participate in any way. She was told that conciliation was a voluntary process and she did not have to participate.

The Respondent seems to be contending that Carroll's alleged confusion over the correspondence and her understanding that she need not participate in conciliation leads inevitably to her misunderstanding that she need not appear at the Pre-Hearing Conference. The Hearing Examiner reaches a contrary conclusion.

The Commission's Notice of Pre-Hearing Conference can hardly be called a complex document. It simply sets forth the time, date and location of the conference along with the clear requirement for the appearance of the parties. The requirement for appearance and the consequences for the failure to appear are capitalized. Other than the caption, the statement that “failure to appear at the Pre-Hearing Conference may result in entry of an order disposing of the complaint” is the only material that appears in all capital letters.

As noted by the Complainant in his brief, this was the first document received by the Respondent from the Hearing Examiner. It seems that a reasonably prudent person receiving a document such as a Notice of Pre-Hearing Conference would be concerned that prior statements made by other individuals may not apply to the new correspondence. This would seem especially likely where the document, on its face, indicates that a failure to appear may have significant or drastic consequences.

At the hearing provided by the Hearing Examiner, at the request of the Respondent, Carroll acknowledged that she received the Notice of Pre-Hearing Conference and that she read it. She asserts, however, that she was confused by its requirements. Despite having received a document in a legal form requiring a return receipt, Carroll took no steps to clarify her confusion. She neither contacted the Hearing Examiner, nor Mr. Kestin with whom she had prior discussions nor apparently consulted legal counsel. This latter fact is presumed as surely Ms. Carroll would have testified to such a contact had it occurred.

The Hearing Examiner asked the parties to address the Court of Appeals recent ruling in Mohns, Inc. v. TCF National Bank, 2006 WI App 65, 292 Wis. 2d 243, 714 N.W. 2d 245 (Ct. App. 2006). In that case, the Court of Appeals overturned the Circuit Court's denial of a default judgment for the defendant's failure to answer the complaint. The court applied the test of excusable neglect to the defendant's actions. In noting the defendant's repeated and questionable efforts at avoiding responsibility, the court stated that carelessness, inattentiveness, mistake inadvertence and neglect fail to establish excusable neglect. Additionally, the Mohns court, citing Hollingsworth v. American Fin. Corp., 86 Wis. 2d 172, 271 N.W. 2d 872 (1978), found that confusion is no more a compelling reason for a party's default than the other factors.

The Respondent contends that its actions in failing to appear for the Pre-Hearing Conference do not rise to the level of conduct that led the court in Mohns to find a default. The Respondent's argument has two components. First, it attempts to portray its conduct as innocent and relatively blameless. Second, the Respondent contends that even if its failure was not excusable, it is not of a kind or culpability to require the "ultimate" sanction of a default judgment.

Given the record in this matter, the Hearing Examiner finds that the Respondent's conduct represents, at best, a serious lapse in professional judgment that cannot be excused through any of the explanations presented here, and at worst, a flagrant refusal to participate in the complaint process. The Respondent's conduct during the investigation of the complaint likely saves it from a finding of a willful withdrawal from the process. It is clear that the Court of Appeals would not find any of the Respondent's explanations compelling enough to save it from sanctions for the failure to attend the Pre-Hearing Conference. Nothing in this record demonstrates any reason for the Commission to apply a more relaxed standard. As indicated above, even if the Respondent had been confused, Carroll's failure to take any of several possible easy steps to resolve the confusion prevent the Hearing Examiner from finding anything but negligence on the part of the Respondent. Nothing establishes any form of credible excuse given the Respondent's conduct.

Before addressing an appropriate sanction for the Respondent's default, the Hearing Examiner must address the Respondent's failure to respond in a timely manner to the Hearing Examiner's Order to Show Cause. The circumstances surrounding the failure to timely respond to the order demonstrate the Respondent's lack of concern to some extent, however, they do not necessarily demonstrate neglect on the part of the Respondent. Once the Respondent received the Order to Show Cause, it acted in sufficient time to have a response filed in a timely manner. The action taken by the Respondent was to forward the order to its attorney for response. It could have contacted the Commission to determine what needed to be done, however, it chose to involve its counsel.

