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

Chris M Groholski
1202 McKenna Blvd Apt 303
Madison WI 53719

Complainant

vs.

Old Town Pub
724 S Gammon Rd
Madison WI 53719

Respondent

HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER ON COMPLAINANT'S PETITION FOR COSTS AND FEES

CASE NO. 20072041

EEOC CASE NO. 26B200700022

On March 12, 2010, the Commission Hearing Examiner, Clifford E. Blackwell, III, issued his Recommended Findings of Fact, Conclusions of Law and Order in the above-captioned matter. The Respondent did not appeal the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order. In the Order, the Hearing Examiner directed the Complainant to file a petition for his costs and fees including a reasonable attorney's fee expended in connection with pursuit of this complaint. On April 5, 2010, the Complainant, through his counsel, filed a petition for costs and fees and supporting documentation.

The Hearing Examiner's Order, issued on March 12, 2010, provided that the Respondent could submit a response to the Complainant's petition within 15 days of its receipt. The Respondent has not filed a response.

Accordingly, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order on Complainant's petition for costs and fees.

RECOMMENDED FINDINGS OF FACT

1. The Complainant is the prevailing party in the above-captioned matter.

2. At all times relevant herein, the Complainant was represented by Stix Law Offices. Stix Law Offices is owned by Sally A. Stix. Stix Law Offices employs a paralegal and two associate attorneys.

3. One associate, Timothy M. Scheffler, was primarily responsible for the representation of the Complainant in this matter.

4. The other associate, Andrea L. Sumpter, had only minimal responsibility with respect to the Complainant's representation.

5. Sally Stix had yet less responsibility for the representation of the Complainant.

6. Stix Law Offices does not have a standard rate at which it charges clients for their representation. Instead, Sally Stix charges between $250.00 and $350.00 per hour for her legal services. The precise amount differs depending upon the client's ability to pay and the complexity of the matters in question.

7. Stix Law Offices charges for the time of its associates on a scale from $150.00 to $250.00 per hour. The charges differ depending upon the experience of the associate, the ability of the client to pay and the complexity of the matters involved.

8. Timothy Scheffler is a competent attorney with considerable experience in legal matters related to the issues involved in the present matter. On several recent occasions, Administrative Law Judges and the Hearing Examiner have awarded Scheffler attorney's fees premised on an hourly rate of $200.00 per hour.

9. In the present matter, Scheffler seeks to bill his time at the rate of $250.00 per hour.

10. In the present matter, Stix seeks to bill her work at the rate of $375.00 per hour. Stix is an experienced and capable attorney who has worked in the area of the issues presented in the present matter.

11. Sumpter seeks to bill her work in the present matter at the rate of $150.00 per hour. Sumpter has relatively little legal experience in the present matter or in related matters.

12. Scheffler expended 79.8 hours in his representation of the Complainant in this matter. Review of Scheffler's contemporaneously maintained billing records indicates that the time he spent working on the case was reasonably necessary for the representation of the Complainant and there appears to be no duplication of time or billing.

13. Though contemporaneously maintained records of Stix's time indicate that she spent 3 hours with respect to this matter, she seeks only 1 hour of compensation for her time.

14. Sumpter expended 7 hours in her representation of the Complainant in this matter. Review of Sumpter's contemporaneously maintained billing records indicates that the time appears reasonably necessary to the representation of the Complainant and there appears to be no duplication of time or billing.

15. The Complainant expended $121.32 in costs including photocopies $62.85, postage $30.37 and miscellaneous costs $28.10 during his pursuit of this matter.

CONCLUSIONS OF LAW

1. A prevailing Complainant is entitled to the costs and fees associated with his or her bringing of an action under the ordinance including a reasonable attorney's fee.

2. The amount of a reasonable attorney's fee is presumptively the attorney's usual and customary hourly rate so long as that rate is representative of the rate charged for similar work in the general geographic area multiplied by the hours reasonably expended

on the matter in question without duplication of time or billing. The result of this calculation is called the lodestar.

3. The lodestar may be either increased or decreased depending on several factors, however not on factors including complexity, experience and outcome.

4. In calculating the lodestar in the present matter, the Hearing Examiner will use the following hourly rates: a. Stix $300.00, b. Scheffler $200.00 and, c. Sumpter $150.00.

5. The above hourly rates for the number of hours leads to a total fee of $17,010.00.

6. The record does not demonstrate the presence of any factors that would justify either increasing or decreasing the lodestar calculation.

7. The costs set forth in the Complainant's petition are reasonable and non-duplicative.

ORDER

1. The Hearing Examiner incorporates by reference as if fully set forth herein, all earlier findings and orders.

2. The Respondent is ordered to pay the damages and attorney's fees and costs set forth in the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order dated March 12, 2010, in accordance with the schedule set forth in that document, as well as those costs and fees related to the Hearing Examiner's Decision and Order on Complainant's Motion for Default Judgment dated July 30, 2008.

3. The Respondent shall pay to the Complainant the costs and fees of bringing this action as follows: a. costs $121.32 and fees including a reasonable attorney's fee $17,010.00

4. The costs and fees set forth above shall be paid no later than 30 days from the date upon which this order becomes final.

MEMORANDUM DECISION

The Commission has a long history of awarding attorney's fees and costs to prevailing Complainants in order to provide a make-whole remedy. If a prevailing Complainant were to be required to pay for his or her own costs and fees out of the proceeds of a complaint, there would be a chilling effect on the willingness of the public to bring, and private attorney's to take, especially modest claims under the ordinance or any other equal rights statute.

The Commission, in determining how to fix the amount of an award of costs and attorney's fees, has followed to a great extent the lead of federal and state courts. See Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. on fees 7/29/93), Harris v. Paragon Restaurant Group, Inc., et al., MEOC Case No. 20947 (Comm. Dec. 2/27/95). In this approach, the first step is to establish the "lodestar" award. The lodestar is calculated by multiplying a reasonable hourly rate for the attorney's services by the number of reasonably necessary hours to gain the successful outcome. A reasonable hourly rate is one that is commonly charged in the

geographic area by lawyers of similar experience in the area of civil rights. See Chung, *supra*. A lawyer's usual and customary hourly rate charged for such services is presumed to be reasonable. See Chung, supra.

