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

Julia Bedford
1518 Woodvale
Madison WI 53716

Complainant

vs.

Farm Tavern
1701 Moorland Rd
Madison WI 53716

Respondent

HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

CASE NO. 20132017

On November 19, 2013 and November 20, 2013, Clifford E. Blackwell, III, Hearing Examiner for the City of Madison Department of Civil Rights Equal Opportunities Division and the Equal Opportunities Commission held a public hearing on the merits of the complaint in the above captioned matter in room LL-120 of the Madison Municipal Building 215 Martin Luther King, Jr. Blvd. Madison, Wisconsin. The Complainant, Julia Bedford, appeared in person and by her counsel, Randall Gold of Fox & Fox SC. The Respondent, The Farm Tavern, appeared by its representative, Liberty Noeski, and by its counsel, Timothy Yanacheck of Bell, Mohr & Richter SC.

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

RECOMMENDED FINDINGS of FACT

1. The Complainant, is a woman in her late 30s who at the time of hearing resided in the City of Madison.

2. The Respondent is a bar or tavern that incidentally serves food and is located at 1701 Moorland Road. The Respondent is owned by Rod Peterson and employs approximately four or five people.

3. The Complainant has a lengthy history of physical and emotional abuse including sexual abuse.

4. The Complainant is an experienced bartender and has worked as a bartender for over fifteen years in a variety of settings.

5. In September of 2012, the Complainant responded to a Craigslist advertisement seeking a part-time bartender. The Complainant was out of work having left her last employment at the Harmony Bar over a dispute about work hours.

6. The Respondent's manager, Liberty Noeski, reviewed the applications received as a result of the advertisement and conducted an interview with candidates including the Complainant. Noeski determined that the Complainant was qualified for the part time bartender position and offered it to the Complainant. The Complainant's first day of work was October 8, 2012.

7. The Complainant was scheduled to work two evening shifts per week. These shifts included closing the bar at the end of the night. In addition to regularly scheduled nights on Monday and Thursday, the Complainant was told that she could/would work on some special occasions such as a planned birthday party of Noeski scheduled for October 28, 2012, and for nights when the Respondent sponsored billiard or bowling leagues, generally Wednesdays.

8. Noeski and another part time bartender, Lorrie Zentner, trained the Complainant on the duties of her position, including food preparation. After a few days of work, the Complainant drafted a list of her duties,, especially those involved in closing the bar. She asked Noeski to review that document which Noeski did. After making some minor adjustments, both the Complainant and Noeski found the document drafted by the Complainant to reasonably reflect her duties.

9. The Respondent's business was variously described as a "rough bar" and a "neighborhood tavern." It does appear that the Respondent's clientele may have represented a somewhat rougher segment of the population. From the descriptions provided at the hearing, the Hearing Examiner would not describe the business as particularly "family friendly."

10. Noeski, Zentner and the Complainant all described conduct of some of the usual customers as being crude and sexually offensive or explicit. Actions on league nights appear to have been rowdy, noisy and potentially offensive for a number of reasons.

11. On the Complainant's first night, October 8, 2012, she was engaged by a frequent customer, Bruce Bennett. Bennett made sexually suggestive comments to the Complainant, commented on her physical appearance and flirted with her in an unwelcome manner. The Complainant deflected Bennett's comments despite being offended by them. After Bennett left for the night, the Complainant approached Noeski and indicated that in her mind, Bennett was a "pervert." Noeski acknowledged Bennet's conduct and indicated that the Complainant had handled the situation appropriately.

12. Bennett was a frequent customer and he continued to speak suggestively to the Complainant. The Complainant told Noeski and other employees of Bennett's conduct. The Complainant believed that Noeski, who would frequently sit at the bar either while on duty or after work, observed Bennett's objectionable conduct. Noeski denies having observed either Bennett's conduct or the Complainant's reaction to it.

13. On November 28, 2012, Bennett's conduct became so objectionable to the Complainant that she ordered him to leave the bar. Bennett refused the Complainant's directive. After a protracted verbal altercation which included the threat to call the police, the Complainant called Noeski to indicate that she (the Complainant) was prepared to call the police to have Bennett ejected due to his conduct and his refusal to leave as ordered. The Complainant demanded that Noeski bar Bennett from coming to the bar while the Complainant was working. Noeski asked the Complainant if she (the Complainant) would like her (Noeski) to come to the bar to handle the situation. At that point, Bennett left the bar as ordered and Noeski did not come to the bar.

14. The next day, November 29, 2012, Noeski came to the bar as the Complainant was preparing to start her shift. Noeski asked Zentner to staff the bar while Noeski and the Complainant spoke about Bennett's conduct the night before. The Complainant affirmed her desire to have Bennett excluded from the bar whenever the Complainant was working. Noeski, with the Complainant as witness, called Bennett whose number she had programmed on her phone and informed him that he was not to return to the bar when the Complainant was working. Bennett did not return during the limited period of time that the Complainant remained employed by the Respondent.

