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

Nathaniel Johnson
21 Lakewood Gardens
Madison WI 53704

John Goodwin
3015 Veterans Pkwy S
Moultrie GA 31788

Complainant

vs.

Madison Taxi
1403 Gilson St
Madison WI 53715

Respondent

HEARING EXAMINER'S DECISION AND ORDER ON COMPLAINANTS' PETITIONS FOR COSTS AND FEES

CASE NOS.
20093094 AND 20093110

BACKGROUND

These cases have been consolidated for hearing and related proceedings and will be treated as consolidated complaints herein. On June 9, 2009, John Goodwin filed a complaint with the City of Madison Department of Civil Rights Equal Opportunities Division (EOD). Goodwin charged that the Respondent, Madison Taxi a.k.a. Affiliated Carriage Systems, Inc., denied him the equal benefits and services of a public place of accommodation or amusement because of his race. On June 20, 2009, Nathaniel Johnson also filed a complaint with the City of Madison Department of Civil Rights alleging that the same Respondent discriminated against him during the same incident as outlined by Goodwin. The Respondent denied having discriminated against either of the Complainants on any basis.

Subsequent to investigation of the allegations of both complaints, a Division Investigator/Conciliator issued Initial Determinations concluding that there was probable cause to believe that discrimination had occurred as alleged in the complaints. Efforts to conciliate the complaints proved unsuccessful and the complaints were transferred to the Hearing Examiner for further proceedings.

After extensive pre-hearing discovery and disputes, a hearing was held on October 19, 2010 at 9:00 a.m. before Hearing Examiner Clifford E. Blackwell, III. On September 7, 2011 the Hearing Examiner issued his Recommended Findings of Fact Conclusions of Law and Order determining that the Respondent had discriminated against the Complainants on the basis of their race in the provision of a public place of accommodation or amusement. The Hearing

Examiner also ordered the Respondent to pay to the Complainant Goodwin $25,000.00 in damages for his emotional distress and Complainant Johnson $10,000.00 in damages for his emotional distress. The Hearing Examiner also ordered the Respondent to pay to the Complainants their reasonable costs and fees incurred in pursuit of their claims before the Department. These costs and fees included $3,521.58 in costs and fees previously assessed against the Respondent for the Respondent's failure to timely file an answer to the Notice of Hearing.

On September 19, 2011, the Respondent appealed the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order to the Equal Opportunities Commission. Pursuant to the Notice of Appeal, further proceedings with respect to the Complainant's petition for costs and fees were stayed. Appeals to the Equal Opportunities Commission are decided by the Appeals Committee of the Equal Opportunities Commission pursuant to the Rules of the Equal Opportunities Commission. See Rule 11. Appeals to the EOC Commission.

After providing the parties the opportunity to submit briefs in support of their respective positions, the Appeals Committee met on February 15, 2012 to address the appeal of the Respondent. On February 28, 2012, the Appeals Committee issued a Decision and Final Order affirming the Recommended findings of Fact, Conclusions of Law and Order of the Hearing Examiner dated September 7, 2011 and incorporating that document into its Decision and Order as if fully set forth therein.

On March 14, 2012, the Complainants filed a petition with the Hearing Examiner seeking an award of the reasonable costs and fees involved in the bringing of the complaint as provided for in the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order dated _____. The Complainants sought a total of $34,256.80 in fees and $441.82 in costs. This amount was in addition to the $3521.58 previously awarded by the Hearing Examiner for Complainant's motion for default judgment. On _____, the Respondent appealed the Commission's Decision and Final Order to the Dane County Circuit court. On October 25, 2012, Judge John W. Markson issued a Decision and Order affirming the Commission's Decision and Final Order which had affirmed and incorporated the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order. That Decision and Order has not been appealed to the Court of Appeals.

On December 11, 2012, the Complainants filed a supplemental petition amending their earlier petition for costs and fees to cover the additional expenses incurred by the Complainant's during the Respondent's appeals to the Equal Opportunities commission and to the Circuit Court.

DECISION

"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." Groholski v. Old Town Pub, MEOC Case No. 20072041 (Ex. Dec, 5/10/10, at 3). "In this approach, the first step is to establish the 'lodestar' amount," or a reasonable hourly rate for the attorney's services multiplied by the number of reasonably necessary hours to gain the successful outcome. Id. "[T]here is a strong presumption that the lodestar is sufficient." Perdue v. Kenny A., _ U.S. _, 120 S.Ct. 1662,1669 (2010). This is because '"the lodestar figure includes most, if not all, of the

relevant factors constituting a reasonable attorney's fee'." Id. at 1673 (quoting Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546,566 (1986)).

An attorney's actual billing rate for comparable work is presumptively appropriate to use as the market rate. People Who Care v. Rockford Bd. Of Educ., 90 F.3d 1307,1310 (7th Cir. 1996). However, "if the court is unable to determine the attorney's true billing rate ... (because he maintains a contingent fee or public interest practice, for example), then the court should look to the next best evidence — the rate charged by lawyers in the community of 'reasonably comparable skill, experience, and reputation'." Id. (quoting Blum v. Stenson, 465 U.S. 886,895 n.l (1984) (parenthetical as in original)); see also Groholski, supra, at 3-4 ("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."). This tribunal has already approved $300/hour for Plaintiffs' counsel in this case related to the motion for default judgment. See 9/7/11 Order at 4, 3), as well as to other plaintiffs' counsel for similar claims of discrimination, e.g., Groholski, supra, at 3, and has noted that an hourly rate of $250.00 is "perhaps even somewhat modest in the Madison community" Id. at 6.

Regarding the hours expended on the litigation, the requesting party must "maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). "The hours necessary to accomplish a given outcome are not to be duplicative and should be reasonable in relation to the outcome achieved." Groholski, supra, at 4. The hours expended on the litigation include "the costs of preparing and defending an attorney's fee petition." Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec, 7/29/93, at 4).

The Respondent has not challenged, at any stage, the petitions of the Complainants for their costs and fees including a reasonable attorney's fee. Given this failure on the part of the Respondent, the Hearing Examiner can find no reason why he should not accept as reasonable the hourly rate of $300.00 for Complainants' counsel as previously established in the Hearing Examiner's Order of September 7, 2011.

To briefly summarize, Complainants' counsel has chosen to bill the Complainants at the rate of $300.00 per hour for work necessitated by their individual files. Where hours expended were for the benefit of both Complainants, counsel has elected to charge her time at $150.00 per hour to each Complainant to preserve the overall hourly rate of $300.00. The same is true for time billed by co-counsel, Pamela McGillivray. At all times relevant to these proceedings, Christa Westerberg acted as primary counsel for both Complainants.

As in the Decision and Order relating to costs and fees for the default judgment, the Hearing Examiner sees nothing wrong with respect to this process of accounting for time spent in connection with this matter. Presumably, had the Respondent found the process troubling, it would have objected to the Complainants' petitions. The Hearing Examiner will use the $300.00 per hour fee in determining the costs and fees for both the March 14, 2012 and the December 11, 2012 petitions.

The Hearing Examiner takes note that the materials submitted by Complainants' counsel indicate that this matter was handled on a contingency fee basis and that she is primarily engaged in a public interest form of practice. However, nothing in this record indicates that the proposed hourly rate of $300.00 is different from the usual hourly rate charged for similar legal

services by Complainants' counsel. Even if there was reason to question the assertion that the Complainants' counsel's usual hourly rate was something different from $300.00, there is nothing in the record to demonstrate that this amount is unreasonable or unjustified. It would be incumbent upon the Respondent to make this demonstration and since it has not filed anything in connection with the fee petitions, there is no record for the Hearing Examiner to base any deviation from the $300.00 per hour figure.

The Hearing Examiner will not separately address the prevailing rates charged by other attorneys of similar experience in the Madison market other than to say, that the materials submitted by the Complainants adequately demonstrate the reasonableness of the $300.00 per hour figure in this matter. See also fee awards in Groholski, supra and Briggs v. Popeyes Chicken and Biscuits, MEOC case no. 20083073.

In the March 14, 2012 petition, the Complainants document 114 hours of billable time spread between the two Complainants and for the work of their primary counsel, their secondary counsel and for other professional staff. While it is the burden of the Respondent to raise any questions concerning the appropriateness of the Complainants time accounting, the Hearing Examiner has made an independent review of the billing records and is satisfied that they are in order. There does not appear time attributable to tasks that were not necessary to pursuit of these claims. Neither are there items that appear to duplicate the time charged for a single item.

Accordingly, using the total number of hours expended as 114 and following the billing records to account for time billed at the varying rates proposed by the Complainants, the Hearing Examiner finds the total award of attorney's fees for the period of this complaint up to March 14, 2012 excluding the fees previously awarded to be $34,256.80.

In addition to the reasonable attorney's fees for this period of time, the Complainants have documented their reasonably necessary and non-duplicative expenditure in costs to be $441.82. The Hearing Examiner will award these costs to the Complainants as well. Again, it is the Respondent's burden to present a challenge to the costs sought by the Complainants and it has not done so.

With respect to the Complainants' supplemental petition filed on November 2, 2012, the Complainants request an award of attorney's fees in the amount of $3,378.33 in fees and $16.78 in costs for Mr. Goodwin, and $3,327.10 in fees and $14.69 in costs for Mr. Johnson for a combined total of $6,705.43 in fees and $31.47 in costs for the period from March 14, 2012 to November 2, 2012. Review of the hours demonstrates only one minor question related to expenditures for the following date: on June 13, 2013, Ms. Westerberg documented a three minute phone call labeled, "Telephone conference with Eric Kestin" on Mr. Goodwin's expense sheet. Ms. Westerberg also documented the three minute phone call on Mr. Johnson's expense sheet, although this time it was titled, "Ketin re procedural question." Because Ms. Westerberg split the rate between Mr. Johnson and Mr. Goodwin, the issue is not a double charge, but rather whether the phone call was an appropriate charge to her clients. There is no explanation as to why the phone call was necessary for their representation. Therefore, the two phone calls, totaling $15.66 shall be subtracted from the requested total of $6,705.43.