The hours necessary to accomplish a given outcome are not to be duplicative and should be reasonable in relation to the outcome achieved. See Chung, *supra*; Meyer v. Purlie's Cafe South, MEOC Case No. 3282 (Ex. Dec. 05/20/95); Sprague v. Hacklander-Ready, MEOC Case No. 1462 (Comm. Dec. 02/09/1998).

Once the lodestar is determined, the court may make adjustments to that amount as outlined by the Supreme Court in its recent decision in Perdue v. Kenny, 559 U. S. ____ (2010). The Complainant does not seek any adjustments to the lodestar amount in the present matter so further discussion is not necessary.

It would seem that calculation of the lodestar and fixing the amount of an award of attorney's fees and costs should be simple in the present matter. The case proceeded to hearing on essentially a default basis and the Respondent has not submitted any materials objecting to the Complainant's petition for costs and fees. However, the Hearing Examiner's review of the record has resulted in questions that complicate the process somewhat and alter the outcome.

First, the Complainant's petition is supported by the affidavits of three attorneys within the firm representing the Complainant and one from an independent attorney. The affidavits of the attorneys in the firm having done the actual work are not as clear as those the Hearing Examiner usually encounters in such matters.

Customarily, the Hearing Examiner is presented an affidavit setting forth the lawyer's hourly rate which is a specific dollar amount. In the present matter, all three attorneys state that their hourly rate falls within a range and where the exact rate falls in a given matter is dependent upon factors such as the Complainant's ability to pay and the complexity of the issues involved.

In the case of attorney Stix, she avers that her usual rate falls between $250.00 and $350.00 per hour depending upon the previously identified factors. Attorney Stix then seeks a fee award based upon an hourly rate of $375.00 per hour.

Attorney Scheffler indicates that the firm bills his work at the rate of $150.00 to $250.00 per hour depending upon the previously indicated factors. He further indicates that he has received attorney's fee awards in several matters including the present matter at a rate of $200.00 per hour. Attorney Scheffler then seeks a fee award based upon an hourly fee of $250.00.

Perhaps the clearest affidavit is that of Attorney Sumpter. She indicates that the firm charges out her work in the range of $150.00 to $250.00 per hour depending upon the above identified factors. Her affidavit then seeks an award based upon an hourly rate of $150.00 per hour for her work.

The Hearing Examiner has no doubts about the competence, experience or expertise of attorneys Stix and Scheffler. Attorney Stix has a well deserved reputation in the Madison area

for her work in the area of civil rights. Her expertise has been demonstrated before the Hearing Examiner in several matters in the past. However, nothing in the record explains why Attorney Stix now seeks an attorney's fee award based on an hourly rate that is $25.00 per hour higher than the rate to which she testifies.

Attorney Scheffler performed in an exemplary manner in the present matter given difficult circumstances that were trying and unusual. However, the record in this matter does nothing to explain how the hourly rate for attorney Scheffler was determined nor the apparent departure from what has apparently been his hourly rate in the recent past.

The Hearing Examiner has little experience involving attorney Sumpter, but her limited appearance in the present matter indicates that she's a capable, young attorney. While nothing in the record demonstrates why her work is billed out at $150.00 per hour, since this is the lowest level of billing, there is no reason to question her hourly rate.

In the case of Attorney Stix, her affidavit indicates that her hourly rate runs from a low of $250.00 to a high of $350.00, but then she uses the hourly rate of $375.00 in her request for attorney's fees. The Hearing Examiner cannot consider the $375.00 hourly rate given the lack of any explanation for its departure from Attorney Stix's usual scale. In determining where in the scale the attorney's rate should fall for her representation in this matter, the record gives the Hearing Examiner precious little guidance. There is no explanation of how the factors of ability to pay and complexity were applied in this matter or how the Hearing Examiner should apply them. The best that the Hearing Examiner can do is to presume that, since such adjustments might be made to either increase the hourly rate in the case of a well-to-do client with a complicated legal issue or to decrease it in the case of a lower income client with a routine matter, attorney Stix's usual and customary hourly rate falls at the midpoint of the range, or $300.00.

The Hearing Examiner notes that Attorney Stix is only seeking compensation for one hour of work and that several possible entries were not subject to a charge. While this is highly commendable, it does not permit the Hearing Examiner to overlook the lack of clear explanation in the record of how attorney Stix determined her hourly rate.

Similarly, in the case of Attorney Scheffler, the record lacks any explanation of why the Hearing Examiner should use the hourly rate of $250.00 per hour to calculate Scheffler's fee instead of the $200.00 per hour rate recognized by the Hearing Examiner in connection with the Complainant's motion for a default judgment. Scheffler's own affidavit indicates that his rate of compensation has been recognized at the $200.00 per hour rate in other administrative proceedings.

The Hearing Examiner has, in the past, recognized fee requests that included an attorney's increase in the hourly rate during the pendency of an action. However, in those earlier matters, the increase was clearly noted and explained.

The practice of indicating that one's hourly rate falls within a given range depending upon various factors may well help particularly low income clients. However, for the Hearing Examiner to utilize such a fee structure to establish a reasonable attorney's fee, there must include some explanation of how those factors are applied to a specific client. Otherwise, one

might be left with the impression that a recalculation is based upon the Respondent's ability to pay rather than the Complainant's. Such is contrary to sound public policy as being punitive in nature.

Given the deficiencies in the record as outlined above, the Hearing Examiner will use the following hourly rates for calculating a reasonable attorney's fee: Stix $300.00, Scheffler $200.00 and Sumpter $150.00.

The hours set forth in the contemporaneous accounting of time expended in this matter appear straight forward. While perhaps some more detail might be necessary in the event of a challenge to the necessity of such time, there is no such challenge in the present matter. While a matter that essentially proceeded on a default by the Respondent might be thought to take a somewhat shorter period of time, the Respondent's later actions made the present matter more complicated than one would expect.