15. Though it appears that Bennett enjoyed some sort of favored status at the bar despite his conduct, the Complainant was not the only employee to have experienced Bennett's unwelcomed attentions. Zentner testified that Bennett had frequently harassed her during her several years of employment by the Respondent. However, Zentner stated that if she told Bennett to stop or if she ignored him, he would not bother her for a period of time. Bennett would, almost inevitably, begin to harass Zentner after the passage of time though.

16. Noeski also testified that she observed Bennett make sexist comments, but that she viewed him as being harmless and a basically nice guy. Noeski admitted that she believed the Complainant when the Complainant complained of Bennett's conduct and believed that Bennett was capable of that conduct. Noeski and Bennett appear to have been personal friends.

17. Bennett was observed to harass other female employees of the Respondent by other former employees. Specifically, Roxane Rodgers, a former bartender for the Respondent, stated that she had seen Bennett harass other employees and customers of the Respondent as well as herself.

18. Bennett's unwelcome conduct included crude sexual comments, propositions of sexual activity, sharing of sexually explicit photographs including those of his own sexual organ, and comments of a sexual nature about the Complainant's and other women's bodies. In addition to the opportunity to observe Bennett's conduct at the bar, the Complainant informed Noeski of the conduct and that it was unwelcome. Noeski made excuses for Bennett and did not take action to stop his harassment of the Complainant until November 29, 2012.

19. The Complainant also was harassed by Ricky Adams, another regular customer of the bar and Noeski's half brother. Adams's conduct included making crude sexual comments to the Complainant, grabbing at her, and restricting her passage of egress

from the bar area by standing so close that physical contact was necessary. On at least one occasion, Adams indicated that he wished to bend the Complainant over a bench and have his way with her. The Complainant is not certain, but believes she reported Adams's conduct to Noeski without apparent effect.

20. On bar leagues nights, the Complainant was subjected to name calling, taunts and efforts to grab her. Some of the language used by customers at the bar on league nights as well as other work nights included, "cunt," "sexy," "whore," and "bitch."

21. The conduct of Bennett, Adams and others caused the Complainant difficulty in performing the duties of her job by keeping her from working effectively and by having to deflect the unwanted conduct and comments. Actions such as grabbing at the Complainant or preventing her easy access and egress to areas of the bar in which she was needed limited her ability to perform the duties of a Bartender. The Complainant's emotional reaction to the comments and conduct of the customers inhibited her enjoyment of the job and occasionally made her physically ill.

22. Zentner, one of the Complainant's coworkers and trainers, started as an evening Bartender similar to the Complainant. Over time, Zentner requested to move to day work only. The reasons for Zentner's request were disputed. Zentner's boyfriend generally accompanied Zentner to work. Again, the reasons for this conduct were disputed.

23. Zentner acted somewhat as an Assistant Manager to Noeski though she did not have any apparent authority to supervise. However, Zentner and Noeski were friends and Zentner might be expected to inform Noeski of issues/problems with other workers at the bar. Other than a brief period of training, Zentner and the Complainant did not work at the same time.

24. Noeski was a frequent customer at the bar when not working at the bar. She would sit at the bar and could observe the conduct of the Bartender and the customers at the bar. Additionally, both Zentner and Noeski participated in pool or bowling leagues sponsored by the Respondent and were present at the bar on league nights.

25. After Noeski's call to Bennett on November 29, 2012 and the rest of the Complainant's shift on that day, the Complainant did not work until December 3, 2012.

26. On December 3, 2012, Noeski came to speak to the Complainant. Noeski's stated purpose was to discuss certain irregularities about the Complainant's time cards and the length of time the Complainant was taking to close the bar. Noeski had not previously discussed with the Complainant or noted in any way these concerns.

27. There were no witnesses to the discussion between the Complainant and Noeski. The Complainant indicates that she believes she was calm and professional. Noeski indicates that the Complainant was loud, angry and insubordinate when talking with Noeski.

28. After meeting with Noeski, the Complainant called Zentner at home. Zentner spoke with the Complainant, who was upset and unhappy with Noeski, for approximately 45 minutes during Zentner's dinner time.

29. On or about December 5, 2012, Noeski attempted to set up a meeting with the Complainant. The Complainant declined to meet with Noeski. Noeski, not being able to meet with the Complainant, called the Complainant and terminated the Complainant's employment, indicating that, "things just weren't working out." Noeski has given other alternative explanations for the Complainant's termination, such as irregularities with the Complainant's time cards.

30. Prior to December 3, 2012, Noeski had not informed the Complainant of any problems with her performance and had not noted any problems in her work records.

31. While employed by the Respondent, the Complainant was paid $6.50 per hour plus her tips. She did not report tips to the Respondent.

32. The Complainant received unemployment compensation for a period of time. She initially obtained part-time employment at the Orpheum Theater and the Great Dane Pub and then full-time employment at Spots where she made more than while employed by the Respondent.