CONCLUSION

For the reasons stated above, the Hearing Examiner awards to the petitioners $3,521.58 in reasonable costs and fees for the default judgment due to Respondent's failure to file a timely answer to their complaints, $34, 256.80 and $441.82 in reasonable fees and costs as requested on March 14, 2012, and $6,689.77 and $31.47 as requested in the petition filed on November 2, 2012 for a total of $44,941.44.

Signed and dated this 22nd day of February, 2013.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner,

cc: Christa Westerberg
Madison Taxi Co.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 1

MADISON TAXI,

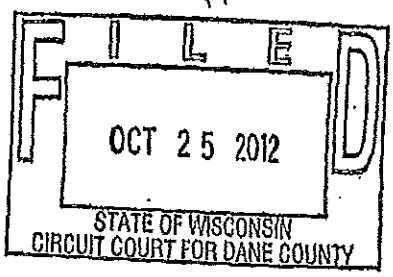
Petitioner,

Case No. 12-CV-1304

vs.

MADISON EQUAL OPPORTUNITIES COMMISSION, CITY OF MADISON, JOHN GOODWIN and NATHANIAL JOHNSON

Respondents.



DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW OF A MUNICIPALITY'S DECISION

PROCEDURAL HISTORY

Respondent-complainants, John Goodwin and Nathanial Johnson, filed discrimination complaints with respondent, Madison Equal Opportunity Commission ("MEOC"), against petitioner, Madison Taxi, after respondent-complainants were dropped off several hundred feet from their requested destination by one of petitioner's taxi drivers. Respondent-complainants, African-American men, claimed they were unlawfully discriminated against in a public accommodation or amusement based on race and sought relief under Madison General Ordinance § 39.03(5). After a hearing, the MEOC Hearing Examiner concluded that petitioner was liable for public accommodation discrimination and awarded the respondent-complainants damages for emotional distress.

Petitioner filed Exceptions to the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order and submitted a supporting brief. Respondent-complainants filed a response and petitioner replied. After considering

these materials, MEOC affirmed the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order.

Petitioner then filed a petition for judicial review of MEOC's decision under Wis. Stat. § 68.13. Respondents, Goodwin, Johnson, and MEOC, have responded to this petition, and petitioner has replied.

For the following reasons, MEOC's decision is AFFIRMED.

STANDARD OF JUDICIAL REVIEW

In a judicial review, the court is limited to considering four factors: (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether the decision was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. *Ottman v. Town of Primrose*, 2011 WI 18, ¶¶ 35, 37, 332 Wis. 2d 3, 79 N.W.2d 411. The scope of review is ordinarily confined to a review of the record of the administrative agency. See *Klinger v. Oneida County*, 149 Wis. 2d 838, 440 N.W.2d 348 (1989), and *Franklin v. Hous. Auth. Of City of Milwaukee*, 155 Wis. 2d 419, 425, 455 N.W2d 668, 670 (Ct. App. 1990).

The court evaluates whether the municipality's decision was made in accordance with applicable statutes. *State ex rel. Geipel v. City of Milwaukee*, 68 Wis. 2d 726, 732, 229 N.W.2d 585 (1975). In essence this evaluates whether the decision was according to law. *See, Metropolitan Holding Co. v. Board of Review of City of Milwaukee*, 173 Wis. 2d 626, 630, 495 N.W.2d 314 (1993). The municipality's decision is presumed to be correct; the presumption can be overcome by credible evidence that the conclusion is incorrect. *State ex rel. Campbell v. Twp. of Delavan*, 210 Wis. 2d 239, 260, 565 N.W.2d 209 (Wis. Ct. App. 1997). If the presumption of correctness is overcome, the court will uphold the municipal's decision if it can be

supported by any reasonable view of the evidence. *Nankin v. Village of Shorewood*, 2001 WI 92, ¶21, 245 Wis. 2d 86, 630 N.W.2d 141. However, this is not an opportunity to re-weigh the evidence. *Cohn v. Town of Randall*, 2001 WI App 176, ¶26, 247 Wis. 2d 118, 633 N.W.2d 674.

An action by a municipality is arbitrary and capricious if it represents the will of the municipality and not its judgment. *Id.* Judicial review does not consider the evidence but rather assesses whether the decision had a rational basis. *Id.* A rational basis exists when there is a sifting and winnowing of evidence consistent with a decision based upon judgment. *Van Ermen v. State Dept. of Health and Social Services*, 84 Wis. 2d 57, 64-65, 267 N.W.2d 17 (1978). The burden is on the petitioner to show that by a preponderance of the evidence the municipality's action was arbitrary and capricious. *State ex rel. Hanson v. Dep't of Health & Soc. Services*, 64 Wis. 2d 367, 375-76, 219 N.W.2d 267 (1974).

ANALYSIS

The specific decision challenged is the validity of MEOC's Decision and Final Order affirming the Hearing Examiner's Findings of Fact, Conclusions of Law and Order. Petitioner does not dispute whether MEOC kept within its jurisdiction, but argues (1) that MEOC did not proceed according to law; (2) that MEOC's action was arbitrary and represented MEOC's will rather than its judgment; and (3) that the evidence did not support MEOC's decision.

First, petitioner argues that MEOC ignored controlling law in concluding that the driver's fear was not based on legitimate concerns, and therefore, must have been the product of racial stereotyping. In affirming the Hearing Examiner's decision, MEOC's Decision and Final Order clearly stated that MEOC extensively reviewed the record and found that the findings of the Hearing Examiner were supported by the record. R: 312. After this extensive review, MEOC adopted detailed and well-reasoned findings of the Hearing Examiner. R: 208-24.

MEOC is correct that the standards governing this area of law are well-established. With specific reference to the evidence, the Hearing Examiner applied the *McDonnell Douglas/Burdine* burden-shifting approach to determine whether discrimination had occurred. R: 211. He thoroughly explained the factors which led him to find that the respondent-complainants established a *prima facie* case of discrimination. R: 211-13. He also explained how he determined that the petitioner's explanation for refusing to carry the respondent-complainants to their destination was a pretext used to cover the driver's real motivation. R: 217-19.

Petitioner incorrectly relies on *Pollard v. REA Magnet Wire*, 824 F.2d 557, 559 (7th Cir. 1987), a case involving an employer who discharged one of its employees for missing work. In *Pollard*, the employee, who was black, had requested time off during a specific week, which the employer denied. When this specific week approached, the employee did not show for work and reported an ankle injury. Not believing the employee, the employer discharged the employee only to discover that the employee was in fact injured. The Seventh Circuit found that the employee failed to show that race, and not his absences from work, was the dispositive factor in the discharge decision. *Id.* at 558-60.

Pollard is distinguishable from this case. Unlike *Pollard*, the present case deals with two customers and a taxi driver who did not know each other and had no prior dealings. R: 261. In *Pollard*, the employer made a mistaken inference because of prior communication with the employee about the employee's interest to miss work. Here, the taxi driver mistakenly inferred that his two customers were dangerous, but, unlike *Pollard*, this inference was not based upon any prior action or communication. R: 235, 262. The customers here were unarmed, did not threaten the driver, and remained silent throughout the duration of the ride. R: 209-10. In *Pollard*, the decision not to believe the employee was based upon a totality of interaction

between the two; here there was no interaction. On this basis, *Pollard* is distinguishable.

MEOC properly cited and applied the relevant law. Petitioner has not proffered sufficient credible evidence to conclude otherwise. *See Campbell*, 210 Wis. 2d at 260.

Second, petitioner argues that MEOC's Decision and Final Order was arbitrary because the Hearing Examiner relied on his own post-hearing investigative efforts and MEOC affirmed his findings and order without any meaningful comment about the challenges directed at those findings and order. The Court finds that MEOC's extensive review of the record evaluating and weighing the credibility of the Hearing Examiner's findings was the type of sifting and winnowing process that is characteristic of a rational basis. R: 312; *See, Van Ermen*, 84 Wis. 2d at 66. There is no evidence that MEOC failed to consider, or showed bias in evaluating, the arguments or evidence in the record before it.

Third, petitioner argues that the evidence did not support MEOC's Decision and Final Order. The court will uphold MEOC's decision if it can be supported by any reasonable view of the evidence. *Nankin*, 2001 WI 92, ¶21. The Court finds that MEOC's decision is supported by a reasonable view of the evidence because the Hearing Examiner's findings are supported by the record. First, MEOC found that respondent-complainants, members of a protected class, suffered an adverse action when they were forced to walk a longer distance, risked potential interaction with the police, and were treated rudely by an agitated driver. R: 208-10, 217. Second, MEOC found that the safety concerns and company policy proffered by petitioner as the primary non-discriminatory reason for the action of its driver are unpersuasive. The MEOC reasonably observed (1) that such concerns and policy were not routinely followed; and (2) that the drop-off location was ultimately based on the driver's discretion. R: 212-17. Third, South Lakewood Gardens Lane was not a narrow alleyway from the testimony and pictures provided in the

record. R: 218. Finally, respondent-complainants' silence without more did not suggest that they were dangerous. R: 218. A reasonable person could reach all of these conclusions based upon the evidentiary record provided. Thus, MEOC's Decision and Final Order is supported by a reasonable view of the record.

THEREFORE, the decision of MEOC is AFFIRMED, certiorari relief to petitioners is DENIED and the writ attached to the petition is QUASHED. This decision and order is final for the purposes of appeal. *See, Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶49, 299 Wis. 2d 723, 728 N.W.2d 670.

Dated: October 25, 2012.

BY THE COURT:

John W. Markson
Circuit Court Judge

Cc: Atty. Bradden C. Backer
Atty. Adriana M Peguero
Atty. Christa Westerberg

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

John Goodwin
2611 Hazelwood Ct #4
Madison WI 53704

Complainant

vs.

Madison Taxi
1403 Gilson St
Madison WI 53715

Respondent

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

CASE NO. 20093094

BACKGROUND

On June 9, 2009, the Complainant, John Goodwin, filed a complaint with the Madison Department of Civil Rights, Equal Opportunities Division. Goodwin charged that the Respondent, Affiliated Carriage Systems, Inc. d.b.a. Madison Taxi, denied him the benefits, rights or privileges of a public place of accommodation or amusement by refusing to drop him at his requested location after a ride in the Respondent's cab on the bases of the Complainant's race and/or color. The Respondent denied having discriminated against the Complainant in any manner and asserted that the Complainant was dropped in the general vicinity of his requested location and that the Respondent's driver felt threatened by the Complainant and his companion.

Subsequent to a public hearing on the merits of the complaint, the Hearing Examiner, on September 7, 2011, issued his Recommended Findings of Fact, Conclusions of Law and Order. The Hearing Examiner concluded that the Respondent had discriminated against the Complainant on the bases of race and/or color in denying him the benefits, rights or privileges of a public place of accommodation or amusement. The Hearing Examiner ordered the Respondent to pay to the Complainant the sum of $25,000.00 for the Complainant's emotional distress stemming from the discrimination. Additionally, the Respondent was ordered to pay certain reasonable costs and fees including a reasonable attorney's fee attributable to pursuit of this complaint.

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

The Appeals Committee gave the parties the opportunity to submit exceptions and additional written argument in support of their respective positions. On February 15, 2012, the Appeals Committee of the Equal Opportunities Commission met to consider the Respondent's

appeal. Participating in the Committee's deliberations were Commissioners Cramer Walsh, Quinlan and Saiz.

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 award of damages, 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 September 7, 2011.

The Respondent has failed to demonstrate that the Hearing Examiner did not properly find the facts as set forth in the record. Equally, there is no basis to conclude that the Hearing Examiner failed to utilize the proper law or legal standard or to apply the facts to that law.

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.

Joining in the Committee's action are Commissioners Cramer Walsh, Quinlan and Saiz. No Commissioner opposed this action.

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

Signed and dated this 28th day of February, 2012.

Katherine Cramer Walsh,
Appeals Committee Chair

cc: Christa O Westerberg
Bradden C Backer

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

John Goodwin 2418 Independence Ln #102 Madison WI 53704 Complainant vs. Madison Taxi 1403 Gilson St Madison WI 53715 Respondent	HEARING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CASE NO. 20093094

BACKGROUND

These complaints came on for a consolidated hearing on the merits before Commission Hearing Examiner, Clifford E. Blackwell, III, on October 19, 2010, in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd., Madison, Wisconsin. The Complainants appeared in person and by their attorney, McGillivray Westerberg & Bender LLC, by Christa Westerberg. The Respondent appeared in person and by its attorney, Brekke Law Office, by Erik Brekke.

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, Madison Taxi, is a taxi service with a location and principal place of business at 1403 Gilson Street, Madison, Wisconsin.

2. The Complainants are adult, African-American, black males and, at the time of the incident, resided principally in the City of Madison. While Nathaniel Johnson remains in Madison, John Goodwin moved to Florida in the spring of 2010.

3. On Saturday, June 6, 2009 at approximately 6:00 AM, Goodwin called the Respondent to drive him and Johnson from Goodwin's residence at 2418 Independence Lane to Johnson's residence at 21 Lakewood Gardens.

4. At approximately 6:30 AM, a taxicab driven by the Respondent's employee, Pierre Schmidt, a white, Caucasian male, arrived at 2418 Independence Lane.

5. The Complainants entered the taxi and told Schmidt their destination. Since the Complainants were tired, they rested with their eyes closed in the backseat. The Complainants rode in silence for the duration of the ten minute taxi ride.

6. The Complainants' taxi ride to 21 Lakewood Gardens was quiet and uneventful.

7. 21 Lakewood Gardens can be accessed by turning on either Fordem Avenue or Sherman Avenue onto South Lakewood Gardens Lane.

8. At approximately 6:40 AM, Schmidt stopped the taxi on the corner of South Lakewood Gardens Lane and Fordem Avenue.

9. While stopped at the corner, Schmidt told the Complainants that he would not continue down South Lakewood Gardens Lane.

10. When Johnson objected, indicated that he lived further down South Lakewood Gardens Lane and asked for an explanation, Schmidt offered no justification.

11. The Lakewood Gardens townhouse buildings are connected to each other by sidewalks, which in turn connect to either North Lakewood Gardens Lane or South Lakewood Gardens Lane.

12. There is a sidewalk perpendicular to South Lakewood Gardens Lane that leads to 21 Lakewood Gardens. When Johnson takes a taxi, including a Madison taxi, to Lakewood Gardens, the taxi driver usually drops him off at that particular sidewalk.

13. Schmidt demanded that the Complainants get out of his taxi. Johnson heard Schmidt tell the Respondent's dispatcher to send the Madison Police Department to the scene.

14. By this time, Goodwin had exited the taxi and called the Respondent's dispatcher to complain. The dispatcher stated that he was aware of the incident, that the police had been called, and then hung up on Goodwin.

15. Goodwin called the dispatcher again and asked to speak to a manager. The dispatcher informed Goodwin that a manager would not be available until later that day.

16. Goodwin left a call-back number for where he could be reached, but after the incident no one from the Respondent returned his call.

17. Goodwin asked Schmidt for his name and business card, but Schmidt provided neither.

18. Meanwhile, Johnson remained in the taxi to pay the $14.28 fare for the ride. He provided Schmidt with a credit card which Schmidt processed. Johnson obtained the customer copy of his receipt, refused to sign the merchant copy and exited the taxi.

19. Thereafter, Schmidt put the taxi in reverse and left, leaving the Complainants to walk the remainder of the way to Johnson's townhome which was less than one mile away.

20. Johnson had lived at 21 Lakewood Gardens for several years and did not consider the area to be one of high crime.

21. The Complainants were not carrying weapons or any item that could reasonably be construed as a weapon. The Complainants did not threaten Schmidt nor did they act abnormally during the taxi ride.

22. Sunrise occurred at 5:19 AM on June 6, 2009.

23. Johnson continues to take taxis, but now fears how his conduct will be construed by the driver. He feels he must try to put the driver at ease by engaging in chit-chat and hoping his behavior is not suspicious.

24. As a result of the incident, Johnson now takes Badger Cab, because he is more comfortable with its ride-sharing program.

25. After the incident, Goodwin sought counseling from a caseworker at Dane County Mental Health and from Tony Casteneda, his housing and job advocate at Housing Initiatives.

26. Goodwin regards the Respondent's actions on June 6, 2009 as a substantial factor in his decision to move to Arkansas and later Florida in the spring of 2010. Ultimately, after moving from Wisconsin to Arkansas, Goodwin was confined to a 28-day hospital stay related to his depression.

CONCLUSIONS OF LAW

1. The Complainants are members of the protected classes, race and color, and are entitled to the protection of the Equal Opportunities Ordinance. M.G.O. Sec. 39.03(5)(a).

2. The Respondent is a public place of accommodation or amusement within the meaning of the Equal Opportunities Ordinance. M.G.O. Sec. 39.03(2)(dd).

3. By prevailing in a claim of discrimination, the Complainants are entitled to be made whole for the act of discrimination.

4. There are no economic damages stemming from the Respondent's act of discrimination.

5. The Complainants experienced non-economic damages for their emotional distress, embarrassment and humiliation resulting from the Respondent's act of discrimination.

6. One reasonable measure of emotional distress damages is that amount placed upon that award by the individual experiencing the emotional distress. A party has a duty to mitigate even emotional distress damages.

7. Prevailing Complainants, in order to be made whole, are entitled to the costs and fees including a reasonable attorney's fee associated with the bringing of a complaint so long as those costs and fees are reasonably necessary and not duplicative.

ORDER

1. The Respondent shall pay to the Complainant Nathaniel Johnson the sum of $10,000.00 for his emotional injuries no later than 30 days after the order in this matter becomes final.

2. The Respondent shall pay to the Complainant John Goodwin the sum of $25,000.00 for his emotional injuries no later than 30 days after this order becomes final.

3. The Complainants' petition for attorney's fees in the amount of $3,521.58 filed on June 4, 2010, in connection with the Respondent's failure to timely file an answer to the Notice of Hearing, is granted.

4. No later than 15 days from the date upon which the present order becomes final, the Complainants shall file a petition for their reasonable costs and fees incurred in bringing this matter including a reasonable attorney's fee.

5. The Respondent may file an objection to the Complainant's petition for costs and fees, as specified in Order #4 above, within 15 days of the filing of the petition.

6. The Complainants may file a reply to any objection to their petition for costs and fees within 7 days of their receipt of an objection.

MEMORANDUM DECISION

The first question presented by the record for the Hearing Examiner is whether this is a case presented by 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.

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 offered a legitimate, nondiscriminatory explanation for its conduct leading to the claim of discrimination.

The Madison General Ordinance provides that it is an unlawful discrimination practice "[f]or any person to deny to another . . . the full and equal enjoyment of any public place of accommodation or amusement because of . . . race [or] color. . . ." Mad. Gen. Ord. § 39.03(5)(a). It is undisputed that the Respondent is a public place of accommodation. The Complainants argue that they were denied service when the Respondent dropped them off prematurely at the corner of South Lakewood Gardens Lane.

The elements of the Complainants' *prima facie* claim require that they be members of a protected class, that they experience an adverse action and that they demonstrate a nexus between the adverse action and their membership in a protected class. It is undisputed that the Complainants are members of the protected classes black and African-American. However, the parties dispute whether the Complainants suffered an adverse action. The Respondent maintains that its driver, Pierre Schmidt, simply followed its curb-to-curb policy regarding drop-offs. Alternatively, the Respondent contends that Schmidt reasonably feared for his safety and that this fear justified Schmidt's conduct. The Complainants counter that the Respondent's policy is not consistently followed and that, where drop-offs are concerned, the Respondent's drivers often rely on their own judgment. The parties further dispute whether the Complainants sufficiently demonstrated a causal connection between the alleged adverse action and their protected class membership. The Complainants argue that Schmidt's actions, coupled with his written statement offered as proof at the hearing, clearly demonstrate that his actions on June 6, 2009 were racially motivated. On the other hand, while acknowledging that Schmidt artlessly handled the situation on June 6, the Respondent maintains that Schmidt followed company policy and that he was justified in fearing for his safety.

The Complainants assert that they suffered an adverse action when the Respondent refused to drive them to the sidewalk at the center of South Lakewood Gardens Lane. The Complainants argue that, while the Respondent maintains that Schmidt simply followed Madison General Ordinance section 11.06(7)'s requirement of "curb to curb" service, the ordinance provides that a passenger may be deposited not just at the curb, but also at some "other loading location where the vehicle stops." M.G.O. §11.06(7)(k). The Complainants further assert that the Respondent's drivers may, from time to time, choose to drop off a passenger at a location other than the curb.

The Complainants maintain that multiple witnesses testified that curb-to-curb service is not often followed. Johnson testified that the curb-to-curb requirement was not followed by the taxis he has taken, including the Respondent's taxis, and that taxi drivers always dropped him off at the sidewalk on South Lakewood Gardens Lane. The Respondent's taxi driver, Ronnie Murray, testified that where to drop a passenger is ultimately a judgment call based on the specific circumstances of the ride and that the Respondent's taxi drivers do not always pick up and drop off at the curb.

The Complainants argue that individual judgment calls can be influenced by personal biases and discrimination. The Complainants assert that Schmidt's biases against black, African-Americans affected his judgment on June 6, 2009 and that he discriminated against the Complainants because of their race. As a result of being dropped off at the corner of South Lakewood Gardens Lane, the Complainants were forced to walk a farther distance to 21 Lakewood Gardens. However, the Hearing Examiner finds that, contrary to the Complainants' beliefs, the walking distance from the corner of South Lakewood Gardens Lane/Fordem Avenue to 21 Lakewood Gardens does not constitute the length of two football fields. A review of the physical location of Lakewood Gardens reveals that the Complainants had to walk an additional .15 miles to 21 Lakewood Gardens.

As for the relationship between the Complainants' protected class membership and the alleged adverse action, the Complainants argue that the Respondent's denial of service was motivated by their race and color. The Complainants testified that Schmidt's actions were motivated by an irrational fear that they would harm him. The Complainants assert that Schmidt's actions and words demonstrate as much. In Schmidt's written statement submitted by

the Respondent as an offer of proof at the hearing, he stated that he was uncomfortable with the Complainants. In his statement, Schmidt further admitted to threatening to call the police and acknowledged that his actions could be construed as racially motivated.

The Complainants argue that Schmidt's sole basis for his assumption that the Complainants were a threat is the Complainants' race and color. According to the Complainants, even if Schmidt did not explicitly tell them to get out of his cab because of their race, Schmidt's concern that the Complainants would harm him is a surrogate for racial stereotypes. In this case, the stereotype is that black, African-Americans are violent. Here, the Complainants cite Thompson v. Burlington Coat Factory for the Hearing Examiner's recognition that, "[i]n a society where the adverse consequences of overt discrimination are readily known, one sees a greater prevalence of more subtle types of discrimination such as steering or profiling members of protected classes." MEOC Case No. 20053210 (Ex. Dec. 9/11/06).

The Complainants assert that Schmidt's fears of violence were not justified under the circumstances. The record shows that, while the Complainants were silent during the taxi ride, they were unarmed and they did not threaten Schmidt or engage in suspicious behavior. The Complainants further contend that Schmidt's acknowledgement of the racial implications of his conduct confirms that race explicitly played a role in and motivated his decision-making. Finally, the Complainants argue that the Respondent's culpability is further demonstrated by the way it handled the complaint. The Complainants maintain that the Respondent initially denied the taxi ride occurred despite having corroborating documentation and access to Schmidt who later provided a written statement.

The Hearing Examiner finds that the Complainants provided sufficient evidence to establish a prima facie case of discrimination. Therefore, the burden shifts to the Respondent to supply a legitimate, non-discriminatory reason for its actions. Regarding the Complainants' allegation that they were denied full and equal enjoyment of a public place of accommodation, the Respondent argues that it has curb-to-curb and anti-alleyway policies in place to protect its taxi drivers. The Respondent acknowledges that its drivers use their discretion to determine where to drop off passengers, but asserts that, where a driver's discretion violates company policy, such violation does not justify a blanket generalization about the Respondent's taxi drivers.

Rick Nesvacil, the Respondent's general manager, expressed his belief that Schmidt would have received and seen notices warning against drop-offs in alleyways and behind buildings. In addition, the Respondent asserts that its taxi drivers are instructed to drop passengers off at a curb as opposed to a narrow alleyway in which it may be difficult to turn a vehicle around. While the Respondent recognizes that Schmidt provided no explanation to the Complainants when he dropped them off at the curb of South Lakewood Gardens Lane, it stresses that there was little time for Schmidt to provide an explanation, as the drop-off lasted about one minute. Thus, the Respondent argues that the dispute on June 6 was not driven by discrimination, but rather by Schmidt's poor communication of both law and policy.

Further, the Respondent asserts that there are certain exceptions to the curb-to-curb policy for the elderly or disabled. The Respondent maintains that there is no evidence that the Complainants were entitled to a similar exception. Johnson testified that he has seen other passengers picked up and dropped off at the sidewalk perpendicular to South Lakewood Gardens Lane. However, according to the Respondent, the Complainants presented no

evidence as to whether the people referred to by Johnson warranted a special exception to the Respondent's curb-to-curb and alleyway policies.

As for the Complainant's contention that Schmidt's actions were racially motivated, the Respondent argues that Schmidt's awareness of the potentially discriminatory implications of his actions does not amount to an admission that his actions were racially motivated. The Respondent asserts that, in 21 years of employment, Schmidt was not involved in any dispute involving a passenger due to that person's race, color, or any other discriminatory reason. The Respondent also considers it highly relevant that, at the time of the incident, Schmidt was in a long-term relationship with an African-American woman.

Further, the Respondent contends that Schmidt's sense of danger on June 6, 2009 was justified by the Complainants' behavior and by his surroundings. The Respondent argues that South Lakewood Gardens Lane is a narrow alleyway and that its drivers are instructed not to drop off passengers in such locations. The Respondent asserts that its drivers are instructed to use common sense and good discretion in making themselves aware of unusual or unnerving customer behaviors and to take appropriate action. Andrew Chiello, a taxi driver for the Respondent, testified that a silent passenger is the common denominator in many violent crimes against taxi drivers. The Respondent maintains that a passenger's silence is a red flag due to its potential "plotting" element and that its taxi drivers are taught to recognize this behavior. This "plotting" element, according to the Respondent, includes a passenger potentially robbing a taxi driver or abruptly and prematurely exiting the taxi in order to avoid paying the fare.

The Respondent also denies asserting that the Complainants' ride never occurred. The Respondent maintains that, at the inception of the complaint process, the Complainant provided it with the wrong pickup and drop-off times and therefore it could not locate the Complainant's ride information. Goodwin initially informed the Respondent that he called for a taxi at 5:20 AM and was picked up at 5:45 AM. In actuality, Goodwin called the Respondent around 6:00 AM, was picked up at about 6:30 AM and was dropped off at approximately 6:40 AM.

Finally, the Respondent cites two cases which, in its opinion, demonstrate that it did not discriminate against the Complainants. The Respondent cites Hackett v. Russ Darrow, a case involving a dispute between a black, African-American customer and a white, Caucasian car salesman in which the salesman told the customer to leave. MEOC Case No. 3356 (Ex. Dec. 8/5/97). In Hackett, the Hearing Examiner found that the Complainant failed to make out a *prima facie* case of discrimination because he failed to provide sufficient evidence to demonstrate that the Respondent's actions towards him were racially motivated. Id. The Respondent argues that, as in Hackett, there is no evidence of racial epithets in this case. Further, the Respondent maintains that safety is a legitimate, non-discriminatory reason for Schmidt's actions.

The Respondent also cites Mack v. Kayser Automotive Group which is factually similar to Hackett, except that racial epithets were involved. MEOC Case No. 20043144 (Comm. Dec. 4/1/08, Ex. Dec. 9/18/07). In Mack, the Complainant, a black, African-American, brought her car to the Respondent's dealership for servicing. Id. A dispute arose between the Complainant and the Respondent as to the quality of repairs performed on the Complainant's vehicle. Id. Subsequent to a heated argument the Respondent told the Complainant to leave the dealership. Id. Essentially, the Hearing Examiner was faced with determining "which of two equally credible witnesses he should believe." Id. In the end, the Hearing Examiner came down on the side of the Respondent since ultimately the burden of proof is on the Complainant. Id. The Respondent argues that the situation in this case is not as severe as the situation in Mack. The Respondent

also contends that, as in Mack, the June 6, 2009 incident represents a one-time flare up between two parties who previously enjoyed a healthy business relationship.

Since the Respondent posited several non-discriminatory reasons for the adverse action taken against the Complainants, the burden shifts to the Complainants to show that the Respondent's proffered explanations are either pretextual or not credible. As to whether the Complainants suffered an adverse action, the Complainants contend that the Respondent attempts to fabricate a steadfast rule that it prohibits its drivers from going down alleys. The Complainants maintain that the Respondent offered no credible evidence of drivers following such policy or that such a policy exists. The Complainants assert that the Respondent relies exclusively on the self-serving testimony of its still-employed taxi drivers. The Complainants further reiterate that the Respondent's witnesses could not say with certainty whether Schmidt had been educated on or otherwise exposed to any policies about loading and unloading passengers in alleys.

The Complainants assert that the issue of whether South Lakewood Gardens Lane is an alley was disputed at the hearing. Johnson testified that he has ridden in and witnessed the Respondent's taxis on South Lakewood Gardens Lane. The Complainants further argue that there is no evidence that Schmidt's actions were motivated by the ordinance or the Respondent's policy. The Complainants maintain that Schmidt's written statement reveals that he dropped the Complainants short of their destination because he was "uncomfortable" with them. The Complainants reiterate that, even if Schmidt had cited the ordinance, the ordinance does not mandate that taxi drivers load and/or unload at the curb.

On the issue of racial animus, the Complainants argue that the Hackett case is distinguishable because the Complainant in Hackett relied on two factors to prove his case: a) the fact that he is a black, African-American and b) the fact that there was an alleged pattern or practice of discrimination against black, African-Americans who are tough negotiators. The Complainants point out that the Complainant in Hackett testified that he did not know what motivated the Respondent's conduct. The Complainants argue that, in contrast, the record shows that Schmidt's actions were consistent with an individual who was afraid. In support of this contention, the Complainants highlight the fact that Schmidt abruptly stopped the taxi; that the Complainants were told to exit the cab in a forceful manner; that Johnson heard Schmidt instruct dispatch to summon the police; and that Schmidt refused to provide his name and business card upon request. The Complainants assert that, in light of the fact that they did nothing to cause Schmidt any concern or justify his behavior, it is clear that Schmidt relied on the unfortunate racial stereotype of black, African-Americans as violent to profile them and assume that they would harm him.

The Complainants reiterated that Schmidt's fears of violence were not legitimately supported by non-discriminatory factors, such as the Complainants' conduct. The Complainants assert that Schmidt claimed that their silence during the taxi ride raised a red flag, but that the Respondent nevertheless acknowledged that silent passengers are not always dangerous and that verbose passengers are not always safe. The Complainant also points out that Schmidt did not try to engage the Complainants in conversation, a strategy that might have dispelled any fears he had. Further, Johnson testified that he tried to give Schmidt his credit card upon entering the cab. Schmidt confirmed in his written statement that Johnson offered his "warped" credit card at the outset of the ride. The Complainants argue that Johnson's gesture should have dispelled any notion that the Complainants would try to avoid paying the fare by exiting the taxi prior to arrival at their destination. The record also shows that despite Schmidt's

characterization of Johnson's credit card as "warped," he was able to successfully process the credit card for payment.

In addition, the Complainants argue that the Mack case is distinguishable because the record in that case was "sparse and confusing" according to the Hearing Examiner. The Complainants observe that the record in Mack was confused as to the essential fact of whether a racial slur had actually been used. The Complainants also assert that the absence of racial slurs in the present case is not dispositive and cites Thompson v. Burlington Coat Factory for the proposition that discrimination tends to be more subtle "[i]n a society where the adverse consequences of overt discrimination are readily known . . . ." MEOC Case No. 20053210 (Ex. Dec. 9/11/06).

Although the Respondent maintains that the incident on June 6, 2009 was a one-time occurrence, the Complainants note that, unlike in employment cases and other kinds of discrimination cases, most public accommodation discrimination cases are one-time. In support, the Complainants cite Briggs v. Popeyes Chicken & Biscuits, MEOC Case No. 20083073 (3/19/10) (finding liability after a single incident of discrimination). See also Nichols v. Buck's Madison Square Garden Tavern, MEOC Case No. 20033011 (Ex. Dec. 11/8/05); Steele v. Highlander Motor Inn, MEOC Case No. 3326 (Ex. Dec. on liability 3/24/95).

The Complainants reiterate that Schmidt's acknowledgement of the racial implications of his conduct confirms that race explicitly played a role in and motivated his decision-making. On this issue, however, the Hearing Examiner finds that one's awareness that his or her behavior could be construed as racist, without more, does not amount to intent on the part of such individual to engage in racist behavior. In the same vein, the Hearing Examiner finds that there is no evidence to substantiate the Respondent's claim that Schmidt was in a relationship with an African-American woman. Even if there was such evidence, the fact that Schmidt was in such a relationship does not necessitate the conclusion that he is incapable of harboring racial stereotypes about African-American men. Accordingly, this purported revelation of the Respondent is neither necessarily pertinent nor particularly useful.

Finally, the Complainants once again point to the Respondent's initial position that the ride on June 6, 2009 never occurred as additional evidence of the Respondent's culpability. Although the Respondent argues that it could not locate the Complainants ride because they provided incorrect pickup and drop-off times, the Hearing Examiner finds that the Complainants provided the Respondent with sufficient information to locate their ride record. The record in this case shows that Goodwin's June 9, 2009 complaint made the Respondent aware of his address, 2418 Independence Lane, his destination, 21 Lakewood Gardens, and the date of the incident, June 6, 2009. The Respondent notified the EOD that it could not locate the Complainants' ride information despite checking dispatch slips for the aforementioned addresses in addition to checking all of its driver's route sheets and checking GPS tracking information. Specifically, the Respondent stated that its review of GPS tracking information for its vehicles revealed no pickups or drop-offs at the aforementioned addresses.

Nesvacil acknowledged during his testimony that the Respondent was unable to produce the aforementioned GPS tracking information upon which it ostensibly relied. Therefore, the Respondent failed to substantiate its assertion that it reviewed its GPS tracking records to determine whether the ride occurred. As for the Respondent's review of its call slips, the Hearing Examiner accepts that, in light of Complainant's Exhibit 8 depicting Schmidt's

incomplete call slip, the Respondent would have had difficulty locating the Complainants' ride information. This is because Schmidt's dispatch slip does not contain a specific date or time.

Nevertheless, the Hearing Examiner regards the Respondent's overall explanation as incredible in light of Complainants' Exhibit 7, Schmidt's route sheet for June 6, 2009. The route sheet clearly shows a pickup location of "2418 Ind" and a drop-off location of "Lakewood Gardens." Although Schmidt's handwriting is poor and he uses short-hand, one can clearly make out a passenger number of "2" and a pickup time of "6:30." If the Respondent's statement, that it checked every driver's June 6, 2009 route sheet, is accepted as true, it is hard to believe that it was unable to locate the Complainants' ride information because it relied solely upon the incorrect pickup and drop-off times in Goodwin's complaint.

Upon careful consideration of the testimony and evidence, the Hearing Examiner is satisfied that the Complainants suffered an adverse action and finds that the Complainants sufficiently demonstrated that the Respondent's proffered non-discriminatory explanations are pretextual. The record shows that the Complainants suffered an adverse action when they were forced to walk a longer distance to 21 Lakewood Gardens as a result of being dropped off at the curb of South Lakewood Gardens Lane/Fordem Avenue. While the additional distance is not great, the insult to one's pride or dignity is the measure of the injury not the number of footsteps. It also appears that the Complainants risked potential interaction with the authorities, as the evidence shows that Schmidt threatened to and eventually did summon the police. Thus, the Complainants exited Schmidt's cab while under duress and the Complainants received no explanation for Schmidt's behavior. The Respondent admitted in its appeal brief that Schmidt was agitated and rude. The Respondent also acknowledged that Schmidt's behavior toward the Complainants was "less-than-professional." The Respondent offered safety concerns and company policy as the primary non-discriminatory reasons for Schmidt's actions towards the Complainants. However, neither explanation is particularly persuasive in light of the evidence.

The crux of this case is whether Schmidt's actions towards the Complainants on June 6, 2009 were racially motivated. In this regard, the Hearing Examiner is deeply troubled that Schmidt essentially removed himself from the case and opted not to appear and testify at the hearing. In an unsigned statement purportedly type-written by Schmidt and offered as proof by the Respondent at the hearing, Schmidt claimed that he was "uncomfortable" with the Complainants and that he feared for his safety. Schmidt further stated that, as a result, he resolved to drop the Complainants short of their destination before reaching 21 Lakewood Gardens. Ultimately, the Respondent asserts that the incident on June 6 occurred not because of unlawful discrimination, but due to Schmidt's poor communication of both law and policy.

However, Schmidt admitted to threatening to call the police in order to resolve the dispute. Accordingly, the Hearing Examiner finds that Schmidt had little desire to explain company policy and the local ordinance to the Complainants on the morning of June 6 or apparently to the Hearing Examiner at the time of hearing. Further, the Complainants aptly pointed out that Schmidt could have engaged the Complainants in conversation over the course of the ten minute taxi ride. It appears that Schmidt had decided early in the taxi ride to drop the Complainants off at the entrance to the apartment complex. Thus, Schmidt had ample opportunity to inform the Complainants that he planned to drop them off at the curb and to explain his reasons for doing so. For example, Chiello testified that he often asks his passengers whether they are comfortable with being dropped off short of their destination. In contrast, it appears that Schmidt waited until the last minute to reveal his intentions and then became frustrated with Johnson when he demanded an explanation.

The Respondent argued that South Lakewood Gardens Lane is a narrow alleyway and that its drivers are instructed not to drop off passengers in such locations. However, a typical alleyway is not marked by signage and is extremely narrow in that only one car may traverse it at a time and in only one direction. A review of the physical location and surroundings of South Lakewood Gardens Lane reveals that the lane is wide enough for one vehicle to comfortably pass the other and that it is clearly identified by a signpost. Additionally, the record shows that, rather than put a vehicle into reverse or turn a vehicle around in order to exit, a vehicle turning onto South Lakewood Gardens Lane from Fordem Avenue may continue down the lane and exit at Sherman Avenue. The map of Lakewood Gardens' physical location shows that the sidewalk leading to 21 Lakewood Gardens is more or less equidistant between Sherman Avenue and Fordem Avenue. Thus, had Schmidt dropped the Complainants off at the sidewalk, he could have continued driving less than two minutes to the Sherman Avenue exit. It is possible that Schmidt did not want to continue down what he perceived to be a dark alleyway. However, the parties stipulated to the fact that sunrise occurred at 5:19 AM on June 6, 2009 and the Respondent failed to demonstrate that Schmidt had insufficient daylight at the time of the incident to judge his surroundings or to observe possible threats to his safety.

Ultimately, given the physical layout of South Lakewood Gardens Lane, it is unlikely that Schmidt's only means of exiting would have entailed putting the taxi into reverse and leaving at Fordem Avenue. The Hearing Examiner could conceive of such an exit strategy on a narrow thoroughfare. However, the Respondent failed to adequately establish that South Lakewood Gardens Lane is in fact a narrow alleyway.

The Respondent further asserts that its drivers are instructed to use common sense and good discretion in making themselves aware of unusual or unnerving customer behaviors and to take appropriate action. The Respondent maintains that a passenger's silence is a red flag due to its potential "plotting" element and that its taxi drivers are taught to recognize this behavior. This "plotting" element, according to the Respondent, includes a passenger potentially robbing a taxi driver or abruptly and prematurely exiting the taxi in order to avoid paying the fare. However, the Complainant pointed out, and Schmidt acknowledged, that Johnson attempted to provide his credit card to Schmidt at the outset of the taxi ride. Thus, it appears that there was little reason for Schmidt to fear that the Complainants might skip out on the fare or rob him.

As a result, we are left with the argument that the Complainants might have harmed Schmidt. According to Schmidt's statement, the Complainants' silence during the taxi ride made him uncomfortable. The Respondent asserts that silence is a common denominator in many violent crimes against taxi drivers. However, silence without more does not definitively show machinations on the part of a passenger. In his written statement, Schmidt admitted that the Complainants were "completely silent" during the taxi ride. This is consistent with the Complainants' testimony that they rested with their eyes closed during the ride, because they were tired. The Hearing Examiner finds it difficult to understand how two resting passengers, who had earlier demonstrated a willingness to pay for the ride, exhibited a potential threat to Schmidt. Further, there is insufficient evidence to suggest that Schmidt was primarily motivated by compliance with local ordinance section 11.06(7) when he stopped the taxi at the entrance to South Lakewood Gardens Lane.

While the Hearing Examiner is sensitive to the need for safety is paramount on the part of cab drivers, such safety may not come at the expense of the application of pernicious stereotypes and the deprivation of civil rights. Schmidt's disappearance prior to hearing may be

explained by any of number different reasons, including the ones posited by the Respondent, i.e. a dispute between Schmidt and the Respondent. However, it is also possible that Schmidt's failure to appear represents an unwillingness to testify at hearing along the lines desired by the Respondent. Given Schmidt's failure to appear, there can never be a clear answer to this situation. While Schmidt's failure to appear hurt the Respondent's ability to fully present its position, the Complainants' inability to examine and cross-examine Schmidt equally hampered the presentation of their cases.

The handling of Schmidt's statement at the hearing was not precisely the best way to address the Respondent's offer of proof. In retrospect, the Hearing Examiner should have permitted the reading of Schmidt's statement as the offer of proof, but then prevented additional questioning or reference with regard to the statement. However, as both parties referenced the statement in testimony and argument, the Hearing Examiner concludes that any prejudice resulting from the manner of addressing the matter has been mitigated.

Given the record as a whole, the Hearing Examiner is convinced that the Complainants were treated less favorably than other customers of the Respondent when Schmidt refused to drop them at their requested location and that this less favorable treatment was motivated, at least in part, by Schmidt's negative stereotyping of the Complainants because of their race and color. The Complainants successfully rebut the Respondent's legitimate, nondiscriminatory explanations for Schmidt's conduct by casting doubt on the Respondent's application of its "curb-to-curb" policy and by demonstrating that any possible concerns for Schmidt's safety were more likely than not the result of negative racial stereotyping given the circumstances of the ride as set forth in the testimony of the parties. Accordingly, the Hearing Examiner finds that the Respondent's non-discriminatory explanations for Schmidt's behavior are pretextual and not credible.

The question now before the Hearing Examiner is what order might make the Complainants whole again or otherwise redress the discrimination that they have experienced. M.G.O. § 39.03(10)(c)2b. Determining damages, especially those for emotional distress, is one of the most difficult aspects of adjudication. In the present matter, as is true in most claims of discrimination in a public place of accommodation or amusement, there are no economic or out--of-pocket damages. The Complainants present no evidence of additional expenses that they incurred as a result of the act of discrimination. Instead, the primary measure of damages is for the emotional damage done to the Complainants as a result of the discrimination that they have experienced.

In attempting to fix an amount of damages that might compensate the Complainants for their emotional distress, the Hearing Examiner looks to the testimony of the parties, the testimony of other witnesses (if any) and the testimony of medical or other treating professionals (if any). The Hearing Examiner assesses that testimony and applies it to the goals and purposes of the ordinance. He may compare the circumstances presented in a given matter with those presented in similar complaints where damages were awarded. Ultimately, the Hearing Examiner sets an amount that, given the testimony and record as a whole, redresses the discrimination experienced by the Complainants and makes them whole again. To make a prevailing Complainant whole is to attempt to put him or her in the position he or she would have been in had there been no discrimination.

It is not the goal of an award of damages to punish the Respondent for the act of discrimination. There are other portions of the ordinance that may be utilized should punishment

be deemed to be appropriate and desirable. It is not a function of the complaint process, however.

In stating that the goal of a damage award is not to punish, the Hearing Examiner understands and accepts that any damage award may well have a significant economic impact upon a Respondent and that, for this reason, the damage award may feel punitive to the Respondent. However, the focus of a damages award is its effect on the prevailing Complainant, not on the Respondent. The affect on the Respondent would be a legitimate consideration, if an award of punitive damages was at issue.

As there are two Complainants in the present matter with differing testimony, the Hearing Examiner will address each Complainant individually.

First, Nathaniel Johnson testified about his immediate feelings of hurt, confusion and outrage at Schmidt's treatment. He testified that he no longer utilizes the Respondent's taxi cabs. He testified about his continuing feelings of apprehension when taking a cab and about feeling the need to put a driver at ease upon entering a cab.

The Hearing Examiner understands Johnson's testimony to reflect an immediate, substantial impact followed by a gradually reduced effect with a continuing low level concern or anxiety that is reflected in a change in attitude and outlook. That continuing anxiety represents the most detrimental impact of discrimination, as it erodes trust in others and diminishes self-esteem. In this regard, Johnson's case is somewhat similar to that of the Complainant in Miller v. CUNA, in that both cases involve continuing emotional injury. MEOC Case No. 20042175 (Ex. Dec. 5/16/08).

In Miller, the Complainant testified that he had continuing feelings of failure and distress when he had to explain to his young son their family's changed economic circumstances after his retaliatory termination. In contrast, the degree of the emotional injury Johnson suffers is not as extreme. First, Johnson does not appear to have a family with whom he must share the consequences of discrimination. Secondly, a one-time incident as experienced by Johnson does not necessarily result in the continuing impact of the loss of employment. In Johnson's case, he has immediate alternatives to riding with the Respondent, while Miller had to replace his income and employment.

Johnson's case is somewhat more typical of the single, emotionally injurious incident of discrimination depicted in the Briggs case cited by Complainants' counsel. See Briggs v. Popeye's Chicken & Biscuits Restaurant, MEOC Case Nos. 20083073, 20083074 (Ex. Dec. 3/19/10). Still, while the Briggs case turned partially on the one-time nature of a discriminatory transaction, it also differs from Johnson's case. In Briggs, the Complainants had a young son who repeatedly wished to know why they could not go to the restaurant that he liked and that other members of his family patronized. This continuing aggravation of emotional harm makes the Briggs case somewhat more substantial in comparison to this case.

While a Complainant's own judgment of the extent of his or her emotional distress is often the best measure of a Complainant's damages, it is helpful to the Hearing Examiner to have outside testimony about the apparent affect that an act of discrimination has had on an individual. However, in Johnson's case, there was no such external testimony.

The Complainant seeks an award of $15,000.00 for his emotional distress. In two cases, the Hearing Examiner has awarded $5,000.00 in damages for emotional distress. See Laitinen-Schultz v. TLC Wisconsin Laser Center, MEOC Case No. 19982001 (Ex. Dec. 7/1/2003); Carver-Thomas v. Genesis Behavioral Services, Inc., MEOC Case Nos. 19992224, 20002185 (Ex. Dec. 1/25/06). In Laitinen-Schultz and in Carver-Thomas, the Complainants testified about the need for medical intervention. In Carver-Thomas, the Hearing Examiner found that, though the Complainant's emotional distress was intense initially, she was able to recover her mental stability fairly quickly. In Laitinen-Schultz, the Complainant also showed a fairly quick recovery, despite quite severe and explicit discrimination and treatment by a doctor for her symptoms. In contrast, neither Johnson's immediate symptoms nor the actual incident of discrimination at issue in this case appear to have been quite as severe. Nevertheless, Johnson's symptoms seem to have persisted for a long period of time.

In fixing an award of emotional distress for Johnson at $10,000.00, the Hearing Examiner weighs the comparative seriousness of the initial incident and the evidence of a continuing affect upon Johnson against the fact that this was a single incident. The Hearing Examiner also considers that the law requires individuals to do what is reasonably necessary to mitigate the impact of discrimination upon them and to mitigate their damages. Johnson has avoided repeat problems with the Respondent, but in doing so has had to limit his transportation options. As the Respondent points out, Johnson's life has in some measures improved over time as he was unemployed at the time of the incident, but is now gainfully employed.

This award recognizes the inexact art of establishing a damage award. However, given the short duration of the incident and the solitary nature of it, the Hearing Examiner finds that $10,000.00 will put Johnson in the place he would have been in, absent the Respondent's discrimination. Such an award is not intended to represent a windfall to the Complainant nor a penalty to the Respondent.

In the case of Goodwin, the Hearing Examiner finds that the impact of the Respondent's actions had a more substantial effect. In this regard, the testimony of Goodwin's counselor, Julianne Trimmel is particularly enlightening. Trimmel confirmed that prior to the June 6, 2009 incident, Goodwin had a history of depression. In the months prior to June 6, 2009, Goodwin had been able to manage his symptoms and was generally improving and functioning at a reasonable level.

Trimmel testified that subsequent to the incident of June 6, 2009, Goodwin expressed a renewal of his depression that worsened and created problems in his life. The Respondent's discrimination was a focal point for Goodwin's feelings of despair and depression. These feelings manifested in a failure to maintain his treatment regimen and in absence from scheduled appointments.

Goodwin's housing counselor, Tony Casteneda, corroborated Trimmel's testimony about Goodwin's withdrawal from responsibility and about the impact of the June 6, 2009 incident on his life. While Casteneda's testimony was not as direct or eloquent as Trimmel's, it nevertheless painted a picture of an individual who suffered a substantial shock with which he had difficulty coping.

Goodwin testified that the Respondent's discrimination made him feel that Madison was no longer a safe place for him to live as a black man. Ultimately, Goodwin determined that he

needed to leave Wisconsin. He chose to move to the south where discrimination was more open so that he knew what to expect.

Goodwin initially moved to Arkansas and eventually to Florida. While in Arkansas, Goodwin was hospitalized for a serious reoccurrence of his depression. While Goodwin and others testified that the June 6, 2009 incident was the trigger for Goodwin's hospitalization, there is no competent evidence in the record upon which such a finding might be supported. Only a treating medical professional would be able to make such a judgment and no such individual was produced at hearing.

Despite the lack of competent medical testimony, it should be noted that Goodwin's continued emotional decline subsequent to June 6, 2009 seems to be a logical cause or contributing factor to the exacerbation of his depression. However, the Hearing Examiner makes no finding with respect to the reasons for Goodwin's hospitalization.

The discrimination experienced by both Johnson and Goodwin on June 6, 2009, affected Goodwin more profoundly and for a longer period of time. While both Johnson and Goodwin appear to have achieved some level of acceptance of the June 6, 2009 incident, the conduct of the parties at hearing indicates a continuing well of emotion tied up in the incident. The Hearing Examiner points specifically to the request of Respondent's counsel to direct Goodwin that counsel was not intimidated by Goodwin's "death stare". It did appear to the Hearing Examiner that Goodwin and Johnson both tended to focus intensely on Respondent's counsel or Respondent's corporate representative during the hearing. Whether this represents intimidation or an outward display of the emotions conjured up by the hearing, it is not possible for the Hearing Examiner to conclude.

Given the record as a whole, it appears that Goodwin's emotional suffering, in comparison to Johnson, was more intense and lasted for a longer period of time. While Johnson testified that he had changed his conduct by attempting to ingratiate himself with cab drivers and limited his transportation options, Goodwin took the more drastic step of leaving Madison entirely. The testimony of Trimmel and Casteneda describes how Johnson was deeply troubled by the discrimination that he experienced and reveals how the discrimination affected his ability to cope with his depression.

Accordingly, the Hearing Examiner finds that $25,000.00 will adequately compensate Goodwin for the effects of discrimination. While it might appear that Goodwin had other stressors in his life that might have resulted in the reoccurrence of his depression, the testimony of Goodwin, Trimmel and Casteneda clearly point to the act of discrimination as being the most primary and direct cause. As Trimmel and Casteneda both testified, Goodwin's depression was well controlled prior to the June 6, 2009 incident, but it then became problematic immediately afterwards. The fact that Goodwin's depression constitutes a pre-existing medical condition that may have made him more vulnerable to the effects of discrimination does not act to limit the damages due to Goodwin. As the individual with an eggshell head does not limit his damages by virtue of his condition for a head injury, neither does Goodwin's depression.

While Laitinen-Schultz and Carver-Thomas yielded damage awards of $15,000.00 for arguably similar injuries, the Hearing Examiner finds that the injuries experienced by Goodwin are of a longer duration and that they more deeply affected Goodwin than the Complainants in Laitinen-Schultz and Carver-Thomas. While the act of discrimination experienced in Leatherberry v. GTE was more severe, the effect on the injured party seems similar to the

Hearing Examiner. MEOC Case No. 21124 (Comm. Dec. 4/14/93, Ex. Dec. 1/5/93). In Leatherberry v. GTE, the Hearing Examiner imposed a $25,000.00 emotional damage award.

In cases where damages are readily calculable, as in the instance of wage loss, the Commission has awarded a prevailing Complainant pre-judgment interest in order to repay the Complainant for the lost opportunity costs attributable to those damages. Such damages are only appropriate where the damages are easy to establish and are relatively certain.

In the case of damages for emotional distress, such an award of pre-judgment interest is inappropriate. While there may be a lost opportunity cost to that sum, the amount is not easily calculated and is subject to the sound discretion of the Hearing Examiner. As such, pre-judgment interest cannot be awarded absent a statement of liquidated damages. Accordingly, the Hearing Examiner will not make such an award.

In any claim brought to enforce civil rights, a prevailing Complainant must be awarded his or her reasonable costs and fees including a reasonable attorney's fee that is necessitated by the action. This rule of fee shifting is well recognized as being necessary to encourage individuals to act as public Attorneys General to enforce rights that improve society as a whole. If a prevailing Complainant were required to bear his or her own expense as under the "American rule", it would likely work an economic hardship on the Complainant and discourage others from seeking to enforce their rights under the ordinance or similar statutes.

Therefore, the Complainants are entitled to an order for their reasonable costs and fees including a reasonable attorney's fee so long as the costs incurred were reasonably necessary and were not duplicative.

During the pendency of this matter, the Complainants filed a motion for default judgment or in the alternative for sanctions stemming from the Respondent's failure to timely file an answer to the Notice of Hearing. The requirement to answer is clearly set forth in the ordinance, in the Rules of the Commission and in the Notice of Hearing itself. On May 28, 2010, the Hearing Examiner found that the Respondent had failed to meet the requirements of the ordinance and entered an order so stating. As part of that order, the Hearing Examiner directed the Complainants to file a petition for their costs and fees including a reasonable attorney's fee necessitated by the Respondent's failure. The Respondent was given the opportunity to file an objection as to form.

On June 4, 2010, the Complainants filed a petition setting forth their costs and fees including attorney's fees pursuant to the Hearing Examiner's order. On June 14, 2010, the Respondent filed an objection to the Hearing Examiner's order and, in the most general terms, to the Complainants' petition.

The Hearing Examiner does not find any merit in the objections raised by the Respondent and finds the Complainants' petition to be sound and in proper form.

In order for the Complainants to be made whole, the Respondent must, in addition to the other costs and fees imposed pursuant to the order in this matter, pay the Complainants for their costs and fees as set forth in their petition dated June 4, 2010.

For the Respondent not to be required to pay these costs and fees would allow the Respondent to escape the consequences of its failure to comply with the processes and

procedures established in the ordinance and the Rules of the Commission for the reasonable processing of complaints. In submitting their petition for costs and fees pursuant to this order, the Complainants shall not include any amount included in their earlier filed petition.

Signed and dated this 7th day of September, 2011.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Christa O Westerberg
Erik Brekke

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

John Goodwin
2418 Independence Ln #102
Madison WI 53704

Complainant

vs.

Madison Taxi
1403 Gilson St
Madison WI 53715

Respondent

HEARING EXAMINER'S DECISION AND ORDER ON COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT OR SANCTIONS

CASE NO. 20093094

BACKGROUND

On June 9 2009, the first Complainant, John Goodwin, filed a co mplaint with the Madison Department of Civil Rights, Equal Opportunities Division (EOD). The complaint alleged that the Respondent, Madison Taxi, discriminated against the Complainant on the basis of race when it treated him less favorably than those not of his race with respect to the provision of a public place of accommodation or amusement. On July 2, 2009, the Respondent filed a form of answer to that complaint. On July 20, 2009, the second Complainant, Nathaniel Johnson, filed a complaint against Madison Taxi which relates to the same incident of discrimination about which Mr. Goodwin complained. The second complaint similarly alleged that the Respondent discriminated against Mr. Johnson on t he basis of race in the provision of a publ ic place of accommodation or amusement.

The complaints were transferred to a Division Investigator/Conciliator for investigation. Subsequent to that investigation, the Investigator/Conciliator issued Initial Determinations concluding the there was probable cause to believe that the Respondent had di scriminated against the Complainants on the basis of their race in the provision of a service of a public place of accommodation or amusement. Efforts at conciliation were unsuccessful and the complaints were separately transferred to the Hearing Examiner for further proceedings.

The Hearing Examiner, *sui sponte* consolidated the complaints for purposes of holding a Pre-Hearing Conference on O ctober 8, 2009. At that conference, the Respondent requested that the complaints be remanded for further efforts at conciliation. The Complainants concurred and the Hearing Examiner remanded the complaints as requested.

The further efforts at conciliation were unsuccessful. On December 8, 2009, the Hearing Examiner held a co nsolidated Pre-Hearing Conference. At that time, hearing was set for April 20, 2009 and se veral interim dates, including dates for the conduct of discovery, were set. The Hearing Examiner specifically reminded the Respondent of its obligation to file a written

answer to the Notice of Hearing. The parties agreed to continue to consolidate the complaint for purposes of hearing.

On December 14, 2009, the Hearing Examiner issued a Notice of Hearing a Scheduling Order. These documents were mailed to the last known addresses of the parties, as reflected in the files of the EOD, and to the addresses of the attorneys for the parties. As evidenced by a delivery confirmation provided by the U.S. Postal Service, the Respondent received the Notice of Hearing and Scheduling Order on December 16, 2009.

The Respondent did not file an answer to the Notice of Hearing until May 11, 2010. This date is well outside the 10 days provided for in the Equal Opportunities ordinance, the rules of the Commission and the Notice of Hearing itself. See Madison General Ordinance § 39.03(10)(c)2.a., Equal Opportunities Commission Rule 7.101.

On January 11, 2010, the Complainants filed a motion seeking a default judgment or in the alternative an order precluding the admission of testimony from the Respondent for the Respondent's failure to submit an answer. As noted above, the Respondent did not file an answer, despite having been put on notice by the Complainant's motion, until May 11, 2010.

On April 14, 2010, the Hearing Examiner indicated that he would address the Complainant's motion as the first item of business on the day of hearing. On April 19, 2010, the Complainant requested a postponement of the hearing due to the medical unavailability of one of the Complainants. The Hearing Examiner granted a postponement of the hearing and set a date for a status conference. On May 4, 2010, the Hearing Examiner held a status conference to determine the availability of both Complainants for hearing. The Hearing Examiner also inquired as to whether he should set a date for a separate hearing on the Complainant's motion or whether that motion should be heard on the day of hearing.

After discussion by the parties, the Hearing Examiner determined to set a separate date for consideration of the Complainant's motion for default judgment.

On May 24, 2010, the Hearing Examiner held a hearing on the Complainant's motion. Technically, the hearing was denoted to be on the Hearing Examiner's Order to Show Cause why the Hearing Examiner should not enter a default judgment or otherwise impose sanctions against the Respondent for its failure to file a timely answer.

DECISION

At the hearing, Complainant's counsel essentially relied upon the grounds cited in her original motion. Relying upon the Hearing Examiner's decision in Green v. Soliman, MEOC Case No. 1679 (Ex. Dec. on Preclusion of Testimony 2/28/97), the Complainants requested either an order of default judgment or an order precluding the Respondent from putting on a case in defense of the Complainant's allegations. In relying on Green, the Complainants note that a demonstration of prejudice is not necessary. However, the Complainants, according to their counsel, were prejudiced in preparation for hearing by not knowing the precise nature of the Respondent's defense. The fact that the Respondent filed an answer on May 11, 2010 does not absolve it of the obligation to have filed an answer when the Notice of Hearing was received in December 2009.

The Complainants also contend that the Complainant's filing of an answer to the Notice of Hearing does not relieve it of an obligation to file an answer to the complaint.

The Respondent asserted that it did not receive the Notice of Hearing despite evidence to the contrary. It blamed failure of the appropriate individual to receive the Notice of hearing in December 2009 on problems with internal mail handling at the Respondent's office. Respondent's counsel asserted that despite any apparent delivery to the Respondent that he had not received the Notice of Hearing at any time.

The Respondent additionally contended that the Complainants could not show any prejudice by the lack of an answer, asserting that the Respondent's position has been well known and notorious throughout these proceedings.

The Respondent contended that to the extent that the Complainants were deprived of the opportunity to conduct specific discovery, it was open to permitting the Complainants additional time to conduct discovery. The Respondent repeatedly emphasized that the matter was not yet set for hearing and additional time would not adversely affect either party. Oddly, the Respondent later attempted to take the opposite of this position when considering scheduling options. Finally, the Respondent asserted that to enter a judgment without providing the Respondent the opportunity for a hearing was unjust and represented a totalitarian application of justice and discretion.

The Hearing Examiner noted both the similarities and the differences between the present matter and the Green v. Soliman case. The Hearing Examiner noted that the Respondent had failed to address in any meaningful way the evidence that the Respondent had in fact received the Notice of Hearing in December and did not explain why it was prevented from answering the complaint at that time. The Hearing Examiner explained that the Commission has long taken the position that once there is evidence that a notice was received at the last known address provided by the parties that ended the inquiry. See Velazquez-Aguilu v. Abercrombie & Fitch, MEOC Case No. 03398 (Comm. Dec. 7/20/99, Ex. Dec. 3/30/99), Murphy v. Woodman's and Kellahue, MEOC Case No. 21688 (Comm. Dec. 10/26/93), Francis v. Quarra Stone Company, MEOC Case No. 21764 (Comm. Dec. 11/4/93).

The Hearing Examiner took some effort to indicate that what was in question here was the failure of the Respondent to answer the Notice of Hearing as required by Commission Rule 7.101, the Notice of Hearing and Madison General Ordinance section 39.03(10)(c)2.a. In retrospect, the Hearing Examiner recognizes that section 39.03(10)(c)2.a. is inconsistent in its language using both the phrase "Notice of Hearing" and "complaint" to describe the timing and the document to be subject to the answering requirement. The Hearing Examiner has always understood section 39.03(10)(c)2.a. to require an answer only the Notice of Hearing. To answer the originally filed complaint once the Notice of Hearing has been issued does not make procedural sense as the original complaint might contain allegations for which there was a finding of no probable cause to believe discrimination occurred. Once a Notice of Hearing has been issued, allegations of no probable cause would not need to be answered, unless those allegations were reversed on appeal.

The Hearing Examiner does not accept the mere protestation of the Respondent that it did not receive the Notice of Hearing. Further, the Hearing Examiner believes that the Complainants have experienced some prejudice in their preparation for hearing as a result of

the Respondent's extremely late filing of an answer. Nevertheless, the Hearing Examiner finds that an entry of a default judgment is not supported by this record, because the Complainants have not filed any offer of proof in connection with their motion. Without some factual basis for finding that a *prima facie* claim exists, it is inappropriate to enter a default judgment.

Since the Hearing Examiner will not issue a default judgment on the basis of this record, the question is whether some other sanction is appropriate and, if so, what it should be. The Complainants request an order precluding the Respondent from submitting evidence in its own defense at the time of hearing. A similar remedy was provided in Green where the Respondent failed to answer the Notice of Hearing.

The Respondent contends that such a remedy is draconian and unnecessary in light of the Respondent's eventual filing of an answer.

While the Hearing Examiner finds the manner in which the Respondent cast its "justice" argument to be little more than name calling and a misplaced reliance on patriotism, the Hearing Examiner finds that the filing of an answer in this matter is sufficient to distinguish the present matter from the circumstances in Green. The Hearing Examiner believes that there are other methods to redress the prejudice to the Complainants that do not require the entry of a default judgment.

The Hearing Examiner believes that providing the Complainants with additional time to conduct the discovery that they might have conducted had they been fully apprised of the Respondent's defense partially mitigates the prejudice done by the Respondent. To more fully mitigate the delay in proceedings, the Hearing Examiner will require the Respondent to pay the Complainants their reasonable costs and fees including a reasonable attorney's fee for the time expended in bringing and pursuing their motion and for the time previously expended on discovery that could have been more effectively completed had the basis of the Respondent's defense been finalized in the form of an answer.

The Respondent expressed some frustration that it was prepared to proceed to hearing when Complainant, John Goodwin, was taken ill. The Respondent believes that it will be difficult to arrange for its witnesses in the future.

The Hearing Examiner is convinced that such concerns of the Respondent are irrelevant to this proceeding. Had the hearing proceeded as scheduled, the proceedings would have been without any answer to the Notice of Hearing by the Respondent and as such, the Respondent may well be looking at more drastic sanctions in an attempt to balance the books between the parties. Also, attempting to arrange the schedules of witnesses and parties is a burden for each party to a complaint. There is nothing in this particular matter that pushes the balance of difficulty towards one party or away from the other.

In future scheduling of this matter, the Hearing Examiner will endeavor to meet the needs of both parties. In the coming months, both may have limitations on availability. However, it is the intent of the Hearing Examiner to attempt to schedule this matter for hearing as promptly as possible.

ORDER

The Complainants may conduct additional discovery until August 5, 2010. Once discovery is completed, the Hearing Examiner will schedule further proceedings in this matter.

The Complainants shall submit a petition for their costs and fees including a reasonable attorney's fee for their bringing and prosecution of the present motion on or before June 4, 2010. Additionally, the petition shall include the time expended for the taking of discovery to the present date. The Respondent may object to the form of the Complainant's petition until June 14, 2010. Once the Complainant's petition has been approved as to form, the Respondent shall pay the Complainant's costs and fees no later than 14 days after the approval of the petition.

Signed and dated this 28th day of May, 2010.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Erik Brekke