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

Kevin A Rhyne
635 Skyview Pl #5
Madison WI 53713

Complainant

vs.

Kelley Williamson's Mobil
636 W Washington Ave.
Madison WI 53703

Respondent

COMMISSION'S DECISION
AND FINAL ORDER ON
APPEAL OF HEARING EXAMINER'S
RECOMMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

CASE NO. 20092086

BACKGROUND

On June 3, 2009, the Complainant, Kevin Rhyne, filed a complaint with the Madison Department of Civil Rights, Equal Opportunities Division. Rhyne charged that the Respondent, Kelley Williamson's Mobil, suspended and terminated his employment because of his race and/or color in violation of the Equal Opportunities Ordinance. The Respondent denied having discriminated against the Complainant in any manner and asserted that the Complainant was terminated because it believed that the Complainant had engaged in misconduct and theft from the Respondent.

Subsequent to a public hearing on the merits of the complaint, the Hearing Examiner, on December 1, 2011, issued his Recommended Findings of Fact, Conclusions of Law and Order. The Hearing Examiner concluded that the Complainant had failed to demonstrate that his race or color was a motivating factor in his suspension and termination. Rather the Hearing Examiner found that the Respondent may have mismanaged its personnel and policies, but that there was insufficient proof that the Complainant's race or color were the bases for his suspension and/or termination. The Hearing Examiner ordered the complaint dismissed.

The Complainant timely appealed the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order to the Appeals Committee of the Equal Opportunities Commission.

The Appeals Committee gave the parties the opportunity to submit exceptions and additional written argument in support of their respective positions. On May 22, 2012, the Appeals Committee of the Commission met to consider the Complainant's appeal. Participating in the Committee's deliberations were Commissioners Bustamante, Nerad and Solomon.

DECISION

After the opportunity for extensive review of the record in this matter, the Appeals Committee is convinced that the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order, including the Hearing Examiner's recommended dismissal, is supported by the record of the proceedings. The Appeals Committee adopts and incorporates by reference as if fully set forth herein, the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order dated December 1, 2011.

Though the Appeals Committee finds the circumstances surrounding the case disappointing, it must conclude that the Complainant has failed to meet his burden to establish discrimination.

ORDER

The Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order are affirmed and are incorporated by reference as the order of the Commission. The complaint is dismissed.

Joining in the Committee's action are Commissioners Bustamante, Nerad and Solomon. No Commissioner opposed this action.

On behalf of the Equal Opportunities Commission and the Appeals Committee,

Signed and dated this 23rd day of May, 2012.

Coco Bustamente,
Appeals Committee Chair

cc: Mary E Kennelly
Steven Balogh

EQUAL OPPORTUNITIES COMMISSION
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Kevin A Rhyne 635 Skyview Pl #5 Madison WI 53713 Complainant vs. Kelley Williamson's Mobil 636 W Washington Ave. Madison WI 53703 Respondent	HEARING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CASE NO. 20092086

BACKGROUND

This complaint came on for a hearing on the merits before Commission Hearing Examiner, Clifford E. Blackwell, III, on March 22, 2011, in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd., Madison, Wisconsin. The Complainant appeared in person and by his attorney, Fox & Fox S.C. by Mary E. Kennelly. The Respondent appeared by its corporate representative, Monique Lundstedt, and by its attorney, WilliamsMcCarthy LLP, by Stephen E. Balogh.

Based upon the record of these proceedings, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Respondent, Kelley Williamson Mobil, is a gas station and a subsidiary of Kelley Williamson Company with a place of business at 636 West Washington Avenue in Madison, Wisconsin.

2. The Complainant, Kevin Rhyne, is an adult, African-American, black male.

3. From April 15, 2007 to January 26, 2009, the Respondent employed the Complainant as a cashier/attendant (sales associate).

4. As a sales associate, the Complainant's responsibilities included maintaining the gas station, watching fuel pumps and cashiering.

5. The Respondent hired Janel Skuldt (white/Caucasian) as its store manager in November 2008. As a result, Skuldt became the Complainant's supervisor.

6. Prior to Skuldt's hire, the Complainant received generally satisfactory performance reviews and pay increases in October 2007 and in May 2008.

7. During the course of the Complainant's employment, prior to the incidents giving rise to this complaint, the Respondent disciplined him twice. The first disciplinary action, a verbal warning, occurred in October 2007 and regarded a violation of the Respondent's check cashing policy. The second disciplinary action, a written warning, occurred in May 2008 and regarded a violation of the Respondent's cash shortage policy.

8. On January 15, 2009, the Respondent's district manager, Suzanne Dorsey (black, African-American), called the Complainant to her office. Skuldt and two police officers were also present in Dorsey's office.

9. Dorsey told the Complainant that she had a video of him voiding a pack of cigarettes and giving that pack to a customer.

10. Dorsey played the video and neither the Complainant nor the two officers observed any wrongdoing.

11. Dorsey suspended the Complainant's employment pending further investigation.

12. As of the time of his suspension on January 15, 2009, the Complainant performed his job satisfactorily and in accordance with the expectations of his position.

13. Following the Complainant's suspension on January 15, 2009, the Respondent did not call the Complainant back to work. On January 26, 2009, the Respondent terminated the Complainant's employment.

14. The Respondent did not give the Complainant a definite reason for his termination.

15. During the Complainant's employment, a non-African-American employee, Kevin Hernandez, was disciplined for multiple incidents of cash shortages and the Respondent did not terminate his employment.

16. In the year following the Complainant's termination (January 26, 2009 - March 14, 2011), the Respondent hired eighteen sales associates and retained only seven. Of the seven who remained employed as of March 14, 2011, only one is African-American and he was hired shortly before the hearing in this matter. The other 6 employees are white, Caucasian.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected classes, race and color, and is entitled to the protection of the Equal Opportunities Ordinance. M.G.O. Sec. 39.03(8)(a).

2. The Respondent is an employer within the meaning of the Equal Opportunities Ordinance.

3. The Complainant was not suspended and terminated on the basis of his race and color. It appears from the record that the Complainant's suspension and termination resulted from the Respondent's poor decision-making.

4. The Respondent did not violate the ordinance in suspending and terminating the Complainant's employment on January 15, 2009.

ORDER

The complaint is dismissed without costs to either party.

MEMORANDUM DECISION

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 a claim based upon indirect evidence, 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 adduced by indirect evidence, the Hearing Examiner will often rely upon inferences and presumptions raised by the evidence as well as more direct forms of proof.

The testimony and evidence presented in this case create a factual record that fits with a determination of discrimination under the indirect 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 an application of the facts to the elements of a *prima facie* claim of discrimination and an examination of whether the Respondent has any defense to such a claim.

Prior to the hearing on the merits, the Complainant moved for a default judgment for the Respondent's failure to timely answer the Notice of Hearing issued on October 6, 2010. Rather than subject the Respondent to a default judgment, the Hearing Examiner precluded the Respondent from submitting evidence and testimony in its defense. However, the Hearing Examiner permitted the Respondent to cross-examine the Complainant's witnesses and submit documentary evidence during cross-examination. See Rhyne v. Kelley Williamson's Mobil, MEOC Case No. 20092086 (Ex. Dec. re Motion for Default Judgment, 3/30/11). Further, the Hearing Examiner reiterated that the Complainant still bears the burden of proof at the hearing and that the Complainant cannot rest on the Hearing Examiner's reversal of the Initial Determination of No Probable Cause. Id.

Accordingly, the Hearing Examiner's decision in this case necessarily alters the typical McDonnell Douglas standard that is utilized in a decision on the merits. This is because, at the hearing, the Respondent was not permitted to produce evidence to support a legitimate, non-discriminatory reason for the Complainant's suspension and termination. As a result, what we are left with is the question of whether the Complainant presented sufficient evidence to make out a *prima facie* claim of discrimination on the basis of race or color.

Neither party seems to be fully aware of the standard by which the Complainant's case is to be adjudicated. The Complainant believes that "if the employer fails to produce [a non-discriminatory explanation for its actions] then the employee will win." The Complainant argues that, the Respondent "must use admissible evidence to raise a genuine issue of fact as to whether it [terminated Rhyne] based on a discriminatory motive." Since the Hearing Examiner precluded the Respondent "from entering a defense that might have otherwise been noted in an Answer," the Complainant asserts that the Respondent could not and did not introduce any admissible evidence concerning an alleged non-discriminatory reason for the Complainant's termination. See Rhyne v. Kelley Williamson's Mobil, MEOC Case No. 22105 (Ex. Dec. re Motion for Default Judgment, 3/30/11). As a result, the Complainant maintains that the Respondent "failed to meet its burden of production as a matter of law."

The Complainant seems to believe that he is entitled to a judgment in his favor simply because the Respondent was precluded from asserting a non-discriminatory reason for his suspension and subsequent termination. However, in the Decision and Order on Complainant's Motion for Default Judgment, the Hearing Examiner explained to the parties that the Complainant must make out a *prima facie* case of discrimination and produce evidence at the hearing to substantiate his claims.

In the Decision and Order on Initial Determination of No Probable Cause, the Hearing Examiner set forth the proper standard of review for the Complainant's case. See Rhyne v. Kelley Williamson's Mobil, MEOC Case No. 20092086 (Ex. Dec. 6/17/10) (unpublished). To make a *prima facie* case of discrimination in employment, the Complainant must show: "(i) that he belongs to a [protected class]; (ii) that he was performing his job satisfactorily; (iii) that he suffered an adverse employment action; and (iv) that the employer treated a similarly-situated employee not in [his] protected class more favorably." 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).

It is important to emphasize the fact that a Complainant always bears the burden of establishing a nexus between his or her membership in a protected class and the alleged adverse action s/he suffered. In other words, the Complainant in this case must show that his suspension and termination resulted from the Respondent's racial animus toward him. To demonstrate racial animus, the Complainant may highlight incidents of disparate treatment. Specifically, the Complainant may point to similarly situated employees not of his protected class that were treated more favorably by the Respondent.

Although the Complainant asserts that he may also prevail if he demonstrates that the Respondent sought a replacement outside of his protected class, there is no need for the Complainant to make such a showing to substantiate his claims. See Morgan v. Community Action Comm., MEOC Case No. 2642 (Ex. Dec. 2/12/82) (recognizing that "[r]eplacement is not . . . always a necessary element of a *prima facie* case"). Thus, the Respondent's assertion, that the Complainant is required to prove that the employees hired after his termination were less qualified in order to prevail, is unnecessary to the ultimate resolution of the Complainant's allegations of discrimination.

At the hearing, Complainant's counsel argued that the Complainant is permitted to show evidence of discriminatory hiring subsequent to his termination in lieu of showing disparate treatment and cited Pantoja v. American NTN Bearing Mfg. Corp., 495 F.3d 840, 845-46 (7th Cir. 2007). Counsel for the Complainant stated that the modified McDonnell Douglas paradigm

is appropriate where a plaintiff cannot show disparate treatment, presumably due to the particular circumstances of his or her employment. However, the Complainant did not explain why the circumstances of the Complainant's case warrant application of the modified McDonnell Douglas requirements. Further, even in its application of the modified McDonnell Douglas standard, the Court in Pantoja nevertheless expected the plaintiff to provide at least some evidence of disparate treatment to support his claim of racial discrimination in termination. See Pantoja, 495 F.3d at 846-47. Moreover, the Complainant had initially put forth a viable claim of disparate treatment, as he provided sufficient argumentation to warrant reversal of the terms and conditions portion of the Initial Determination of No Probable Cause. However, it appears that the Complainant chose not to further develop that claim at the hearing or in his post-hearing briefs.

At any rate, in order to prevail, the Complainant must not only establish the four elements of a *prima facie* claim delineated in Cronk, but also demonstrate that the Respondent's decisions to suspend him and terminate his employment stemmed from a discriminatory motive. The obligation to demonstrate racial animus is subsumed within the fourth element as set forth in Cronk. It is undisputed that the Complainant belongs to the protected classes, race and color. It is also undisputed that the Complainant performed his job satisfactorily prior to his suspension and termination. Further, the parties agree that the Complainant suffered an adverse action when the Respondent suspended and subsequently terminated his employment. Thus, the only real question to be resolved is whether the Respondent's adverse actions toward the Complainant were racially motivated.

The Complainant argues that the Respondent discriminated against him on account of his race and color when it suspended him for allegedly violating company policy and then terminated his employment for no apparent reason. When the Respondent's district manager, Suzanne Dorsey, called the Complainant into her office on January 15, 2009, the Complainant found two police officers and his supervisor, Janel Skuldt, waiting for him. The Complainant testified that Dorsey told him that she had a video of him voiding a pack of cigarettes and giving that pack to a customer. The Complainant also testified that Dorsey played the tape for him and that neither he nor the two police officers observed any wrongdoing.

While in Dorsey's office, the Complainant explained that if the cigarettes had been voided, the void probably resulted from his belief that he had wrung up the item twice by mistake. The Complainant testified that there are numerous reasons why a drawer might not balance given the large number of transactions that occur during a shift. The Complainant asserts that prior to January 15, 2009, he did not engage in any conduct that would constitute an improper void under company policy. After Dorsey suspended the Complainant pending further investigation on January 15, the Complainant received a termination letter on January 26, 2009. The termination letter did not explicitly state the reason for the Complainant's termination. Rather, the letter indicated that the Respondent had turned over past videos to the Madison Police Department. Further, the letter informed the Complainant that his termination was "based on that information." The Complainant correctly asserts that the Respondent's termination letter provides no apparent reason for the Complainant's termination. Nor did the letter reveal the results of the Respondent's investigation of the alleged violation of company policy that led to the Complainant's suspension.

As for the Complainant's terms and conditions claim, the Complainant does not provide much in the way of evidence. Initially, the Complainant had argued that Skuldt engaged in a pattern or practice of falsely accusing him of theft. See Rhyne v. Kelley Williamson's Mobil,

MEOC Case No. 20092086 (Ex. Dec. 6/17/10) (unpublished). The Complainant appeared to assert that he was singled out for potential wrongdoing, while other employees not of his protected class who actually violated company policy were either not disciplined or did not receive proper discipline. Id. Naturally, the Hearing Examiner expected the Complainant to further expand on this argument at the hearing and in his post-hearing briefs. However, in the end, the Complainant failed to adequately sustain his terms and conditions claim.

At the hearing, the Complainant did not testify in greater detail as to the Respondent's motive for disciplining him more harshly than other employees. Further, in the Complainant's initial post-hearing brief, he barely mentions, let alone fully addresses disparate treatment issues, including his interactions with Skuldt, that partly resulted in the reversal of the Initial Determination of No Probable Cause. Rather, the Complainant chose to rely solely on the fact that the Respondent hired and retained only one African-American in the year following the Complainant's termination. This fact, without more, cannot demonstrate that the Complainant's suspension was racially motivated. At most, it may raise an inference of discrimination, but even that inference remains limited without more support.

The Respondent asserts that, at the hearing, the Complainant testified that he had no first-hand knowledge of any non-African-American employee who was treated more favorably under similar circumstances. The Respondent also argues that the Complainant was not aware of any other African-American employees treated in a discriminatory fashion by the Respondent. In response, the Complainant once again relies principally on the Respondent's subsequent hiring decisions and only mentions in passing the Respondent's treatment of employees not of his protected classes.

In his reply brief, the Complainant points to a single employee named, Kevin Hernandez, to bolster his terms and conditions claim. The Complainant asserted that the Respondent disciplined Hernandez, who is not African-American, multiple times for cash shortages, but did not terminate his employment. However, the Complainant did not provide any additional argumentation or documentary evidence on that issue. In this regard, it should be noted that Dorsey, the individual who apparently made the termination decision is African-American. Her continued employment in a management position tends to undercut the effect of any inference raised by the Complainant's presentation.

While it is apparent that the Respondent suspended the Complainant even though it had no definitive evidence of wrongdoing at the time, the Complainant must still show that his suspension was racially motivated, as opposed to a lapse in business judgment. If the Respondent's decision to suspend the Complainant was motivated by racial animus, the onus is on the Complainant to make that clear. It is not the Hearing Examiner's responsibility to make that connection for the Complainant. See generally Judge v. Quinn, 612 F.3d 537, 557 (7th Cir. 2010) ("It is not the obligation of [a] court to research and construct legal arguments open to parties, especially when they are represented by counsel…"). Therefore, the Hearing Examiner has little choice but to find that the Complainant failed to demonstrate that the Respondent suspended his employment on account of his race and color.

The same reasoning applies to the Complainant's termination claim. The Complainant supports his contention that the Respondent terminated his employment on account of his race and color by asserting that "there is a presumption that race discrimination occurred." Here, the Complainant once again relies on the argument that the Respondent failed to supply a non-

discriminatory reason for its actions (because it was precluded from doing so by judicial order) and that, as a result, he must prevail.

The Complainant's argument seems to rely on the presupposition that he satisfactorily demonstrated a *prima facie* case of discrimination. However, on this record, it appears that the Respondent's suspension and subsequent termination of the Complainant's employment, while perhaps ill-advised, was not clearly discriminatory. It is not apparent that the Respondent discriminated against the Complainant on the bases of race and color. The Complainant must supply some nexus between the adverse action suffered by the Complainant and his protected class membership. The Complainant does not provide sufficient evidence to reasonably make that connection. See Morgan, MEOC Case No. 2642 (Ex. Dec. 2/12/82) ("Although an employee's discharge may be 'unfair', an unfair, unreasonably severe and/or insensitive discharge is not necessarily an unlawfully discriminatory one. However, where there is evidence…that white employees who committed more serious offenses were terminated only after progressive discipline or a repeated recurrence, the termination of a black employee without warning gives rise to liability for racial discrimination"). The Hearing Examiner acknowledges that the Respondent's inability to hire and/or retain more than one African-American employee at the Complainant's level and work place in the year following the Complainant's termination does not reflect well on the Respondent. Nevertheless, this fact without more cannot be grounds for a determination that the Respondent discriminated against the Complainant on account of his race and color when it terminated his employment.

Hence, the Respondent correctly asserts that the Complainant must show that the employer's business decision was improperly motivated. The Respondent argued that the Complainant must demonstrate that the Respondent's decision to suspend and ultimately terminate his employment transcends one that is "mistaken, ill-considered or foolish." Franzoni v. Hartmarx Corp., 300 F.3d 767, 772 (7th Cir. 2002). In this regard, the Complainant failed to provide the requisite argumentation and evidence to support his claim that the Respondent's suspension and termination of his employment was racially discriminatory. Had the Complainant adequately demonstrated disparate treatment and provided sufficient evidence to substantiate his claim that the adverse actions he suffered were racially motivated, the outcome may have been different.

For the aforementioned reasons, this complaint is dismissed, subject to the rights of review set forth in the ordinance and the Rules of the Commission.

Signed and dated this 30th day of November, 2011.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Mary E Kennelly
Steven Balogh

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
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Kevin A Rhyne 635 Skyview Pl #5 Madison WI 53713 Complainant vs. Kelley Williamson's Mobil 636 W Washington Ave. Madison WI 53703 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT CASE NO. 20092086

BACKGROUND

On June 3, 2009, the Complainant, Kevin Rhyne, filed a complaint of discrimination with the City of Madison Department of Civil Rights, Equal Opportunities Division (EOD). The complaint charged that the Respondent, Kelley Williamson's Mobil, discriminated against the Complainant on the bases of race and color when it suspended and terminated his employment in January 2009. The Respondent denied that it had discriminated against the Complainant and asserted that it had legitimate, nondiscriminatory reasons for its actions which primarily concerned allegations of misconduct by the Complainant.

Subsequent to an investigation on September 18, 2009, a Division Investigator/Conciliator issued an Initial Determination concluding that there was no probable cause to believe that the Respondent had discriminated against the Complainant as charged in the complaint. The Complainant timely appealed the Initial Determination to the Hearing Examiner.

On June 17, 2010, after providing the parties with the opportunity to supplement the record and to provide additional written argument, the Hearing Examiner issued a Decision and Order on review of the Initial Determination concluding that there was probable cause to believe that discrimination had occurred as alleged in the complaint and reversed the Initial Determination. The Hearing Examiner transferred the complaint to conciliation.

Efforts at conciliation failed and the complaint was returned to the Hearing Examiner for a hearing on the merits of the complaint.

On September 30, 2010, the Hearing Examiner held a Pre-Hearing Conference with the parties. Neither party was represented by counsel at the conference. The Complainant indicated that he was in the process of retaining counsel. The Respondent which was represented by its Director of Human Resources, Monique Lundstedt, indicated that it had counsel, but that Ms.

Lundstedt did not feel that it was necessary to have counsel appear at the Pre-Hearing Conference.

As is generally the case when one or both parties are unrepresented, the Hearing Examiner took time to explain various legal concepts and to remind the parties of various obligations. This included reminding the Respondent of its obligation to file an answer to the Notice of Hearing.

On October 6, 2010, the Hearing Examiner issued a Notice of Hearing and Scheduling Order. The Notice of Hearing included a statement of the issues for hearing and, in bold type, a statement of the Respondent's obligation to file an answer to the Notice of Hearing within ten days of the receipt of the notice.

The requirement that a Respondent answer the Notice of Hearing within ten days of its receipt derives directly from the Equal Opportunities Ordinance Sec. 39.03(10)(c)2.a. That requirement is carried through to Rule 7.4 of the Rules of the Equal Opportunities Commission.

Despite the requirement to file an answer to the Notice of Hearing, the Respondent did not file the required answer. The Respondent did cooperate in a variety of scheduling matters including extending the period for discovery and the date of the hearing.

On March 14, 2011, the Complainant filed a Motion for Default Judgment or for sanctions in the alternative. The Respondent submitted a written response and the Complainant submitted a written reply. On March 18, 2011, the Hearing Examiner held a telephone hearing on the Complainant's motion with counsel for both parties.

DECISION

The circumstances of the present matter are strikingly similar to those in Green v. Soliman, MEOC Case No. 1679 (Ex. Dec. on preclusion of testimony 2/28/97). In Green, the Respondent failed to file an answer to the Notice of Hearing and, in response to Complainant's motion for default, failed to produce an explanation for its failure to file an answer. After weighing the interests of the parties and the Commission, the Hearing Examiner found that the Respondent had defaulted in its obligation to file a written response to the Notice of Hearing and failed to present any acceptable reason for the failure. However, the Hearing Examiner declined to enter a default judgment of liability and instead ordered that the hearing proceed with the limitation the Respondent be precluded from the presentation of evidence or testimony in the form of a defense.

In the present matter, the Respondent has similarly failed to submit an answer to the Notice of Hearing and failed to present any explanation for the failure. Instead of presenting an explanation for the failure to file an answer, the Respondent argues that any order would be unjustified and, given the record as a whole, would place form over substance. The heart of this argument seems to be that the Respondent had filed an answer to the original complaint and had submitted much documentary evidence during the investigatory phase and in response to discovery requests made during the hearing phase. This argument apparently is intended to demonstrate a lack of prejudice to the Complainant by the Respondent's failure to respond.

The Complainant correctly points out that the issue of prejudice enters the equation only once there has been a finding of default. In other words, the degree of prejudice is only relevant

to the question of the remedy to be imposed for a default. This point is bolstered by the absolute nature of the requirement to answer.

The provisions relating to the requirement to answer the Notice of Hearing are stated in absolute terms. There is no indication that a Respondent is required to answer only where there would be prejudice to the Complainant if the Notice of Hearing is not answered.

Additionally, the Respondent's arguments, relating to the answer filed to the original complaint and evidence submitted during the investigation, fail to adequately address the nature of that process. A complaint may well include allegations that are eliminated either through withdrawal or through a finding of no probable cause. In many instances, an answer filed to the initial complaint may little resemble the answer filed in response to the Notice of Hearing. For example, the Notice of Hearing may require the enumeration of affirmative defenses, a matter that is unlikely to be required or addressed shortly after the original complaint is filed.

In seeking an order finding liability by default, the Complainant similarly fails to appreciate the differences between the two phases of the complaint process. The Complainant contended that a finding of liability was appropriate because the Initial Determination represented a finding that the Complainant had made out a *prima facie* claim of discrimination. Such a finding is essential, for due process reasons, to entry of a finding of liability. While it is true that the Complainant must make out a *prima facie* claim of discrimination in order to receive a finding of probable cause to believe that discrimination may have occurred, such a *prima facie* showing rests only on evidence presented by the Complainant and does not seek to resolve conflicts in the evidence that may cast doubt on the Complainant's demonstration.

The standard of proof during the probable cause phase is lower than for a finding of discrimination. This lower standard, one of probability rather than proof by the greater weight, by itself may be insufficient to support a finding of liability at the hearing stage. A Respondent may choose not to present all of its evidence during the investigative phase if the Respondent determines that the Initial Determination's lower standard of proof would be met even with the additional evidence. It would be inappropriate to find liability given the lower standard and given the nature of the record that may exist at the end of the investigatory phase.

It is for these reasons that the Hearing Examiner, as in the Green case, finds that the Respondent has defaulted in its responsibility to file an answer to the Notice of Hearing. However, rather than enter a finding of liability on behalf of the Complainant, the Hearing Examiner will require the demonstration of discrimination at the time of hearing. The Respondent will be precluded from entering a defense that might have otherwise been noted in an answer to the Notice of Hearing. The Respondent will be permitted to cross-examine witnesses presented by the Complainant and to introduce such documentary evidence as can be authenticated during such cross-examination.

The Hearing Examiner finds that this order strikes a balance between the Complainant's interest in receiving notice of the Respondent's defenses, the Department's need for certainty and a full and fair process, and the Respondent's right to challenge the Complainant's proffered evidence and testimony. Given the Respondent's failure to present any explanation for its failure to file an answer, much less to present a reasonable explanation, the Hearing Examiner cannot relieve the Respondent of the effects of a default. However, as the Complainant has had the opportunity to review the Department's file and has engaged in discovery, the impact of the failure to file an answer seems likely to have been somewhat diminished.

The Department must take seriously the limited procedural requirements found in the ordinance. However, in doing so, the Department must act to protect the interests of its process and the due process rights of the parties to its proceedings. In entering this order, the Hearing Examiner has attempted to meet those competing requirements.

Signed and dated this 30th day of March, 2011.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Mary E Kennelly
Steven Balogh