33. The Complainant experienced anxiety, loss of sleep, frustration and other difficulties due to the conduct of the customers at the Respondent's bar. She discussed these problems with her friend Andy Ellis. Occasionally, she asked Ellis to come to the bar because of her concerns for her safety and the conduct of various customers.

34. Subsequent to her termination, the Complainant experienced a wage loss of $531.50 for shifts that she would have worked, but could not because of her termination.

35. Subsequent to her termination, the Complainant experienced emotional distress from the loss of employment and due to the circumstances of her termination.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class, "sex" as that term is used in the Equal Opportunities Ordinance.

2. The Complainant exercised a right protected by the Ordinance by complaining about and opposing sexual harassment by customers at the Respondent's bar.

3. The Respondent is an employer as that term is used in the Equal Opportunities Ordinance.

4. The Respondent violated the terms of the Equal Opportunities Ordinance by failing to promptly and reasonably address the Complainant's claims of sexual harassment by customers of the Respondent said harassment of which the Respondent knew or reasonably should have known. The harassment materially affected the Complainant's job and made performance of her duties more difficult than when she was hired.

5. The Respondent retaliated against the Complainant for her exercise of a right protected by the Ordinance when it terminated the Complainant's employment.

ORDER

1. The Respondent shall develop and implement a policy against harassment based upon any of the protected classes set forth in the Equal Opportunities Ordinance no later than 90 days from the date upon which this Order becomes final.

2. Once developed, the Respondent shall post its anti-harassment policy prominently in its premises where both employees and customers may observe it.

3. The anti-harassment policy shall include a description of the steps or process for making a complaint of harassment and that such complaints may be made without fear of retaliation.

4. The Respondent shall pay to the Complainant the sum of $531.50 in back wages no later than 30 days from the date upon which this Order becomes final.

5. The parties shall confer to determine an appropriate rate of interest for the calculation of pre-judgment interest on the award of back pay to run from the date of the Complainant's termination until the date upon which this Order becomes final. Should the parties not be able to agree upon the rate of interest to be used to calculate pre-judgment interest, the Complainant may petition the Hearing Examiner for further proceedings.

6. No later than 30 days from the date upon which this Order becomes final, the Respondent shall either pay to the Complainant $20,000.00 as compensatory damages for the sexual harassment the Complainant experienced while employed by the Respondent or negotiate a payment schedule for payment of the damages at a later date.

7. No later than 30 days from the date upon which this Order becomes final, the Respondent shall either pay to the Complainant $10,000.00 as compensatory damages for the Respondent's termination of the Complainant for the Complainant's exercise of a right protected by the Ordinance or negotiate a payment schedule for the payment of the damages at a later date.

8. No later than 45 days from the date upon which this Order becomes final, the Complainant shall submit a petition along with supporting documentation of her costs and fees, including a reasonable attorney's fee. The Respondent may object to the Complainant's petition within 15 days of the receipt of the Complainant's petition.

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 from the record presented to him. 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 more closely 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 actions.

If the Respondent succeeds in stating a legitimate nondiscriminatory reason for its actions, the Complainant may still prevail if she produces sufficient evidence to establish that the Respondent's proffered explanation is either not credible or represents a pretext for an otherwise discriminatory reason. It is not adequate to simply establish that the Respondent's explanation was a pretext for some other nondiscriminatory reason.

In the current matter, the Complainant states two separate and distinct claims. First, she asserts that she was exposed to a sexually hostile work environment and that the Respondent failed to take reasonable action to provide her with a workplace free from sexual harassment despite the Respondent's knowledge or, at least, constructive knowledge of the harassment. Second, the Complainant contends that the Respondent terminated her employment as a result of her complaints of the sexually hostile environment and opposed having to work in those conditions. Additionally, the Complainant asserts that she was terminated because of her sex.

The Respondent states that it had no knowledge of the harassment to which the Complainant alleges she was exposed until the November 28, 2012 incident with Bennett. Further, the Respondent asserts that the Complainant was terminated due to continuing irregularities on her time card, problems with the Complainant's closing procedure and the Complainant's insubordination towards Noeski on December 3, 2012.

Both parties rely heavily on cases from jurisdictions other than the City of Madison. While reference to decisions of those jurisdictions can be helpful, what is most important is the application of the Equal Opportunities Ordinance to the facts of this case. McMullen v. L.I.R.C., 148 Wis. 2d 270, 434 N.W. 2d 83 (Ct. App. 1988). In this instance, the Equal Opportunities Ordinance has two provisions that directly bear upon the allegations in this complaint. First, with respect to the claims of termination because of sex and of sexual harassment, Section 39.03(8) and specifically (8)(k) are applicable. With respect to the allegations of retaliation, Section 39.03(9) directly applies to the allegations. Cases decided under the provisions of the Equal Opportunities Ordinance are most helpful in applying the provisions of the Ordinance to this complaint. However, decisions of Wisconsin and federal courts may help where there is a similarity of language and purpose to that of the Ordinance.

One initial issue will be cleared away at this point. In her post-hearing brief, the Complainants seeks an Order holding the Respondent (The Farm Tavern), its owner (Rod Peterson) and its manager (Liberty Noeski), jointly and severally liable in the event of a finding of discrimination or retaliation. With respect to the Respondent's manager, the Hearing Examiner knows of no precedent that would permit him to impose liability on Ms. Noeski

personally. In the case of Hovde v. Equal Opportunities Commission of the City of Madison, 00 CV 0803 (Dane County Cir. Ct. 2/20/01), the Hearing Examiner's decision that the complaint of an employee claiming individual liability on her supervisor for retaliation was rejected by the Circuit Court. Specifically with respect to the claims related to sex and sexual harassment, the Ordinance only imposes liability on employers, not individuals. There are no allegations in this record indicating that Noeski was the Complainant's employer. There was testimony indicating that at some point, Noeski had either an ownership interest or some interest in the profits of the Respondent. The Hearing Examiner takes the testimony concerning this past interest to mean that Noeski did not have such an interest at the time of the filing of the complaint. There is no evidence in the record linking Noeski to such an interest at any time relevant to this complaint.

With respect to liability as between Peterson and the entity, the Farm Tavern, the record is devoid of any information about how the named Respondent, the Farm Tavern, is organized. Whether it is a solely owned corporation or a sole proprietorship will determine the prospective liability of Peterson. Since Peterson is not a named party, the Hearing Examiner's decision can only apply to the named party.

The Hearing Examiner will first address the allegation that the Complainant was terminated from employment because of her sex. The prima facie elements for such a claim can be most simply stated as: membership in the protected class "sex," experiencing an adverse employment action, and the existence of a causal link between the Complainant's sex and her adverse action (termination). While some may contend that an additional element of satisfactory job performance is also appropriate, for purposes of this complaint, the simpler statement of the prima facie elements is sufficient.

There is no doubt that the Complainant has established the first two elements of the prima facie claim. It does not appear that the Respondent contests proof of these elements. However, the Hearing Examiner finds a total lack of proof to establish the third element that of a causal connection between the first two. There is nothing in the record even indicating that there exists another similarly situated male employee whose treatment might serve as an apt comparitor. Nothing in the testimony of the Complainant, Noeski, or Zentner, gives rise to any inference or hint that the Complainant was terminated because of her status as a woman.

With respect to this allegation, the Hearing Examiner notes that neither party devotes any time in their post-hearing briefs addressing this particular allegation. The Hearing Examiner addresses it only because it is an issue identified in the Notice of Hearing and is merely referenced as such by the Complainant.

Next, the Hearing Examiner turns to the allegation of sexual harassment. Generally speaking there are two types of claims of sexual harassment, quid pro quo sexual harassment or hostile workplace sexual harassment. Quid pro quo sexual harassment generally involves making acquiescence in sexual favors a condition of employment. Quid pro quo sexual harassment is regulated in section 39.03(k)(1)1 and (k)(1)2 of the Ordinance. This is not a case of quid pro quo sexual harassment. The record does not demonstrate any explicit conditioning of the Complainant's hire or continued employment on her acquiescence in or granting of sexual favors.

Rather, this is a case premised on the creation and exposure to a sexually hostile environment. Sections 39.03(8)(k)(1), (2) and (4) apply to this type of claim. Section 39.03(8)(k)

creates a requirement that each employer afford each employee an environment that is free of sexual harassment. Section (k)(1)3 establishes that sexual harassment is conduct that has the intent or effect of substantially interfering with an employee's work performance or of creating an intimidating, hostile or offensive work environment. Section (k)(2) establishes a "reasonable person" test for determining whether conduct substantially interferes with an employee's work or creates an intimidating, hostile or offensive work environment. Finally, section (k)(4) makes it clear that sexual harassment generated by nonemployee individuals such as customers, contractors or other third parties, violates the Ordinance where the harassment occurs during the employees regular work duties and where the employer knows or reasonably should know of the harassment.

The first inquiry is whether the conduct of which the Complainant complains meets the definition of sexual harassment. Section 39.03(2) defines sexual harassment as follows: "Sexual harassment" means unwelcome sexual advances; unwelcome requests for sexual favors; unwelcome physical contact of a sexual nature; or unwelcome verbal or physical conduct of a sexual nature which shall include, but not be limited to, deliberate or repeated unsolicited gestures, verbal or written comments, or display of sexually graphic materials which is not necessary for business purposes. "Sexual harassment" includes conduct directed by a person at another person of the same or opposite gender."

The Complainant testified to the language directed at her by customers such as Bennett, Adams and others on a regular basis. Words such as bitch, cunt, whore, sexy are without a doubt sexual in nature and are intended to convey a sexual message. The Complainant also testified that she routinely received propositions to engage in sex from customers such as Bennett, Adams and others. The Complainant testified to Bennett's display of pornographic pictures from his phone including pictures of his own penis. Both Bennett and Adams, and others regularly tried to grab the Complainant while she worked behind the bar. Adams and Bennett also stood in a manner to require the Complainant to brush against them as she worked in the area of the bar. The Complainant testified that Adams remarked that he wanted to bend her over a bench and have his way with her.

The Respondent does not appear to contest that these incidents occurred. Zentner testified to Bennett's continued harassment over the period of her employment. Zentner indicated that she did not consider Bennett's conduct unusual for the environment. She stated that Bennett would stop for some period of time if she objected. However, it is clear that Bennett would then resume his harassment at some later date.

Noeski testified that she believed the Complainant's statement of complaints about Bennett. Though Noeski and Bennett are friends, she stated that Bennett was capable of the conduct described by the Complainant and that she believed the Complainant's accounts of sexual harassment.

Rather than denying that the Complainant's statements were true, the Respondent in its post-hearing brief indicates that the Complainant's testimony was exaggerated particularly in light of the Complainant's continued employment and interest in remaining employed with the Respondent. As to the contention that the Complainant's testimony was exaggerated, Roxane Rodgers testified as a former employee of the Respondent to substantially similar conduct during the period of her employment.

Additionally, Zentner testified to having received objectionable comments and conduct from customers such as Bennett frequently over the period of her employment. The Complainant testified that Zentner requested to be moved from the evening shifts because she didn't feel safe working those hours and especially doing the closing. Zentner denies having requested the transfer for those reasons, stating that she preferred to work days. Zentner customarily is accompanied to work by her boyfriend. There is again a dispute as to the reason for this conduct. The Complainant asserts it is for concerns for her safety, while Zentner indicates that she and her boyfriend only have one vehicle and it's the only way to arrange their transportation.

Further supporting the Complainant's testimony about the conduct she experienced was the testimony of Andy Ellis, the Complainant's friend and landlord/housemate. Ellis testified to the Complainant's recounting to him the conduct of Bennett and other customers of the Respondent. He testified to how upset the Complainant appeared and to the Complainant's occasional requests that he come to the bar to help her to feel safe. Ellis testified that he did not personally observe the harassing conduct on the three or four occasions that he went to help the Complainant. Ellis did testify to seeing at least one customer hold the Complainant's hand/arm longer than necessary and observed that the Complainant was made uncomfortable by the customer's contact and attention. Ellis did not have to intervene in this situation.

Given the evidence as a whole, the Hearing Examiner finds that the Complainant experienced sexual harassment as that term is defined in section 39.03(2). There were verbal conduct of a sexual nature, unwelcomed sexual advances and requests for sexual favors, and the unwelcome display of graphic sexual images. On several occasions, the Complainant was the recipient of unwanted physical contact by several different customers. The Complainant was subjected to statements of unwanted sexual violence. The Complainant's testimony about this conduct is credible and is corroborated in various degrees by Rodgers, Zentner, Noeski and Ellis.

Even if the Respondent is correct that the Complainant has somewhat exaggerated the extent of the sexually harassing conduct, there is more than sufficient evidence to convince the Hearing Examiner that the conduct experienced by the Complainant was of a degree that meets the definition of sexual harassment. Noeski's testimony indicating that she believed the Complainant's statement and that she took action to prevent it once she knew of the conduct, supports a finding that the Complainant was not exposed to mere banter or poor judgment on the part of drunken bar customers that should be shrugged off.

The next question is whether the sexual harassment experienced by the Complainant was of a nature or severity to interfere with the performance of her duties as a bartender or to create an intimidating, hostile or offensive working environment. Mad. Gen. Ord. 39.03(8)(k)1 and 39.03(8)(k)2. In making this determination, the Hearing Examiner must look at the record from the perspective of the fictional "reasonable person," not solely from the perspective of the Complainant. There is no doubt that the Complainant considered the conduct offensive and intimidating. The Complainant testified about how she felt angry and humiliated by the conduct of Bennett, Adams and others. Ellis testified about his observations of the Complainant's accounts about the harassment she experienced at work. These accounts were often accompanied by tears and emotional displays. Ellis also stated that he observed the Complainant's discomfort and unhappiness when a customer held her hand longer than

appropriately. From this portion of the record, it is clear that subjectively, the Complainant found the conditions at the workplace to be offensive and intimidating.

The question, however, is would a reasonable person, other than the Complainant, find the conditions intimidating, hostile, or offensive. The Hearing Examiner finds that a reasonable person would find that the sexual harassment experienced by the Complainant was pervasive or severe enough that a reasonable person would find the workplace to be intimidating, hostile and/or offensive.

Explaining why a reasonable person would find the conditions experienced by the Complainant is somewhat complex. As a bar, and considering the intake of alcohol, some mild sexual language or conduct that would not be tolerated in other settings might be considered "acceptable." However, nothing in the Ordinance or state or federal law, to the knowledge of the Hearing Examiner, creates an exception for conduct that occurs under the influence of alcohol. Given the Department's somewhat more strict view of harassment than some other jurisdictions, the fact that the conduct giving rise to this complaint occurred in a bar, does not create any exception to the Ordinance's requirement that all work places are to be free of sexual harassment. Use of language such as "cunt," "whore," and "bitch" when directed at an individual or in the presence of someone who finds it offensive is no more tolerable than the use of racially explosive words. The language testified to in this proceeding is demeaning and offensive and is intended to injure and create an imbalance in the power structure between male and female. Bennett's display of photographs of his genitalia is crude, insulting and offensive. The repeated requests by a variety of customers for sexual favors diminishes one's self esteem and belittles one's judgment of their self-worth. Adams's observation about wanting to bend the Complainant over a bench and having his way with her represents a threat of physical, sexual violence and is intimidating and offensive.

The record does not demonstrate that this conduct was constant or even occurring on every night on which the Complainant worked. However, it is clear that it occurred with a frequency that the Complainant felt sufficiently threatened to require the occasional presence of Ellis as a watchman. Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) clearly indicates that harassment should not be evaluated on a numerical basis or should not require debilitating consequences for the Complainant; rather, one must look at the circumstances compassionately and with an eye to the impact upon the individual Complainant. The record in this matter convinces the Hearing Examiner that the sexual harassment experienced by the Complainant created an intimidating, hostile and offensive environment and made the Complainant's ability to perform the duties of her job unusually difficult.

The Hearing Examiner is somewhat troubled by the fact that neither Zentner nor Noeski testified that the conduct of Bennett was particularly troubling to them. Zentner testified that Bennett had, perhaps been offensive to her once or so every other month during the five years she worked at the bar. She indicated that when Bennett's conduct became too offensive, she would tell him to stop and he would for a while. That Zentner was not constantly troubled by Bennett's conduct does not necessarily demonstrate that the Complainant's reaction to it was overly sensitive or unusual. Noeski testified that she believed the Complainant's recounting of Bennett's conduct and believed that it represented sexual harassment. Either Zentner is particularly tolerant or perhaps for reasons of familiarity with Bennett not as capable of being offended by his conduct. It is not clear from the record why Zentner testified the way she did. She does remain employed by the Respondent and appears to like her job. Such a relationship

with her employer could understandably cause a witness to favor her employer with her testimony.

Zentner testified that she switched from evenings to days because a daytime position became available. While perhaps working days is reason enough for such a switch, it is not clear that Zentner's switch was made solely for that reason. The Complainant testified that Zentner wished to avoid the harassment that occurred during the evenings when the bar was busier. That seems as likely a reason to switch as that one prefers working days.

That Noeski did not appear to notice the harassment experienced by the Complainant as an individual who was at the bar occasionally in the evenings, is also troubling. Whether Noeski's testimony on this point is entirely credible will be discussed in the next part of this memorandum. However, as a friend of Bennett's, Noeski might be expected to overlook his conduct or to view it in a less critical manner. That Noeski and Bennett were fairly close social friends is evidenced by the fact that she had his telephone number programmed into her cell phone. One would not expect that level of familiarity with an occasional customer.

Mad. Gen. Ord. 39.03(8)(k)4 makes it clear that harassment can come not only from supervisors and coworkers, but from customers as well. In order for there to be liability where an employee is sexually harassed by a customer, there must be evidence showing that the harassment occurred during the performance of work related to the Complainant's employment and that the Respondent either knew or reasonably should have known of the harassment. There is no doubt that the harassment of the Complainant occurred during the performance of her job duties. There is no allegation that it occurred at any time or place other than during the performance of her work.

The real point of dispute between the parties is whether the Respondent, through its manager, Noeski, knew or reasonably should have known of the Complainant's harassment. Noeski states that she did not know of the harassment until the Complainant's phone call of November 28, 2012 about Bennett's conduct and refusal to leave. The Complainant states that she told Noeski of Bennett's conduct on several occasions and believed that Noeski knew of Bennett's conduct because Noeski was present at the bar on several of these occasions. The Complainant does not recall whether she told Noeski of Adams's harassment, but believes that she did. The Complainant did not believe that Noeski would address Adams's threatening comment because the Complainant did not see that Noeski had taken any action to her earlier complaints and because Adams and Noeski were related.

The record on whether the Complainant complained to Noeski in a manner that put Noeski on notice of the harassment being experienced by the Complainant is not clear. On the Complainant's first day, October 8, 2012, the Complainant testified that she'd had difficulty with Bennett. After Bennett left, the Complainant states that she told Noeski who happened to be at the bar that evening and observed Bennett that Bennett was "a pervert." Noeski allegedly indicated that Bennett was harmless, but that the Complainant had handled the situation appropriately by diverting Bennett's attentions. The Complainant further testified that she complained of Bennett's conduct on other occasions to Noeski, but that Noeski took no action. The Complainant also testified that Noeski was a frequent evening patron of the bar and was generally in a position to observe the harassing conduct of Bennett and others.

Noeski, on the other hand, denied being a frequent evening customer of the bar and denied observing Bennett's or others harassment of the Complainant. Noeski further testified that the first time she became aware of the Complainant's concerns involving Bennett was the Complainant's phone call on November 28, 2012. Noeski states that once she was made aware of Bennett's conduct, she took prompt action to keep him from harassing the Complainant by barring his presence while the Complainant was working.

The Hearing Examiner finds that either Noeski knew of Bennett's harassing conduct prior to November 28, 2012 and took no action to remedy or that, at a minimum, she reasonably should have known of Bennett's conduct from her visits to the bar as a customer or in her capacity as Manager in the evenings.

The Hearing Examiner finds that the Complainant is more credible than Noeski with respect to the question of notice. There is no testimony about exact words used by the Complainant to inform Noeski of Bennett's unwanted conduct, but when on the Complainant's first night of employment, the Complainant feels compelled to call one of Noeski's personal friends "a pervert," it starts placing Noeski on notice that there is a problem developing. It appears that the Complainant may not have used words such as "harassment," but that she found Bennett's conduct unwelcome seems apparent from the record.

Noeski's denials of being told of Bennett's objectionable conduct came quickly and without elaboration. The Hearing Examiner found Noeski's "no"s to questions about her knowledge of Bennett's conduct not convincing and rehearsed.

Even if the Complainant's objections to Bennett's conduct fall short of actual notice to Noeski, the Hearing Examiner finds that Noeski was in a position to know and either willfully ignored or failed to exercise reasonable oversight of the activities in the bar on her evening visits as a customer or as Manager. It is clear that Noeski was a customer/visitor to the bar outside of her work hours. While she might not have been "on duty" at those times, that does not give her carte blanche to ignore what was allegedly going on before her. If Noeski wanted to not have any continuing responsibility for supervision of the bar, she should have taken her socializing to another establishment. The testimony makes it clear that to a great extent, Noeski was a "one person show" when it came to the operation of the bar. Given the level of responsibility delegated to Noeski, any time she was on the premises, she was apt to observe conduct that might create liability for the Respondent. Additionally, the Hearing Examiner finds that it would be irresponsible for a manager in the position of Noeski not to make occasional inspections or observations of the operation of the bar at times when she was not regularly scheduled to be on the premises.

Noeski testified that she believed the Complainant's testimony about Bennett's conduct and that it had occurred as the Complainant stated. Given that testimony, Noeski's testimony that she never observed Bennett's conduct is not credible. The Hearing Examiner does not know whether to think that Noeski was simply too intoxicated to reasonably observe what was happening around her or that her close relationship with Bennett blinded her to the serious nature of his conduct, but the Hearing Examiner finds that Noeski was or should have been in a position to know of Bennett's and other customers conduct towards the Complainant.

One might ask why Noeski's response was different once the Complainant called Noeski on November 28, 2012. Perhaps Noeski failed to appreciate the seriousness of Bennett's and

other customer's conduct. The Hearing Examiner suspects that the Complainant's statement that she wanted to call the police on November 28, 2012 created a new level of urgency with respect to her complaints. Any business engaged in the sale of alcohol must be sensitive to potential involvement with the police. While there is insufficient evidence on the record to find that there was a policy at the bar not to call the police, the Complainant's threat to call the police to eject Bennett most likely demonstrated to Noeski that Bennett's conduct had reached a problem level. It is unfortunate, that Noeski did not see Bennett's and others' conduct as the problem it was prior to November 28, 2012.

In summary, the Hearing Examiner finds that the Complainant experienced unwelcome verbal and physical conduct of a sexual nature while employed by the Respondent. The conduct experienced by the Complainant was sufficiently severe and pervasive to make performance of her work unusually difficult and to create a workplace that was intimidating, hostile and offensive. The conduct directed at the Complainant occurred during her performance of her usually assigned duties. Though the individuals who were responsible for the harassment of the Complainant were customers of the Respondent, the Complainant's supervisor, Noeski, either knew or reasonably should have known of the harassment being experienced by the Complainant and failed to reasonably respond to the harassment until November 29, 2012. The record demonstrates a violation of section 39.03(8)(k)'s prohibition against sexual harassment.

Turning to the Complainant's claim that the Respondent terminated her employment because of her exercise of a right protected by the Ordinance, i.e., the right to oppose her sexual harassment by customers of the Respondent, the record is somewhat more clear. The Complainant contends that the first day after the Complainant insisted on the exclusion from the bar of one of Noeski's friend, Noeski determined that the Complainant must be terminated. The termination occurred one or two days after a disagreement between the Complainant and Noeski on December 3, 2012, the only day on which the Complainant worked after the incidents of November 28 and 29, 2012. Further, the Complainant argues that the varying reasons given by Noeski for the Complainant's termination create an inference of a retaliatory motive. Additionally, the Complainant asserts that the Respondent acted in a similar manner with another employee when that employee complained of harassment.