Though the files relating to the order were apparently transmitted with several other routine matters and without any specific emphasis on the relative importance of the order and its response date, the Respondent did send the order to its counsel in time for an appropriate response to be filed with the Commission. However, due to no fault of the Respondent, the order was not acted upon by counsel for the Respondent until after the lapse of the time for response. This delay was caused by the absence of the Respondent's primary counsel, Steven Nording, on a personal holiday. Mr. Nording's office staff did not identify the Order to Show Cause as something separate from the other more routine matters with which the Order was transmitted. This lapse in office procedure was certainly not the fault of the Respondent. Whether there was some actionable failure on the part of the Respondent's counsel is beyond the scope of this proceeding and will be left to the Respondent and its counsel to work out.

It appears that once Nording became aware of the Order to Show Cause after his return to his office, he took prompt action to remedy the problem. Nothing in this record, however, explains the Respondent's silence after the period to respond had elapsed and when Nording filed his first documents. While this time was only a few days, the Hearing Examiner is of the opinion that a reasonably prudent business person would have contacted counsel to inquire on the status of legal matters given to him or her for action.

Despite the apparently unconcerned attitude of the Respondent, the Hearing Examiner cannot find that the Respondent acted negligently with respect to the Order to Show Cause. The failure to timely reply rests clearly with the office of the Respondent's counsel. That the Respondent's counsel acted promptly to remedy his error does not necessarily act to insulate the Respondent from the effects of the failure. See Mohns, 292 Wis. 2d. 243, supra. Since the Hearing Examiner has determined that the Respondent has failed to provide a reasonable explanation for its original failure to appear at the Pre-Hearing Conference, the Hearing Examiner need not make a final determination of the impact of the Respondent's failure to timely respond to the Order to Show Cause.

The Hearing Examiner will now return to the issue of an appropriate sanction. The Respondent has declined to suggest what sanction less than entry of a default judgment might be appropriate. The only opinion expressed by the Respondent is that a default judgment is too harsh. The Respondent seems content to leave the sanction to the sound discretion of the Hearing Examiner.

In determining that entry of a default judgment is the only appropriate sanction, the Hearing Examiner has considered several factors and principles. These include the impact on the Respondent and its future conduct, the precedent set for other parties and their likely conduct, and the impact upon the Complainant.

First, the Respondent is not a small and unsophisticated business. Carroll testified that it owns and operates nearly 40 salons over a significant geographic area. The demands of the Respondent's business require a staff of 11 in its corporate office. Though the record is not clear about the number of other discrimination claims, if any, the Respondent may have encountered, it seems to have regular contact with its corporate counsel for other litigation matters such as garnishments. Had the record reflected a smaller business with less experience of litigation and related matters, a lesser sanction might be appropriate. However, the Respondent must have had some understanding of the importance of these legal proceedings given its forwarding of the Order to Show

Cause to its counsel. Given the clear language regarding possible summary resolution contained in the Notice of Pre-Hearing Conference combined with some level of business sophistication or savvy, the Hearing Examiner can find no reason to apply less than the sanction called for in the Notice of Pre-Hearing Conference. To apply a lesser sanction does little to encourage the Respondent's future compliance with Commission orders. That is one of the critical purposes of the remedy.

The Hearing Examiner considered and rejected lesser sanctions such as prohibiting the Respondent from filing an answer or making findings against the Respondent. These sanctions seem to have virtually the same impact as entry of a default judgment and put a greater burden on the Complainant than entry of a default judgment. It would be difficult to determine which findings short of default should be entered so as to accomplish the effect of both sanctioning the Respondent and informing other parties of the importance of the Commission's rules and procedures.

Simply setting a hearing date with shortened discovery periods may work as great a hardship on the Complainant as the Respondent. Under the circumstances of this case, allowing the process to proceed even with a shortened process does little to demonstrate to the Respondent and to other parties that the Commission's process has important consequences.

While entry of a default judgment is a strong remedy, the Hearing Examiner finds that the Respondent's conduct and attitude with respect to this matter justifies this result. Entry of a default judgment does not entirely dispose of this matter. There will be a subsequent hearing on damages. The Respondent, through its active participation in that process could substantially limit the economic impact of the default judgment.

ORDER

For the foregoing reasons, the Hearing Examiner enters a default judgment in the above-captioned matter on the issues of liability. Further proceedings will be scheduled to address the issues of damages, if any.

Signed and dated this 11th day of May, 2007.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner