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

Michael K Jackson 14 Kanazawa Cir Madison WI 53718 Complainant vs. U-Haul 22 Atlas Ct Madison WI 53714 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CASE NO. 20093107

BACKGROUND

This complaint came on for a hearing on the merits before Commission Hearing Examiner, Clifford E. Blackwell, III, on May 11, 2010, in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd., Madison, Wisconsin. The Complainant, Michael K. Jackson, appeared in person and by his attorneys, Herrick & Kasdorf, LLP by David Sparer. The Respondent, U-Haul Co. of Wisconsin, appeared by its corporate representative, Josh Marefke, and by its attorneys, Stafford Rosenbaum, LLP by Meg Vergeront.

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, U-Haul Co. of Wisconsin, is a truck rental facility with a location and principal place of business at 22 Atlas Court, Madison, Wisconsin.

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

3. The Complainant is a Lead Youth Worker at the East Madison Community Center ("Community Center").

4. On June 25, 2009, the Complainant approached the Respondent with the intent to rent a truck to finalize his move into a new house.

5. On June 25, 2009, a Field Relief Manager of the Respondent, Josh Marefke, handled the Complainant's rental request.

6. The Complainant asked Marefke whether he could rent a 17 foot truck for four hours.

7. Marefke determined that a 17 foot truck was available for rent and asked the Complainant to produce a valid driver's license.

8. After Marefke accepted and returned the Complainant's driver's license, the Complainant maintains that Marefke requested that he produce a credit card, aside from his debit card, in order to rent the truck.

9. The Complainant disputed with Marefke the necessity of providing more than a valid driver's license, a form of payment and a secondary contact name and number.

10. The Complainant was not asked to provide two credit cards when he rented a truck from the Respondent on May 12, 2009.

11. Marefke explained the Respondent's "Meaningful Assurance" requirements to the Complainant.

12. In addition to a valid, local driver's license, the Respondent requires a minimum of two forms of Meaningful Assurance. The first and primary form of Meaningful Assurance that is always collected is a contact phone number (land line) that is called and verified at the time of rental. A customer may then provide any of the following to satisfy the second form of Meaningful Assurance: (i) an additional contact phone number (called and verified), (ii) a valid credit card in the renter's name (swiped at the sales counter), (iii) an employer's name, address and phone number (called and verified), or (iv) a relative's name, address and phone number (called and verified).

13. While the Complainant and the Respondent disputed whether the Complainant provided to Marefke either a secondary credit card or a secondary contact name and number to satisfy the requirements of Meaningful Assurance, both parties ultimately agreed that the Complainant did, in fact, meet the requirements of Meaningful Assurance and that he was entitled to rent a truck.

14. The Complainant possessed a valid, local driver's license and the required $100.00 deposit in the form of his debit card. Additionally, the Complainant possessed the name and number of a secondary contact. The Respondent maintains that Marefke asked the Complainant to pay the $100.00 deposit and that the Complainant either refused to pay the deposit or disputed the amount of the deposit.

15. On June 25, 2009, the Complainant had sufficient funds available in the bank to pay the $100.00 deposit.

16. On June 25, 2009, the Complainant asked Marefke to produce a copy of the Respondent's store policy.

17. Marefke did not show the Respondent's store policy to the Complainant, despite having laminated copies on hand at the store counter.

18. Marefke became frustrated with the Complainant's repeated requests to see the Respondent's store policy and told him to leave the store.

19. On June 25, 2009, after leaving the store, the Complainant rented a Penske truck. In order to rent the Penske truck, the Complainant was required to and did provide a valid driver's license and a deposit in the amount of $58.78.

20. Shortly after the incident at the Respondent on June 25, 2009, the Complainant voiced his concerns about the incident to John Harmelink (white/Caucasian), a youth program manager at the Community Center, and to Mannwell Boswell (black/African-American), a patron of the Community Center.

21. The Complainant asked Boswell to go to the Respondent and to try renting a 17 foot truck.

22. On July 8, 2009, Boswell went to the Respondent's location on 22 Atlas Court to rent a truck. Boswell states that Marefke told him that he needed a valid driver's license, a $1,200.00 down payment, which can be paid with a credit card, and an emergency contact to rent the truck. Alternatively, Marefke allegedly told Boswell that he could provide two credit cards in order to rent the truck.

23. On July 9, 2009, after overhearing a conversation at the Community Center about the Complainant's experience at the Respondent, the Complainant's co-worker, Regina Lloren (bi-racial/Filipino-American) phoned the Respondent and asked about what was required to rent a 17 foot truck. A customer service representative named Zach allegedly told Lloren that she needed a credit card and a driver's license or a $100.00 cash deposit and a driver's license to rent a 17 foot truck.

24. On July 25, 2009, Harmelink went to the Respondent's location on 22 Atlas Court of his own accord to inquire about what was necessary to rent a truck. A customer service representative named Jackie Thompson allegedly told Harmelink that, in addition to his driver's license, he needed to provide a major credit card, a debit card, or $100.00 cash to rent the truck.