The affidavit of Colleen Bero-Lehmann was presumeably submitted to add weight to the Complainant's claim for an hourly rate higher than the usual rate charged for primarily Scheffler's work. While Attorney Bero-Lehmann's affidavit helps to solidify Scheffler's claim to expertise and competency in the area, it does little to justify the increase in Scheffler's hourly fee from $200.00 per hour to $250.00 per hour, other than to say that rate is reasonable. While the Hearing Examiner might well consider an hourly rate of $250.00 to be reasonable and perhaps even somewhat modest in the Madison community, there is insufficient evidence in this record to indicate that Scheffler is entitled to that hourly rate in light of his recent past awards.

Nothing in the Complainant's requests for costs appears unusual or duplicative. There is no reason for the Hearing Examiner to question the total amount of costs of $121.32.

The Hearing Examiner has incorporated the earlier Findings of Fact, Conclusions of Law and Order, dated March 12, 2010, and Hearing Examiner's Decision and Order on Complainant's Motion for Default Judgment, dated July 30, 2008, and related determinations in this Order to make clear the Respondent's obligation to pay the damages and attorney's fees and costs associated with the Respondent's default in answering the Notice of Hearing. The Respondent must be subject to all these fees in order to make the Complainant whole.

Signed and dated this 10th day of May, 2010.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Timothy M Scheffler
Mark J Cash

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
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HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

CASE NO. 20072041

EEOC CASE NO. 26B200700022

On August 19, 2008, this matter came on for a hearing on the merits of the complaint before Department of Civil Rights Hearing Examiner, Clifford E. Blackwell, III, in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd. The Complainant, Chris Groholski, appeared in person and by his attorney, Timothy M. Sheffler of Stix Law Office. The Respondent, the Old Town Pub, appeared by its owners Kevin Kane and Mark Cash. Based upon the record of those proceedings, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. The Complainant is an adult male.

2. The Respondent is a bar/restaurant with its principle place of business at 724 South Gammon Road in the City of Madison.

3. The Complainant began work at the Respondent's restaurant in October 2005. He began working in the kitchen as a part-time cook and eventually worked his way up to the position of Kitchen/Assistant Manager.

4. Early in 2005, prior to the Complainant's beginning work for the Respondent, the Complainant was diagnosed as having several mental illnesses or disorders including depression and general anxiety disorder. These conditions were generally controlled with the use of medication and occasional counseling. The Respondent was unaware of these conditions until January 30, 2007.

5. The Respondent had a form that was to be used when requesting time off for medical or other reasons. In 2006, the Complainant took an approved medical

leave for cancer surgery, but did not complete the required form. The leave form was not commonly available and was not frequently used.

6. Generally speaking, the Complainant liked working for the Respondent and found it to be a good place to work. One of the Respondent's owners, Kevin Kane, was especially thoughtful. On one occasion, Kane loaned the Complainant a vehicle and on another occasion provided the Complainant with tickets for a Packers game.

7. In late 2006 and early 2007, there was an economic downturn that caused financial concerns for the Respondent. There was talk of closing or selling the business. This uncertainty created stress for the Complainant. Though he enjoyed working for the Respondent, the Complainant began to look for alternative employment in case a job change was necessary.

8. On January 30, 2007, prior to the start of his shift, the Complainant spoke with one of the owners, Kevin Kane. The Complainant told Kane of his depression and that things had gotten to the point where he (the Complainant) needed to seek medical attention and to have his medications checked and perhaps altered. Kane told the Complainant to get himself taken care of and to call in the next day. Kane said that he would take care of finding someone to cover the Complainant's shifts. The Complainant drove to Stevens Point where he had last been treated for his mental/emotional problems. Instead of checking himself in to an inpatient facility, he waited until he could see a private physician on February 2, 2007.

9. The Complainant did not call the Respondent on January 31, 2007 nor on February 1, 2007 as he had not yet seen a doctor and had nothing new to report.

10. On January 31, 2007, Kevin Kane left a message on the Complainant's cell phone asking if there was anything that Kane could do for the Complainant. Kane did not ask the Complainant to return his call nor asked the Complainant about his availability for work.

11. On or about January 31, 2007, the Respondent received a request for a job reference for the Complainant from another restaurant in the Madison area.

12. On February 2, 2007, the Complainant saw a physician and then called the Respondent to indicate that he would be in to work the next day, February 3, 2007. Jennifer Kane, one of the Respondent's owners was present during the Complainant's phone call, but declined to speak with the Complainant. February 2, 2007 was the Complainant's usual day off and he was not scheduled to work that day.

13. When the Complainant called in on February 3, 2007, he was told not to come in as his shift was covered. Later that day, the Complainant came to check on the restaurant. He spoke with Elisabeth Engler, a bartender, who told him that Kane was going to fire him. The Complainant was told to come in the next day. The

Complainant left his keys on Kane's desk without speaking to Kane or any other owner.

14. On February 4, 2007, Kane said he was too busy to speak with the Complainant and directed the Complainant to return on February 5, 2007. On February 4, 2007, the Respondent held a special event tied to the 2007 Super Bowl which occurred that day.

15. On February 5, 2007, the Complainant again came to speak with Kane. However, Kane was tired and not feeling well after the preceding day's events and told the Complainant to return the next day on February 6, 2007. Kane did feel well enough on February 5, 2007 to conduct interviews to find a replacement for the Complainant. On February 6, 2007, the Complainant was finally able to meet with Kane and another owner, Mark Cash. Kane was very upset with the Complainant and asked him when the next time would be that the Respondent would not be able to rely upon the Complainant or to deal with the Complainant's mood swings and attitude. Though Kane initially asked about medical documentation for the Complainant's absence, Kane refused to accept it when the Complainant offered to provide it. Kane refused to accept the Complainant back as an employee or to listen to his explanations for his absence. As of the meeting with Kane and Cash, the Respondent had not replaced the Complainant.

16. During the period of the Complainant's absence from work, both Jennifer and Kevin Kane told other employees and customers of the Complainant's mental or emotional disabilities and on one occasion Kevin Kane told another employee that he believed the Complainant to be in a facility for the treatment of mental illness.

17. At the time of his termination, the Complainant was a salaried employee making $480.00 per week. He was also entitled to be scheduled to work on shifts where additional income in the form of tips would be available. The Complainant also could receive a meal valued at $6.00 on each shift he worked. There was also some provision for paid time off.

18. The Complainant was unemployed from February 3, 2007 until May 6, 2007. The Complainant sought employment once he was terminated by the Respondent.

19. The Complainant may have incurred additional expenses as a result of his unemployment, but those amounts cannot be accurately ascertained.

20. The Complainant experienced a significant amount of stress in his life prior to January 30, 2007. In part, that stress brought about the Complainant's need for a medical absence. Subsequent to his termination, the Complainant experienced some degree of additional stress, emotional distress, humiliation and embarrassment. The Complainant did not experience any unusually outrageous conduct on the part of the Respondent and was able to find employment again in a relatively short time.

CONCLUSIONS OF LAW

1. The Complainant is an individual with a disability within the meaning of the ordinance.

2. The Respondent is an employer within the meaning of the ordinance.

3. The Respondent failed or refused to accommodate the Complainant's disability by failing or refusing to extend clemency or forbearance for any possible violation by the Complainant of the Respondent's attendance policy.

4. The Respondent, at least in part, terminated the Complainant's employment because of his disability and its affects on the Complainant.

5. The Complainant did not violate any policy or practice of the Respondent that was strictly enforced or called for the Complainant's termination.

6. The Complainant experienced a loss of income and injuries due to emotional distress as a result of the Respondent's actions.

ORDER

It is hereby ordered:

1. The Respondent shall pay to the Complainant the sum of $6,312.00 for lost wages no later than 30 days from the date on which this order becomes final.

2. The Respondent shall pay to the Complainant interest on the Complainant's lost wages at the rate of 4% per annum to be calculated from February 3, 2007 until the date upon which this decision becomes final.

3. The Respondent shall pay to the Complainant the sum of $5,000.00 for the Complainant's emotional distress stemming from the Respondent's act of discrimination no later than 30 days from the date on which this decision becomes final.

4. The Respondent shall immediately remit to the Complainant the amount of $2,029.37 ordered for the payment of attorney's fees in this action on July 20, 2008.

5. The Complainant shall no later than 21 days from the undersigned date file a petition and documentation for his costs and fees including a reasonable attorney's fee connected to the pursuit of this complaint. The Respondent may submit any objection to the Complainant's petition and/or documentation within 15 days of its receipt.

MEMORANDUM DECISION

The record in this matter is unique in the experience of the Hearing Examiner. The Complainant is ably represented by counsel. The Respondent is unrepresented by counsel and the Respondent's ownership appears divided by personal problems and difficulties. These difficulties have resulted in the Respondent's failure to act to protect the interests of the Respondent in a variety of ways. Despite the problems in which the Respondent finds itself, the Hearing Examiner must limit himself to the record as created at the hearing and in the processes leading up to that hearing.

Most notably, the Respondent failed to respond to the Complainant's Request for Admissions dated May 16, 2008. Despite the Respondent's current objections to the facts as established in those admissions, the Hearing Examiner is bound by them.

Similarly, in its post-hearing brief, the Respondent makes reference to the Complainant's testimony at a hearing for unemployment compensation benefits. Along with the findings resulting from that hearing, the Complainant's statements were not admitted into the record of the current proceedings. No matter how much the Respondent might like to rely on what it sees as the facts arising from the unemployment compensation benefit hearing, the Hearing Examiner may not consider that material as it is not part of the record of the present matter.

Regardless of the pre-hearing problems and difficulties, the record in this matter deals with a very short period of time and only a handful of contacts between the parties. For the most part, the Complainant's history with the Respondent was happy and successful. However, that changed and came to an end from January 30, 2007 through February 6, 2007.

On January 30, 2007 prior to the start of his shift, the Complainant informed Kevin Kane, one of the Respondent's owners, that he (the Complainant) was not feeling well and would not be able to come in. At the time of this hearing, the Respondent appears to have been owned by Kevin Kane, Mark Cash and Jennifer Kane. Unless otherwise noted, references to Kane are to Kevin Kane. The admissions in effect indicate that the Complainant informed Kane that the Complainant needed to see a doctor and to get medicine for anxiety, stress and depression. The Complainant clearly believes these statements are tantamount to having informed Kane of the Complainant's disability.

Kane now wishes to renounce those admissions, but fails to present any cognizable reason for the Hearing Examiner not to give effect to the admissions. According to the admissions, Kane told the Complainant to do what was necessary to take care of himself and to call in the next day. Kane would also undertake the responsibility to make sure the Complainant's shifts were covered.

On January 30, 2007, the Complainant drove to Stevens Point to consult with his previous physician. He was unable to get an appointment to see a doctor until February 2, 2007. Despite Kane's telling the Complainant to call on January 31, 2007, the Complainant did not. The Complainant temporizes by stating that he had not been able to see a doctor and felt that he had nothing to report to Kane.

Kane called the Complainant's cell phone on January 31, 2007 to check on the Complainant. The admissions indicate that Kane wished to know if there was anything that he

could do for the Complainant. The admissions and the Complainant's testimony do not indicate that Kane requested any information about the Complainant's availability to return to work or to make further contact with Kane or anyone else at the restaurant.

According to the then effective work schedule, the Complainant did not work on Fridays. February 2, 2007 was a Friday and there is no indication that the Complainant was expected to work on that day. On February 2, 2007, the Complainant, according to the admissions, contacted Kane or at least someone at the restaurant to indicate that he would come to work on February 3, 2007. Jennifer Kane was available to speak with the Complainant on February 2, 2007, but decided not to do so. Kane did not contact the Complainant to tell him not to come in on February 3, 2007.

The Complainant did come to the restaurant the morning of February 3, 2007, but the Complainant was told that his shift was covered. In a conversation with the bartender on duty, Elisabeth Engler, the Complainant was told that Kane intended to fire him. The Complainant was upset and concerned. He left his keys on Kane's desk as a result of the information given to him by Engler.

There were several other attempts to communicate over the next two days. However, February 4, 2007 was the day of the Super Bowl game in 2007. For the first time, the Respondent was going to hold a Super Bowl promotion/party. Kane testified that there was too much going on to take the time to speak with the Complainant. The day after, February 5, 2007, Kane was unwilling to speak to the Complainant because he was angry and was tired from the effort that had gone into the weekend's events.

Also, on February 5, 2007, Kane conducted interviews to replace the Complainant.

Despite the interviews on February 5, 2007, there was no permanent replacement for the Complainant as of the next day. On February 6, 2007, Kane, Cash and the Complainant met in what can only be called a confrontation. Kane made it clear that he felt that the Complainant no longer worked for the Respondent. Kane was not interested in receiving any medical information related to the Complainant's condition or diagnosis. Kane initially indicated that he was interested in medical information, but despite the Complainant's willingness to produce such information, Kane decided he was no longer interested. Kane stated that he did not believe that he could rely upon the Complainant any further.

The first question presented by the record for the Hearing Examiner is whether this is a case of direct or indirect evidence. In the case of a claim presented by direct evidence, the Hearing Examiner must review the facts, weigh the evidence and render a decision. Direct evidence is that which if believed demonstrates a fact without reliance upon inference or presumption. In the case of an indirect claim, the Hearing Examiner will apply the McDonnell Douglas/Burdine burden shifting approach to determine whether discrimination has occurred. See McDonnell Douglas Corp. v. Green. 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). In a claim of indirect evidence, the Hearing Examiner will often rely upon inferences and presumptions raised by the evidence.

While the Hearing Examiner most frequently utilizes the McDonnell Douglas/Burdine approach, the record in this matter calls for a more direct analysis. The record of admissions and testimony create a factual record that fits with a determination of discrimination in the direct

method. In this method, the Hearing Examiner must review the record to determine whether it supports a claim of discrimination or not. This analysis is performed through application of the facts to the elements of a *prima facie* claim of discrimination and examining whether the Respondent has any defense to such a claim.

The elements of the Complainant's *prima facie* claim can be simply stated as that the Complainant was a member of a protected class, that he experienced an adverse employment action and that there is a causal connection between the Complainant's membership in a protected class and the adverse action. Subsumed within this general statement are issues such as whether the Respondent knew of the Complainant's status as a member of a protected class and whether the Complainant was adequately performing the duties of his position.

The initial question in determining the *prima facie* claim is whether the Complainant falls within a protected class. The Complainant contends that he is a member of the protected class "disability." Customarily, the analysis of whether the Complainant is a member of the protected class disability would involve review of the record to determine if he is an individual with a physical or mental impairment or is perceived as having one or has a history of such an impairment and that such an impairment substantially affects one or more of the Complainant's major life functions or activities. However, the Respondent by failing to respond to the Request for Admissions issued in this case admits at Admission Request No. 9 that the Complainant has a disability.

The Complainant asserts that his depression, social anxiety disorder and related conditions represent a disability. The Hearing Examiner is bound by the admissions made in this record. However, the Hearing Examiner notes that there is a lack of medical testimony in this matter that would normally support such a finding. Perhaps the Complainant determined that he need not make such a presentation given the admissions. That is not a matter upon which the Hearing Examiner can speculate.

A question related to the Complainant's membership in the protected class "disability" is whether the Respondent knew of the Complainant's disability. Again, the admissions answer this question in the affirmative. Admission Request Nos. 31 - 36 indicate that Kane and other owners told other employees and customers of the Complainant's condition. Admission Request No. 32 indicates that Kane told a customer that he believed the Complainant to be in an institution receiving treatment for mental illness.

There is no indication in this record that the Respondent knew of the Complainant's mental or emotional impairments prior to January 30, 2007. However, the allegations of the complaint all involve actions occurring subsequent to January 30, 2007. The Hearing Examiner is satisfied that the Respondent knew of the Complainant's condition or conditions prior to taking any employment actions. One can find from the testimony of Kevin and Jennifer Kane that they might well have been aware of the Complainant's conditions prior to January 30, 2007, because of their observations that the Complainant was subject to occasional or even frequent "mood swings." By themselves these statements might not establish prior knowledge of a mental disability, but they are suggestive of such knowledge. However, as previously noted, the admissions conclusively determine this point.

The next question is whether the Complainant experienced an adverse employment action. There is no question that the Complainant's employment came to an end. There is some question whether the complainant quit his employment on February 3, 2007 when he left his keys on Kane's desk or whether he was fired by Kane on February 6, 2007. Given this record, there is no question that the Complainant had not abandoned his job prior to February 3, 2007.

The Respondent contends that it thought that the Complainant had abandoned his position on January 30 or January 31, because it had received a request for a job reference for the Complainant from another restaurant at that time. Also, the Complainant's failure to call in on January 31 or February 1 allegedly indicated to the Respondent that the Complainant had quit. However, the Respondent's statements following January 31 to other employees and to customers about the Complainant as reflected in Admission Request Nos. 31 - 35 are a clear indication that the Respondent did not believe that the Complainant had abandoned his position and that he would be returning. The Complainant's phone call and message to the Respondent on February 2, 2007 and the Complainant's phone call and appearance on February 3, 2007 also clearly indicate that the Complainant had not abandoned his position. While the Complainant's leaving of his keys on February 3, 2007 could give rise to an assumption that he had quit, the fact that he continued to follow the Respondent's instructions to come back on successive days should negate that inference.

The Complainant's termination, whether it occurred on February 6, 2007 or at some earlier time is clearly an adverse action. Termination of employment represents one of the clearest examples of an adverse employment action. Along with the Complainant's termination, the Complainant asserts that the Respondent failed or refused to accommodate his disability by not exercising clemency or forbearance from its attendance policy for the Complainant's failure to call in on January 31, 2007 or February 1, 2007. This too is a clear example of an adverse employment action directly related to the Complainant's disability.

The next step is determining whether there is a causal link between the Complainant's disability and the adverse actions that he experienced. The Complainant draws this link in several ways.

First, the Complainant asserts that up until he left the Respondent on January 30, 2007, their employment relationship had been happy and cordial. He points to Kane's having loaned him (the Complainant) his car and Kane's having given the Complainant tickets to a Packers game. The Complainant also points to his steady advancement from an hourly employee to a salaried manager. That the Respondent would indicate that the Complainant was unreliable and difficult to work with only after the Complainant's leaving for medical reasons leads to the conclusion that the Complainant's medical condition was a motivating factor in the Respondent's changed attitude and actions.

Second, the Complainant points to the statements made by both Kevin and Jennifer Kane to other employees and to customers about the Complainant's mental/emotional condition. The Complainant contends that these statements demonstrate an awareness of the Complainant's conditions and, given the context of the statements, indicates a disparaging attitude towards the Complainant held by the Respondent.

Third, Kane's refusal to consider the Complainant's offer of medical records and Kane's reference to the Complainant's alleged lack of reliability tie the Complainant's termination to the

Complainant's disclosure of his conditions and his temporary absence related to those conditions.

The Respondent contends that the Complainant was terminated for a number of legitimate, nondiscriminatory reasons. First, the Respondent asserts that the Complainant's failure to call in on January 31 and February 1 in combination with the request for a job reference for the Complainant led Kane to the conclusion that the Complainant had quit his position. Also, the Complainant's failure to appear for work without a call represents a violation of the Respondent's policies for which termination was appropriate. The Respondent also claims that the Complainant was unreliable, moody and irresponsible and that all of these factors resulted in the decision to terminate the Complainant.

It falls to the Hearing Examiner to determine which of these various explanations more likely than not motivated the Respondent to terminate the Complainant's employment. Given the record as a whole, the Hearing Examiner concludes that the Respondent was motivated, at least in part, by the Complainant's disability when it terminated the Complainant's employment. What is most striking to the Hearing Examiner in this record is the change in attitude by Kane after he became aware of the Complainant's disabilities. The record indicates that there were relatively few problems with the Complainant's employment prior to January 30, 2007. That it was the Complainant's disabilities that were the focus of the Respondent's changed attitude and not simply the Complainant's failure to call in is reflected in the comments of both Kanes to other employees and to customers about the Complainant's condition. Additionally, Kane's refusal to accept proffered medical information relating to the Complainant's absence and his disabilities on February 6, 2007 supports the conclusion that the Complainant's disabilities played at least a part of the motivation for the Respondent's actions.

The fact that the Complainant's position was still open on February 6, 2007 when the Complainant met with Kane and Cash indicates that the Respondent was in no hurry to fill the Complainant's position and could have extended forbearance even if the Respondent had been partially motivated by the Complainant's failure to call in on January 31 and February 1.

The Respondent's alternative explanations are not particularly credible given the record as a whole. While it is conceivable that the Respondent's actions were predicated upon the Complainant's failure to call in, the record lacks any support for the contention that such an action was either a strictly enforced policy of the Respondent or that the Respondent had ever enforced such a requirement. Similarly, there is reference to a leave request form that was to be completed and submitted in advance. The record indicates that though there was such a form, it was rarely used and was not readily available to employees even when it might have been appropriate.

The record indicates that Kane was solicitous of the Complainant's conditions on January 30, 2007 and January 31, 2007 when the Complainant first approached Kane and when Kane called the Complainant. It is incredible to the Hearing Examiner that the Complainant's failure to call in on February 1, 2007 would have triggered such an adverse reaction and attitude in Kane. The Hearing Examiner might accept that Kane was unhappy with the Complainant's failure to communicate especially in light of the Respondent's receipt of a request for a job reference, but such a change does not explain the explicit identification of the Complainant's condition to employees and customers over the next few days.

The Hearing Examiner having determined that the Complainant's disabilities played at least in part a motivating role in the Respondent's failure to extend clemency or forbearance for any technical violation of the Respondent's attendance policy and in the Respondent's decision to terminate the Complainant, the Hearing Examiner must now propose a remedy intended to make the Complainant whole or to redress the violation of the ordinance. See Mad. Gen. Ord. 39.03(10)(c)2b. In the context of an employment discrimination claim, a prevailing Complainant is generally awarded economic damages such as lost wages and compensatory damages for emotional distress injuries such as embarrassment, humiliation or the loss of dignity resulting from being a victim of discrimination.

The Complainant seeks $6,014.89 in lost wages and benefits plus prejudgment interest on that sum. In addition, the Complainant request $120.00 for late payment charges relating to his rent and a minimum of $15,000.00 in damages for emotional distress. While the Hearing Examiner makes note of the Complainant's request, he independently reviews the record to make his proposed award.

The record indicates that the Complainant was without employment from February 3, 2007 to May 13, 2007. The Complainant indicates that his first day without employment was February 5, 2007. However, the Hearing Examiner finds that the Complainant's call on February 2, 2007 placed the Respondent on notice of the Complainant's intent and ability to return to work. It was the actions of the Respondent that prevented the Complainant from returning as indicated. There is little testimony concerning the Complainant's attempts to mitigate his wage loss, though it is the Respondent's burden to demonstrate a lack of reasonable mitigation. The Complainant states that he obtained comparable employment as of May 6, 2007. The Hearing Examiner finds no reason to doubt that assertion.

At the time of his termination, the Complainant was paid $480.00 per week as a salaried employee. He was also entitled to work certain shifts that might yield additional income in the form of tips, one week paid vacation per year and a meal for each shift he worked up to 6 days per week. The Hearing Examiner cannot estimate how much income was lost to the Complainant in the form of tips. There is nothing in the record to establish such a base figure. The Complainant fixes the value of the lost meals at $468.00. The Hearing Examiner is not clear about how the Complainant reached this figure. It seems as if it should be slightly higher.

In calculating the lost wage, the Hearing Examiner takes the number of days between February 3, 2007 and May 6, 2007. The Hearing Examiner finds that there were 92 days between those two dates. Dividing that figure by 7 gives the number of weeks to be 13.15. Multiplying the number of weeks during which the Complainant was without work by his $480.00 weekly salary results in a wage loss of $6,312.00. This is higher than the amount calculated by the Complainant though it is not clear why.