25. Subsequent to the June 25, 2009 incident, the Complainant signed up for and received mental health therapy to cope with anxiety allegedly stemming from the June 25, 2009 incident at the Respondent.

CONCLUSIONS OF LAW

1. The Respondent is a public place of accommodation or amusement as defined in the Madison Equal Opportunities Ordinance section 39.03(2)(dd) and (5).

2. The Complainant is an individual entitled to the protection of Madison General Ordinance section 39.03(5)(a).

3. The Respondent violated the provision of Madison General Ordinance section 39.03(5)(a) by failing or refusing to provide the Complainant with the services, benefits, privileges and advantages of a public place of accommodation or amusement.

4. The Complainant suffered no economic loss as a result of the Respondent's violation of the ordinance.

5. The Complainant experienced emotional distress, embarrassment and humiliation as a result of the Respondent's actions on June 25, 2009.

6. The Complainant is entitled to compensation to redress his emotional injuries resulting from the Respondent's discrimination.

ORDER

1. The Respondent is ordered not to discriminate against the Complainant or any other member of a protected class in the terms and conditions of any service, product or benefit of its public place of accommodation or amusement.

2. The Respondent shall not retaliate against the Complainant for his bringing of this claim or for any other reason connected with this complaint.

3. No later than 30 days from the date upon which this order becomes final, the Respondent shall pay to the Complainant the sum of $15,000.00 as compensation for the Complainant's emotional distress resulting from the discrimination which he experienced.

4. No later than 45 days from the date upon which this order becomes final, the Complainant shall submit a petition for his reasonable costs and fees including a reasonable attorney's fee expended in connection with the bringing of this complaint. The Respondent shall file any objections to the Complainant's petition no later than 15 days from the date upon which the petition is filed with the Commission and is served upon the Respondent.

MEMORANDUM DECISION

The first question presented by the record is whether this is a case to be analyzed as one of direct or indirect evidence. In the case of a claim presented by direct evidence, the Hearing Examiner must review the facts, weigh the evidence and render a decision. Direct evidence is that which, if believed, demonstrates a fact without reliance upon inference or presumption. In the case of indirect proof, 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 presented by indirect evidence, the Hearing Examiner will often rely upon inferences and presumptions raised by the evidence to reach a conclusion as to whether discrimination has occurred.

The testimony and evidence presented in this case create a factual record that fits more closely with a determination of discrimination under the indirect method. This analysis is performed through application of the facts to the elements of a *prima facie* claim of discrimination and examining whether the Respondent has presented a legitimate, non-discriminatory explanation for its conduct and whether the Complainant can rebut the Respondent's proffered explanation.

The elements of the Complainant's prima facie claim require that the Complainant be a member of a protected class, that he experience an adverse action and that he demonstrate a nexus between the adverse action and his membership in his protected class. See Rhyne v. Kelley Williamson's Mobil, MEOC Case No. 20092086 (Ex. Dec. 11/30/11); Meyer v. Purlie's Café South, MEOC Case No. 3282 (Ex. Dec. 3/20/95). It is undisputed that the Complainant is a

member of the protected class black/African-American. The Respondent's testimony establishes that, on June 25, 2009, the Complainant and Josh Marefke reached an impasse during a rental transaction which led to a dispute and to Marefke ordering the Complainant to leave the store. Thus, to the extent that the Complainant went to the Respondent to rent a truck and left without such a truck and was ordered from the premises, it seems that there can be little dispute that he experienced one or more adverse actions. However, the parties disagree about whether the Complainant sufficiently demonstrated a causal connection between the adverse action and the Complainant's protected class membership.

Demonstration of a causal connection between a Complainant's membership in a protected class and an adverse action may be made in a number of ways. In the most obvious cases, the use of racial epithets or other insulting language can demonstrate such a link. Frequently, such a connection is made by comparing the treatment of similarly situated individuals not of a Complainant's protected class with the treatment of the Complainant. From time to time, such a nexus can be demonstrated by "testing" the allegations of discrimination.

In a "test," individuals not of the Complainant's protected classes are matched with the Complainant for other conditions such as income, age, gender, and other characteristics than the traits for which the test is being conducted. Tests can be formal and strictly conducted or informal and somewhat more loosely run. The results of tests can be clear and convincing, raise inferences about the actions that are tested or demonstrate nothing useful to either party. Testing is a widely recognized technique for helping to investigate differences in treatment among different individuals.

The Complainant argues that the testimony and documentary evidence provided by John Harmelink (white/Caucasian), Mannwell Boswell (black/African-American), and Regina Lloren (bi-racial/Filipino-American) demonstrate that the Respondent treated the Complainant less favorably because of his membership in the protected classes, race and color. Boswell testified that the Complainant asked him to go to the Respondent to find out how much it would cost to rent a truck. On July 8, 2009, Boswell went to the Respondent's location on 22 Atlas Court to rent a 17 foot truck. Boswell testified that he spoke to Marefke and that Marefke told him to produce two credit cards, a personal contact and a $1,200.00 down payment in order to rent the truck.

In contrast, Lloren testified that she overheard people at the Community Center talking about U-Haul and the need for two credit cards in order to rent a truck. Lloren testified that what she overheard piqued her interest because she frequently rented trucks and that she did not carry two credit cards. Lloren stated that she offered to call the Respondent to verify its rental requirements. Lloren phoned the Respondent on July 9, 2009 and inquired about renting a 17 foot truck for 24 hours. Lloren testified that she spoke to an employee named Zach and that, according to Zach, she needed to provide a credit card, a driver's license and a $100.00 deposit.

Similarly, Harmelink testified that the Complainant told him about what transpired at the Respondent on June 25, 2009. Harmelink stated that, at that time, the Complainant was visibly upset about the incident. Harmelink also testified that he had planned to visit the Respondent to rent a truck and that he told the Complainant that he would take notes about this experience. The record shows that, on July 25, 2009, Harmelink, a white male, went to the Respondent's location on 22 Atlas Court and asked an employee named Jackie Thompson about the

requirements for renting a truck for 24 hours. Allegedly, Thompson told Harmelink that he needed a major credit card, a debit card, or $100.00 in cash to rent the truck.

Collectively, the testimony of Harmelink, Lloren and Boswell constitute a form of an informal test. While the conditions and regimens of this test cannot be said to be conclusive, they are sufficient to raise a critical inference concerning the experience of the complainant.

The Complainant argues that the dispute on June 25, 2009 did not involve his misunderstanding of the Meaningful Assurance requirements. Rather, the Complainant asserts that the dispute involved the Respondent's imposition of unreasonable terms and conditions of service and the Respondent's refusal to provide him with a copy of its store policy to corroborate those terms and conditions. The Complainant asserts that the Respondent failed to discredit the testimony of Harmelink and Lloren. The Respondent insisted that Harmelink's and Lloren's documented experiences with its store policy were not substantially comparable to the Complainant's experience on June 25, 2009, because the language used by the Respondent's employees in explaining Meaningful Assurance to Harmelink and Lloren differed from that used by Marefke. However, the Complainant argues that both Harmelink and Lloren testified that they had previously visited the Respondent more than once. The Complainant maintains that the Meaningful Assurance requirements explained to Harmelink and Lloren did not differ substantially from what they had been asked to provide to the Respondent in the past. Thus, according to the Complainant, what is most important is not whether Harmelink and Lloren ever spoke to Marefke, but whether their treatment by the Respondent as non-black patrons differed substantially from that of Boswell and the Complainant.

The Respondent makes much of the fact that neither Harmelink nor Lloren spoke with Marefke while the Complainant and Boswell did. In this regard, the Respondent seems to replace Marefke as the Respondent instead of Marefke's employer. While it is Marefke's dealings with the complainant that form the central facts of this complaint, it is the larger Respondent's policies and actions that are key to the complaint.

The Hearing Examiner finds that Harmelink, Lloren, and Boswell were, generally, similarly situated to the Complainant because each of them received information about how to rent a truck from the Respondent and, in so doing, each individual was made aware of the requirements for Meaningful Assurance. Harmelink and Lloren's testimony establishes that the information they received about the Respondent's truck rental requirements did not substantially contradict their past rental experiences with the Respondent. In contrast, it appears that Boswell and the Complainant, black/African-American patrons of the Respondent, did not share equally consistent rental experiences. While the record would be stronger if Lloren and Harmelink had spoken with Marefke, the differences in their treatment juxtaposed with that of Boswell and the Complainant is sufficient to raise an inference of discrimination. In general, there are sufficient differences in what all four individuals were told to create doubts about the solidity of the information provided by Marefke to the Complainant on June 25, 2009.

As for Boswell's testimony, the Hearing Examiner finds that he does not make clear what exactly Marefke required for the truck rental on July 8, 2009. The clearest evidence in this regard is the attachment to Boswell's written statement marked as Complainant's Exhibit 3. This attachment, which was handwritten by Marefke, delineates the purported requirements for Meaningful Assurance: a valid driver's license, a form of payment and either a secondary credit card or a contact name and number. The handwritten attachment to Exhibit 3 makes no mention of a $1,200.00 deposit.

It is troubling that, during his testimony, Boswell could not recall the dollar amount he was quoted for the truck rental. Even though the event occurred one year prior to his testimony, one would expect Boswell to remember being asked to provide the amount referenced in the record in order to rent a truck for 24 hours, given his past experiences with the Respondent. Still, although there is no mention of a $1,200.00 down payment on the attachment to Exhibit 3, this does not necessarily mean that Marefke did not verbally quote that price to Boswell. The Respondent denies that Marefke required Boswell to provide a $1,200.00 deposit. Essentially, what we are left with is a credibility determination. Boswell maintains that Marefke required a secondary credit card or an emergency contact and a $1,200.00 deposit, while Marefke denies that he asked for a $1,200.00 deposit. The Hearing Examiner recognizes that while Boswell may well not have recalled the exact amount, he was reasonably certain that the amount he was quoted was substantially greater than $100.00.

Incidentally, Boswell's testimony is not critical to the determination of whether the Respondent discriminated against the Complainant. This is due to the fact that the Complainant supplied independent evidence from which the Hearing Examiner may find that discrimination more likely than not occurred. The fact that Harmelink and Lloren are not members of the Complainant's protected classes and the fact that they were treated more favorably by the Respondent is sufficient to create an inference of discrimination. The Hearing Examiner recognizes that, if Harmelink and Lloren's experiences had involved an encounter with Marefke, the inference of discrimination would have been stronger. Nevertheless, it is difficult to escape the fact that the Complainant is a black, African-American and that he received less favorable treatment than that provided to Harmelink and Lloren in the information he was provided about rental of a truck.

Accordingly, while some of the testimony may lack a degree of clarity concerning the precise terms of rental proposed to each of the aforementioned individuals, taking the record as a whole, the Hearing Examiner finds that the Complainant has established each of the elements of a *prima facie* claim. As such, the burden shifts to the Respondent to supply a legitimate, non-discriminatory reason for the Complainant's inability to rent a truck on June 25, 2009 and his being ordered to leave the Respondent's place of business. The Respondent asserts that the Complainant misunderstood the requirements of Meaningful Assurance and that he declined to provide the $100.00 deposit necessary to rent a truck.

Marefke testified that employees must obtain two forms of what is called "Meaningful Assurance" before a customer can rent a truck. According to the Respondent, the three most commonly used forms of Meaningful Assurance are local driver's licenses, secondary credit cards, other than those used for payment, and secondary contacts. The Respondent requires Meaningful Assurance to ensure the timely return of its equipment.

The Respondent argues that the Complainant was under considerable stress on June 25, 2009, because that was the day on which he was scheduled to move into a new home that he helped construct with Habitat for Humanity. The Respondent maintains that, as a result, the Complainant erroneously heard Marefke tell him that he needed two credit cards and a form of payment in order to rent a 17 foot truck. The Respondent asserts that Marefke required "a secondary card if using a card for payment." The Respondent does not dispute that the Complainant possessed the items required for Meaningful Assurance.

Rather, the Respondent argues that the dispute on June 25, 2009 centered on the Complainant's refusal to pay the $100.00 deposit. The Respondent maintains that it would have permitted the Complainant to rent a truck if he had provided the necessary deposit. The Respondent asserts that, in this context, the Complainant asked to see the Respondent's store policy. Marefke testified that he did not provide the Complainant with a copy of the store policy, even though it was readily accessible on laminated cards at the counter, because he thought the Complainant was referring to the Respondent's on-line policy. Since the store was busy, Marefke did not want to take the time to retrieve the on-line policy.

It is important to bear in mind that the Respondent's burden in this instance is one of production and not one of proof. The Complainant always bears the ultimate burden of proof. This burden is important given the explanations presented by the Respondent. The Respondent's explanations, primarily those relating to failure to pay the deposit, represent legitimate, non-discriminatory explanations for Marefke's actions on the date in question. To the extent that the Respondent explains the decision to order the Complainant to leave as resulting from Marefke's frustration with the Complainant's repeated requests to see the policy, it marginally meets the requirement to produce a legitimate, non-discriminatory explanation of the Respondent's conduct. Since the Respondent provided non-discriminatory explanations for its treatment of the Complainant, the burden shifts to the Complainant to show that the Respondent's proffered explanations are either pretextual or not credible.

The Hearing Examiner finds that the Complainant satisfactorily demonstrated that the Respondent's proffered non-discriminatory explanations are not credible. Regarding the Complainant's alleged refusal to supply a deposit on June 25, 2009, the Complainant argues that he testified that he did not refuse to pay the $100.00 deposit. The Complainant asserts that he rented a truck from the Respondent on May 12, 2009 and that the record demonstrates that he paid a deposit on May 12. Bank records confirm the fact that he had sufficient funds available on June 25, 2009 to pay the $100.00 deposit. Further, evidence shows that the Complainant rented a truck from Penske on June 25, 2009 and that he put down a deposit in the amount of $58.78.

Accordingly, the Complainant argues that the facts and evidence establish that he knew he needed to put down a deposit prior to going to the Respondent on June 25, 2009 and that it is unlikely that he would refuse to provide a deposit on June 25. In response to this, the Respondent asserts that Marefke did not testify that the Complainant refused to pay the deposit per se, but that non-payment was the subject of the dispute. The Respondent further argues that Marefke told the Complainant to leave the store out of frustration due to the Complainant's repeated requests to see the store policy.

Assuming for the moment that the Complainant outright refused to pay or simply failed to provide payment, the evidence does not support the Respondent's assertion that non-payment was the crux of the dispute on June 25, 2009, as it is clear that, prior to June 25, the Complainant was well aware of the need to provide $100.00 in order to rent a truck from the Respondent. Further, bank records clearly indicate that the Complainant had sufficient funds available to pay the deposit. The record also shows that the Complainant needed the truck on June 25 in order to move his family into their new home. Under the circumstances, it does not seem likely that the Complainant would jeopardize a successful move into his new home by refusing to pay the deposit.

Given the evidence and testimony, it does not make sense that the Complainant would insist on seeing the store policy to merely verify the propriety of paying a $100.00 deposit. What is more likely is that the Complainant sought a copy of the policy to see why he was being treated differently from the last time he had rented a truck. It is clear from the record that a significant disagreement did in fact arise between the Complainant and the Respondent and that this disagreement more likely than not concerned application of the Respondent's Meaningful Assurance requirements. Thus, all that remains is the Respondent's contention that it did not treat the Complainant differently regarding its terms and conditions of service. Specifically, the Respondent asserts that the Complainant misheard Marefke's stated requirements for Meaningful Assurance.

The Hearing Examiner finds that, on this issue, additional evidence in the record calls into question the credibility of Marefke's testimony. Specifically, the record shows that a secondary credit card is not an absolute requirement for a truck rental and that Marefke informed the Complainant that a secondary credit card was necessary in order to rent a truck.

The Respondent's argument is that the Complainant provided the necessary forms of Meaningful Assurance and that payment of the deposit was all that stood between the Complainant and the truck rental. Although the Respondent points to Exhibit 18 as evidence that the Complainant simply needed to provide the $100.00 deposit, Exhibit 18 is not entirely helpful. Respondent's Exhibit 18 shows only the steps required to rent a truck via blank information fields. It does not definitively show that the Complainant provided the necessary forms of Meaningful Assurance in order to advance to the payment portion of the Respondent's rental software.

Moreover, the Respondent's post-hearing briefs reveal that it does not have a clear understanding of its own policy. The Respondent correctly pointed out that "local driver's licenses, secondary credit cards (cards other than those used to pay for the rental) and secondary or alternative contacts for which a name and a phone number are required" comprise three of the most commonly used forms of Meaningful Assurance. However, strangely, the Respondent asserts that "[a]n individual who pays in cash and has a local driver's license can satisfy Meaningful Assurance by providing a credit card or a debit card." The Respondent maintains that, because the Complainant paid with cash when he visited the Respondent in May 2009, there was no need for him to produce two credit cards. According to the Respondent, it simply required the Complainant to provide his "local driver's license and a debit card—a card not used for payment…" in order to satisfy the requirements of Meaningful Assurance. This leads to the conclusion that a customer paying in cash cannot rent a truck from the Respondent unless he or she provides a credit card to satisfy Meaningful Assurance. Herein lays the Respondent's quandary.

Neither Complainant's Exhibit 9 (U-Haul Minimum Rental Requirements) nor Respondent's Exhibit 18 (Web B.E.S.T. Program) substantiates the aforementioned explanation of Meaningful Assurance. Rather, both documents reveal that the Respondent always collects a valid, local driver's license as the first item of Meaningful Assurance. However, as to the second item of Meaningful Assurance, a customer is not required to provide a secondary credit card regardless of method of payment. Exhibits 9 and 18 show that there are at least three additional means of satisfying Meaningful Assurance. Provision of a secondary credit card is certainly an option, but it is not a requirement. Other forms of Meaningful Assurance that will suffice include a relative's contact name and phone number or that of an employer.

According to Respondent's Exhibit 18 and Complainant's Exhibit 9, the minimum requirements for a truck rental include a valid driver's license, a form of payment and a secondary contact name and phone number. This is consistent with Harmelink's testimony and Lloren's written statement concerning the Respondent's rental requirements. The Web B.E.S.T. Program requires driver's license information, a form of payment and a secondary contact name and phone number in order to rent a truck. Regarding the specific form of payment, the Web B.E.S.T. Program allows the Respondent to accept a customer's credit card as one of the two required forms of Meaningful Assurance, but only if the card can be swiped. If the card cannot be swiped, then it will not count as one of the two required forms of Meaningful Assurance. Thus, Exhibit 18 shows that a customer does not have to provide a secondary credit card in order to rent a truck. A customer can arrive at the Respondent with nothing more than a driver's license, a form of payment (cash/credit) and a secondary contact name and number and successfully rent a truck.

Complainant's Exhibit 9 also makes this point clear. Exhibit 9 shows that a valid driver's license is always required to rent a truck. Exhibit 9 shows that, in addition to a valid driver's license, the Respondent requires a minimum of two forms of Meaningful Assurance. Exhibit 9 goes on to show that the primary form of assurance that is always collected is a contact phone number that is called and verified at the time of rental. Exhibit 9 then goes on to list five additional forms of Meaningful Assurance including a secondary contact, such as a relative or an employer, or a "valid credit card in the renter's name (swiped at the sales counter)." The Hearing Examiner observes that the Respondent's position on this issue leads to the conclusion that, an individual who does not own a credit card cannot rent a truck from the Respondent. However, the Respondent's own exhibit clearly demonstrates that even someone who does not own a credit card can rent a truck from the Respondent. Thus, the Complainant could have elected to provide a secondary contact name and number in lieu of his debit card when he rented a truck from the Respondent in May 2009.

Accordingly, the evidence shows that the Complainant possessed the necessary documentation to rent a truck on July 25, 2009. The Complainant had a valid driver's license, a form of payment, namely his debit card, and a secondary contact. The Respondent does not dispute this fact, as it argued that the Complainant provided the requisite Meaningful Assurance. However, the Respondent maintains that the Complainant misunderstood Marefke when he asked for a secondary credit card other than the card used for payment. The Respondent asserts that the Complainant incorrectly believed that he needed to provide two credit cards. However, the record clearly shows that the Complainant did not have to produce a secondary credit card in order to rent a truck, as he already possessed an alternate form of Meaningful Assurance.

Most significantly, the Hearing Examiner observes that the Respondent's position begs the question of how Marefke managed to initially garner the Complainant's compliance. If it is true that the Complainant satisfied the requirements of Meaningful Assurance and that payment of the deposit was the central issue, then it follows that Marefke and the Complainant were somehow able to resolve his initial confusion. The Respondent does not elaborate on how Marefke was able to cure the Complainant's confusion concerning the Meaningful Assurance requirements and bring the Complainant to the final step in the rental process. While Marefke testified that the Complainant was confused, he did not testify as to how he allayed that confusion. Instead, the Respondent leaps from the Complainant's confusion straight to the payment process and asserts that the Complainant refused to pay the deposit. Since it is clear that the Complainant had the means to pay the deposit and that he was aware of the need for a

deposit in order to rent a truck, it is more likely that the dispute concerning Meaningful Assurance did not get resolved. Thus, the record supports finding that Marefke more likely than not asked the Complainant to provide a secondary credit card. Under that circumstance, the Complainant was curious as to why Marefke would require a secondary credit card and he asked Marefke to produce the Respondent's store policy to verify the need for a secondary credit card.

Assuming *arguendo* that the Complainant did in fact dispute the deposit requirement, the record shows that Marefke could have easily diffused the situation by providing the Complainant with a copy of the Respondent's store policy and that Marefke elected not to produce the policy. The Respondent admits that on June 25, 2009, laminated policy cards were available for use and located on the store counter. Marefke testified that he did not show the policy card to the Complainant, even though it could have been used as the Respondent's store policy, because when he hears policy, he thinks of the Respondent's on-line "policy bulletins, not the rental requirements card." Given Marefke's position as a manager, it is difficult to understand why he would make such a distinction. The Respondent's policy card clearly delineates the requirements for Meaningful Assurance as well as the need for a $100.00 deposit. Given that payment was the final transactional step to be completed, it does not make sense that Marefke would tell the Complainant to leave the store, rather than produce the policy card which plainly corroborates the need for a $100.00 down payment.

Overall, the record as a whole cast doubt on the credibility of Marefke's testimony as to what transpired on June 25, 2009. The greater weight of the credible evidence substantiates the Complainant's assertion that Marefke imposed different and more stringent terms and conditions of service on the Complainant than others not of his protected class and that Marefke more likely than not refused to produce the Respondent's store policy. One possible explanation for Marefke's failure to produce the policy is that the policy was at variance with his stated terms and conditions.

The Respondent asserts that the Complainant improperly focuses on the alleged refusal to rent to the Complainant as opposed to allegedly discriminatory terms and conditions However, the Hearing Examiner finds that the Complainant's focus is appropriate given the requirements of Madison General Ordinance section 39.03(5)(a) which covers both denials of service and different terms and conditions of service. The Respondent also argues that, had Marefke intended to discriminate against the Complainant on the basis of his race and color, he could have told the Complainant that no trucks were available for rent instead of engaging the Complainant in the rental process. The Respondent's point is not without merit. Such a refusal would reflect a more clearly discriminatory attitude on the part of Marefke. However, the act of lying to the Complainant about the availability of a truck is but one possible means of discrimination. The Complainant's aptly asserts that discrimination is not always overtly demonstrated or even recognized and that oftentimes it is more subtle.

The Hearing Examiner, having found that the Complainant has established liability for a violation of the ordinance, turns to the issue of damages. Customarily in discrimination claims of all types, the Finder of Fact must determine whether the record supports an award of damages. Specifically, Madison General Ordinance section 39.03(10)(c)2b requires the Commission or initially the Hearing Examiner to propose an order or award that makes the prevailing Complainant whole. The "make whole" remedy is one that places the Complainant in as good a position as s/he would have been in absent the intervening discrimination.

In employment discrimination or housing discrimination claims, the first question is generally what economic or "out-of-pocket" damages were experienced by the Complainant. These economic damages might include lost wages, higher rental payments, storage costs, or other expenditures necessitated by the Complainant not receiving what had been sought. However, in claims of discrimination in public places of accommodation, there are frequently no economic damages or, at least, very minor ones. That is because, what is generally lost is an opportunity to engage some service or to receive some benefit.

In the present matter, there was testimony concerning the rental rate for the truck which the Complainant rented at another venue. Had the actual rental cost the Complainant more than the rental of a truck would have cost with the Respondent, the Complainant would have been entitled to the cost difference as well as the extra costs in obtaining that rental. However, the record fails to disclose any such losses suffered by the Complainant.

After reviewing the record for evidence of economic losses or damages, the Hearing Examiner must determine whether the Complainant experienced any non-economic or compensatory damages. These claims are generally for emotional damage which is often a consequence of discrimination. The evaluation of a claim for damages for emotional injuries customarily has two parts. The first determination involves an inquiry into whether emotional injuries are present. If so, then the Hearing Examiner must assess the severity of those injuries. The second determination centers on what amount of money, if any, will compensate the prevailing Complainant for those emotional injuries. There is no precise methodology for making either determination.

The record in this matter is somewhat mixed with respect to the nature and the severity of the Complainant's emotional injuries. On one hand, the act of discrimination in this matter was not blatant or necessarily overt. There were no racial insults or epithets. The adverse action taken against the Complainant was not part of a continuing act of discrimination, but rather, it was a single act. Comparatively, this case involves discriminatory conduct that might not be seen as quite so severe. On the other hand, the incident was focused around an important event in the Complainant's life. The Respondent acknowledged that, on the day in question, the store was very busy. It was likely quite embarrassing to be refused service and told to leave in front of other customers. Further, the Complainant was sufficiently offended and upset to recount the circumstances to his coworkers who observed the impact that the incident had upon the Complainant. The Complainant testified about his exploration of his feelings stemming from the discrimination with a clinical psychologist. The record does contain testimony from the Complainant's psychologist, Peter Weiss, regarding two visits to Weiss' office in October 2009 and January 2010.

Given this record, it seems clear that the Complainant experienced more than an inconsequential level of emotional distress resulting from the circumstances of June 25, 2009. Though there were other factors that contributed to the stress of that day, the Complainant's treatment at the Respondent appears to have been a primary factor. These reactions form the basis for a claim of damages for the discrimination experienced by the Complainant.

The Hearing Examiner must now attempt to determine what dollar amount, if any, will compensate the Complainant for the discrimination. This effort is never exact. The Hearing Examiner can only take the factors as presented in the record and make a comparison to other awards made in previous cases and adjust awards according to the difference in circumstances.

One critical factor in making damage awards in claims of discrimination is the overt nature of the discrimination. In Leatherberry v. GTE, MEOC Case No. 21124 (Comm. Dec. 4/14/93, Ex. Dec. 1/5/93), the Complainant was directly confronted by her supervisor's discriminatory attitude and use of insulting language. In Leatherberry, the Complainant also experienced the loss of career opportunities for which she had worked several years. Id. The Hearing Examiner determined that the Complainant was entitled to an award of $25,000.00 which, at the time, was the highest amount awarded for a complaint before the Commission. Id. In Laitinen-Schultz v. TLC Wisconsin Laser Center, the Complainant was confronted with a supervisor's explicit discriminatory attitude about the Complainant's disabilities. MEOC Case No. 19982001 (Ex. Dec. 7/1/03). In that case, the Complainant received an award of $15,000.00 for her emotional distress. Id. Moreover, in Briggs v. Popeyes Chicken & Biscuits Restaurant, a case involving race and color discrimination in a public place of accommodation, the Complainants experienced discriminatory service first hand and were told by others of similar discrimination. MEOC Case Nos. 20083073, 20083074 (Ex. Dec. 3/19/10). Those factors helped support an award of $10,000.00 for each of the named Complainants. Id.

In the present case, though Marefke was angry when he ordered the Complainant from the premises, there were no racially discriminatory statements made. Though it was confusing at the time, the act of discrimination did not become clear until later when the results of testing helped document the incident. The facts in the present matter tend to not support the higher level of awards made in Leatherberry ($25,000.00), Laitinen-Schultz ($15,000.00) or Briggs ($20,000.00 for all parties).

The second factor that tends to support higher damage awards is the continuing impact of the discrimination including the seeking of medical treatment. In Miller v. CUNA, the Complainant was awarded $75,000.00 for the protracted and substantial impacts of the discrimination involved, the highest award made by the Commission to date. MEOC Case No. 20042175 (Ex. Dec. 5/16/08). The testimony in that case included the continuing impact of the discrimination on the Complainant and his family including the loss of medical insurance and the need for the Complainant to explain to his child the reasons for their changed circumstances. In the Briggs matter, the Complainants had to pass by the place of the discrimination and explain to their children why they did not want to go there any longer. In Laitinen-Schultz, the Complainant's period of upset was not too protracted but she did receive medication for treatment related to the short term consequences of the discrimination.

In the present matter, the one-time nature of the events are more like those in Steele v. Highlander Motor Inn et al., where the Complainant was denied a room, but was not particularly upset by the event. MEOC Case No. 3326 (Comm. Dec. 8/31/95, Ex. Dec. on liability 3/24/95). In that case, the Hearing Examiner awarded the Complainant $3,000.00. Id. In Nichols v. Buck's Madison Square Garden Tavern, the Complainant was awarded $5,000.00 for a single act of discrimination where the Complainant was irritated as opposed to very angry. MEOC Case No. 20033011 (Ex. Dec. 10/14/03, Ex. Dec. 11/08/05).

The record contains testimony from the Complainant about his decision to seek medical treatment for the anxiety and anger over the discrimination he experienced. The Complainant testified about his sessions and produced his medical records. Dr. Weiss testified about the meaning of the entries on the Complainant's medical records and generally in support of the Complainant's testimony. Dr. Weiss confirmed that, as of October 2009, the Complainant still felt rage and feelings of helplessness over the incident at the Respondent's. Weiss did not believe that further treatment was warranted unless desired by the Complainant.

The Complainant saw Dr. Weiss again in January 2010, apparently at the request of his counsel. Weiss observed that the Complainant seemed to be recovering to some extent as of the January 2010 consultation and only required the Complainant to return as needed. There appear to be no further meetings with Dr. Weiss or with any other medical professional concerning this incident.

Given the record as a whole, the Hearing Examiner determines that the amount of $15,000.00 will adequately compensate the Complainant for the act of discrimination that forms the basis of this complaint. In reaching this determination, the Hearing Examiner relies on the one time nature of the discrimination and the lack of overt signs of discriminatory language or conduct. While the record does contain some indication of a continuing affect upon the Complainant as evidenced by his medical records, the Hearing Examiner finds that the adverse effects were substantially diminished by the end of 2009 as evidenced by the Complainant's failure to return to Weiss for treatment after October 2009. The Complainant's visit to Weiss in January 2010 appears to have been elicited not by medical need, but at the request of counsel.

The record lacks the type of evidence that supported higher awards in cases such as Miller and Leatherberry. However, the impact on the Complainant seems more significant and more damaging than in Steele or Nichols. The fact that the Complainant independently sought out medical intervention in October 2009 creates a record that is more closely analogous with Laitinen-Schultz than either Steele or Nichols. However, the lack of medical intervention and the shorter period of the Complainant's distress keeps the record from supporting greater levels of damages.

The Respondent must also pay the reasonable costs and attorney's fees associated with the bringing of this action. If a prevailing Complainant were required to shoulder the burden of the costs of such an action, other potential Complainants might be dissuaded from bringing claims to enforce their civil rights and the Complainant in this matter would likely not be made whole or placed in the same position he would have been in absent the act of discrimination. Payment of attorney's fees and costs has long been required in cases brought under the ordinance and are a recognized element of damages provided for in the ordinance itself.

The record in this matter reflects the often confusing and subtle types of discrimination in today's society. Though the Hearing Examiner concludes that the Complainant was discriminated against under the terms of the ordinance, the Hearing Examiner is not entirely convinced that those involved on the part of the Respondent truly understood the consequences of the incident. Respondent, in its briefs, puts the responsibility for any misunderstandings and the consequences of those misunderstandings on the Complainant. However, the Hearing Examiner, as one who comes to this claim anew, sees that Marefke essentially controlled the transaction and the flow of information and it was his actions and reactions that lead to the denial of the rental of the truck to the Complainant. Even is the Complainant misunderstood what Marefke said, Marefke was the individual who was in the best position to identify the misunderstanding and to correct it. Equally, if the transaction broke down over whether payment was offered or not, Marefke was the individual who was in the best position to stop the confrontation and to point out that everything had been presented and only payment was necessary.

Why did Marefke not exercise his control of the situation? The record is unsatisfying for one seeking a clear and convincing picture. However, the standard of proof in a discrimination

claim under the ordinance and most other statutes is not clear and convincing, but rather by the greater weight of the credible evidence, sometimes known as the preponderance of the evidence.

In determining whether the parties have met their respective burdens, the courts have given us the burden shifting approach described above. In the application of this approach, the Respondent's explanations are less satisfying than the evidence and argument presented by the Complainant.

Ultimately, the Complainant's explanation that his race and/or color was/were the reason for why a company that is in the business to rent trucks to otherwise qualified individuals did not rent him a truck on June 25, 2009. That there was confusion and an order to leave the premises is not disputed by either side. It is not disputed either, that the Complainant, an African American, was the person who was not permitted to rent a truck on that day and that other non-African American friends and colleagues were quoted more favorable terms of rental than was the Complainant on June 25, 2009. The confusing and alternative explanations presented by the respondent fail to convince the Hearing Examiner that they are anything more than an after-the-fact explanation for the events of June 25, 2009.

Signed and dated this 8th day of February, 2012.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: David R Sparer
Meg Vergeront