The Complainant requests $961.00 for two weeks of vacation that he was unable to take, one for 2007 and one for 2008. It is not at all clear why the Complainant would seek pay for vacation time in 2008. Additionally there is no indication that the Complainant would or could have taken the time in 2007. To make such an award is too speculative on the part of the Hearing Examiner. Accordingly, the Hearing Examiner declines to make this portion of the requested award.

Similarly, it is not clear how the Complainant derived a value of $6.00 per meal. It is not clear that the Complainant would have taken advantage of this benefit each day or not. This leads the Hearing Examiner to the conclusion that the amount of the meal benefit is too speculative for the Hearing Examiner to accept. The Hearing Examiner has no doubts that the Complainant would have taken advantage of that benefit sometimes, but there is no way to know how frequently the Complainant would have utilized it. Nothing in the record indicates that an employee who did not utilize the benefit was entitled to the cash value of that meal either. Accordingly, the Hearing Examiner declines to make such an award.

The amounts for late rent payments for the months of February, March and April 2007 are also too speculative to be awarded. In theory, the Complainant's February rent might have come out of his January pay checks or he might have been charged a late fee any way. There is an insufficient record to know the Complainant's payment record or his usual practice.

Customarily, a prevailing Complainant is entitled to an award of prejudgment interest on amounts of monetary damages that are readily calculable and able to be fixed with certainty. Payments for back wages are typical of the type of awards for which supplementation by prejudgment interest is appropriate. Prejudgment interest is intended to compensate the prevailing Complainant for the lost opportunity cost associated with the loss of wages.

In the last case in which the Commission awarded prejudgment interest, the Commission used the stipulated amount of 4% per annum. Cronk v. Reynolds Transfer & Storage, MEOC Case No. 20022063 (Comm. Dec. 3/5/2007; Ex. Dec. 8/29/2006; Comm. Dec. 2/28/2005; Ex. Dec. 9/13/2004). The Hearing Examiner applied interest in that amount in Larry v. Peterson, MEOC Case No. 20051069 (Ex. Dec. 7/8/08, Ex. Dec. atty. fees 9/2/09). Absent some evidentiary record on a different amount to be used, the Hearing Examiner will use 4% per annum to apply in this matter.

The Complainant seeks an award of damages for emotional distress of at least $15,000.00. To support this request, the Complainant seeks to compare his circumstances to those in Carver-Thomas v. Genesis Behavioral Services, Inc., MEOC Case No.19992224 and 20002185 (Ex. Dec. 1/25/06); and Laitinen-Schultz v. TLC Wisconsin Laser Center, MEOC Case No. 19982001 (Ex. Dec. 7/1/2003). In both of those cases, the Hearing Examiner found an award of emotional distress damages of $15,000.00 was necessary to make the prevailing complainants whole. The Hearing Examiner finds these comparisons lacking. In the present case, the Complainant experienced a single event that was particularly upsetting followed by a relatively short period of unemployment. While the Hearing Examiner does not mean to minimize the Complainant's reactions or difficulties created by the loss of employment, those circumstances bear little relationship to the protracted period of antagonism and explicitly discriminatory language and conduct experienced by Carver-Thomas or Laitinen-Schultz.

In the present matter, the Complainant was already experiencing stress and unhappiness as a result of the difficult economic conditions in which the Respondent found itself in late 2006 and early 2007. It was these conditions that caused the Complainant to begin seeking alternative employment and triggered his stress and depressive episode that required him to seek treatment on January 30, 2007.

Given this record of other significant stressors in the Complainant's life leading up to January 30, 2007, it is difficult to calculate how much the Respondent's act of discrimination added to the stress and distress already experienced by the Complainant. While the Hearing Examiner can accept that things became more difficult for the Complainant and the Respondent's bullying attitude on February 6, 2007 might have temporarily added to the Complainant's discomfort, the Hearing Examiner is not prepared to assess the level of damages sought by the Complainant.

In reviewing the record, the Hearing Examiner finds that the circumstances are more similar to those in Nichols v. Buck's Madison Square Garden Tavern, MEOC Case No. 20033011 (Ex. Dec. 10/14/03; Ex. Dec. 11/08/05; Comm. Dec. 05/22/06; *aff'd* Daily d/b/a Buck's Madison Square Garden Tavern v. EOC, City of Madison, 06CV1931 (Dane County Cir. Ct. 03/30/07)), in that a single intense incident of discrimination was followed by a period afterwards during which the Complainant had to relive the event. Also, the disabilities experienced by the Complainant's are similar i.e. depression, anxiety, etc. Given this comparison, the Hearing Examiner finds that an award of $5,000.00 is adequate to compensate the Complainant for any emotional distress that he may have experienced as a result of the Respondent's discrimination.

Given the appearance of the parties during the hearing in this matter, it appears that to some extent there is an element of personal vendetta between the parties. While it is difficult to put one's finger on the precise facts that lead to this feeling, the Hearing Examiner during the testimony of both the Complainant and Kane was struck by how these opposing parties seemed to wish only the worst for the other. This forum is ill-suited to address such disputes.

Finally, in order to make the Complainant fully whole, the Hearing Examiner will award the costs and fees associated with the bringing and pursuit of this complaint to the Complainant. As an enactment intended to redress a social wrong such as discrimination, the ordinance encourages individuals to bring actions as private Attorneys General. In this way, the purposes of the ordinance will be furthered with less expense to the public. To encourage the public to accept this responsibility, awards of costs and fees including a reasonable attorney's fee are made so that prevailing Complainants will not have their judgments reduced by the costs of bringing an action. To deprive a prevailing Complainant of the full award to which he or she is entitled by requiring him or her to bear these expenses would chill those who have been discriminated against from pursuing their rights and furthering society's interest in workplaces free of discrimination. See generally, Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. on liability 2/10/93, on attorney's fees 7/29/93 and 9/23/93); Sprague v. Rowe & Hacklander-Ready, MEOC Case No. 1462 (Comm. Dec. on attorney's fees 2/9/98, Comm. Dec. 7/10/92, 2/10/94, Ex. Dec. 12/27/91); Gardner v. Wal-Mart Vision Center, MEOC Case No. 22637 (Ex. Dec. on Attorney's Fees 6/1/01).

Accordingly, the Respondent must pay the reasonable costs of the Complainant associated with this action. The precise amount of these costs and fees will be determined in post-judgment proceedings.

The parties are also reminded of the outstanding order for the Respondent to pay to the Complainant the sum of $2,029.37 as compensation for the Respondent's failure to file a timely answer and to require the Complainant to bring a motion to enforce the requirements of the ordinance, the Rules of the Commission and the Notice of Hearing.

Signed and dated this 12th day of March, 2010.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Timothy M Scheffler
Mark J Cash

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

Chris M Groholski 1202 McKenna Blvd Apt 303 Madison WI 53719 Complainant vs. Old Town Pub 724 S Gammon Rd Madison WI 53719 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT CASE NO. 20072041

BACKGROUND

On February 20, 2007, the Complainant, Chris Groholski, filed a complaint with the Madison Equal Opportunities Commission (Commission). Groholski's complaint charged that the Respondent, Old Town Pub, terminated his employment because of his disability and thereby violated the Equal Opportunities Ordinance sec. 39.03(8) Mad. Gen. Ord. The Respondent denied that it discriminated against the Complainant on any basis and that it had legitimate, non-discriminatory reasons for terminating the Complainant.

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

On April 14, 2008, the Hearing Examiner held a Pre-Hearing Conference in Room LL-120 of the Madison Municipal Building. The Complainant appeared in person and by his counsel, Timothy Scheffler of Stix Law Office. The Respondent appeared by its owners, Mark Cash and Kevin Kane. In addition to scheduling, the Respondent asked questions concerning their legal rights. They also stated the grounds for the position that the Respondent did not discriminate against the Complainant. The Hearing Examiner reminded the Respondent of its responsibility to file a written response to the Notice of Hearing.

On April 15, 2008, the Hearing Examiner issued a Notice of Hearing and Scheduling Order in this matter. The Notice of Hearing indicated the requirement that the Respondent file a written answer within 10 days of the issuance of the Notice of Hearing.

The Respondent failed to file the required written response/answer. On or about May 1, 2008, counsel for the Complainant contacted the Respondent to inquire about the status of the

Respondent's written answer. Mark Cash, on behalf of the Respondent, indicated that he would forward the response "ASAP."

No response was filed with the Hearing Examiner or with the Complainant's counsel. On May 6, 2008, the Complainant filed a motion for default judgment for the Respondent's failure to file an answer as required. On May 27, 2008, the Hearing Examiner issued an Order to Show Cause why a default judgment should not be entered for the Respondent's failure to file a written answer. The Order to Show Cause required the Respondent to explain its failure to file and to file a written response on or before June 9, 2008.

The Respondent by Mark Cash, filed a written response to the Notice of Hearing on June 9, 2008. The Respondent's filing did not explain why it had not filed the answer as required within 10 days of the Notice of Hearing. On June 13, 2008, the Complainant filed an objection to the Respondent's response indicating that the Respondent had not explained its failure to respond, and averring that the Complainant had expended funds for discovery that he might not have spent otherwise.

The Hearing in this matter is set for August 19, 2008.

DECISION

The decision whether to issue a default judgment in circumstances such as these rests in the sound discretion of the Hearing Examiner. The equities of the current circumstance are not one sided or clear. On one hand, the Commission's orders and those of the Hearing Examiner must be enforced if they are to have any meaning. On the other hand, the Hearing Examiner is aware that the Respondent is unrepresented and is likely unaware of the importance with which lawyers and the Commission hold such requirements.

The primary purpose of the requirement to answer the Notice of Hearing is to make sure that the Complainant and the Commission have a clear and adequate notice of the basis for the Respondent's defense. In this regard, the Respondent filed such an answer in response to the Order to Show Cause. The nature of the Respondent's defense is clear from a cursory reading of the investigative file and from the discussion held at the time of the Pre-Hearing Conference. It would not seem that the Complainant is going to arrive at the day of hearing without a clear idea of the basis of the Respondent's defense. This is different from the situation in which the Complainant found herself in Green v. Salimun, MEOC Case No. 1679 (Ex. Dec. 2/28/97).

On the other hand, the Complainant avers that he did expend resources on discovery and hearing preparation that he would not have had he received the Respondent's answer in a timely manner. This additional expenditure is not set forth in the Complainant's response, but that seems to be the primary manner in which the Complainant has been damaged by the Respondent's delay in filing its written answer.

The Hearing Examiner finds that the Respondent's compliance with the Order to Show Cause by filing of its written answer, though not in complete accordance with the order, is sufficient to demonstrate a renewed intent on the part of the Respondent to fully comply with future orders of the Hearing Examiner. It would have been preferential for the Respondent to also explain the reason for its failure to timely file the answer, but given the Respondent's unrepresented status and the indication of continuing compliance, the Hearing Examiner does not find it necessary to sanction the Respondent for that failure.

However, the Hearing Examiner cannot overlook that the Respondent's actions have generated additional expense for the Complainant. The Hearing Examiner will direct the Complainant to submit an accounting of additional expense and to the extent appropriate, the Hearing Examiner will order the payment of those additional expenses regardless of the outcome of this complaint. In this way, the Complainant should be made whole for the Respondent's failure to comply with the order of the Hearing Examiner to file a written answer.

ORDER

The Complainant shall file an accounting and explanation of additional discovery expenses on or before August 8, 2008. The Respondent shall have seven days in which to object to the Complainant's accounting. If no objection is filed, the Respondent shall pay the additional expenses on or before the day of hearing or face additional sanction.

The Complainant's motion is dismissed subject to the Respondent's compliance with this order.

Signed and dated this 30th day of July, 2008.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Timothy M Scheffler
Mark J Cash