The Respondent asserts that the timing of the Complainant's termination was mere coincidence and to draw any conclusion from the timing of the decision relies upon faulty logic. Additionally, the Respondent states that the Complainant's termination was justified by the Complainant's emotional response to Noeski's criticism of her time cards and her closing procedure which were first and only raised on December 3, 2012.

The Hearing Examiner need not detail each step of the McDonnell Douglas analysis in this context. It is clear that the Complainant, in fact, exercised a right protected by the Ordinance and that she experienced an adverse action, her termination. What is at question is whether the Complainant termination was causally linked with her complaints about her harassment and whether the Respondent had a legitimate, nonretaliatory reason to terminate the Complainant.

The Complainant relies initially on the fact that Noeski's decision to terminate came mere days after, the Complainant threatened to call the police and cause Noeski to exclude one of her friends and customers from the bar. This temporal closeness can create an inference of retaliation in many circumstances. However, the Complainant does not rely solely on an

inference created by the timing of events. The Complainant points to the fact that the Respondent has produced several different reasons for the decision to terminate the Complainant. These include, an allegation that things were just not working out; problems with the Complainant's timekeeping and closing procedure; and insubordination because the Complainant yelled at Noeski on December 3, 2012.

The Respondent argues in counterpoint to the Complainant that the mere temporal closeness of the Complainant's complaints on November 28 and 29, 2012 trigger the logical fallacy of *post hoc ergo propter hoc*. This fallacy arises when there is a linkage between events that fails to take into account other possible explanations for the relationship of one event to a following event. In this case, the intervening event that breaks the inference of causation, according to the Respondent, is the Complainant's insubordinate reaction to a phone call made by Noeski to the Complainant on December 3, 2012. Noeski stated that she'd observed several issues with the Complainant's time cards including, the Complainant's writing upon her time cards. Also, Noeski was concerned about the length of time the Complainant seemed to be taking between the closing of the till and the Complainant's final closing of the business. Noeski suspected that the Complainant might be sitting and drinking instead of working for the good of the business. When Noeski called the Complainant on December 3, 2012, having no intention of terminating the Complainant, the Complainant became incensed when Noeski raised her concerns and the Complainant began to yell and swear at Noeski and threaten to close the bar earlier than posted hours. Noeski alleges that it was this reaction of the Complainant that motivated Noeski to terminate the Complainant.

Essentially, the above positions create an issue of credibility for the Hearing Examiner. If the Hearing Examiner believes Noeski, for the most part, then the Complainant's claim of retaliation is overcome. If the Hearing Examiner believes the testimony of the Complainant and does not believe Noeski's explanation, then retaliation is demonstrated. Given the record as a whole, the Hearing Examiner finds Noeski's version of events not worthy of credence.

First, the period of time between Noeski's call to Bennett excluding him from the bar and Noeski's raising of the time card/closing issues was short, at most four days, November 29, 2012 to December 3, 2012. That Noeski would choose to question the Complainant's time cards and closing procedure so soon after having to exclude a regular customer and friend because of the complaints of the Complainant strikes the Hearing Examiner as highly suspicious. Had there been a serious issue with respect to the time cards, the Hearing Examiner believes that as a prudent manager, Noeski would have raised the issue with the Complainant more contemporaneously with the concern. It was Noeski's testimony that time cards were submitted weekly. It seems more likely that if there was an issue such as that now claimed by Noeski, she would have known of it and questioned the Complainant about it earlier than December 3, 2012. Additionally, Noeski testified that there were no issues with the Complainant's employment prior to the November 28/29, 2012 incident. What happened to create the issue for Noeski between those dates and December 3, 2012? The Complainant's complaints of sexual harassment and the threat to call the police to eject Bennett.

Noeski's credibility is further eroded by the shifting reasons given for the Complainant's termination. In the Respondent's post-hearing brief, the Respondent alleges that the Complainant was, at best, a marginal employee. While there is no contention that the Complainant was the best of all employees, the record indicates that there were no significant issues with the Complainant's employment from the perspective of the Respondent prior to

November 28, 2012. In its answer to the Notice of Hearing, the Respondent asserts that the Complainant was terminated due to issues with her time cards and problems with her closing procedures. However, Noeski did not corroborate these reasons at hearing, indicating that there were no such problems prior to December 3, 2012, and that on December 3, 2012, she had no intention of terminating the Complainant prior to the phone call on that date.

That Noeski told the Complainant that things were just not working out in the phone call during which Noeski terminated the Complainant and gave that response at other times further complicates the terrain of explanation for the Respondent.

The strange circumstance of Zentner's statement casts doubt on the Respondent's credibility as well. Zentner testified that Noeski asked Zentner on December 3, 2012 to write a statement allegedly detailing the Complainant's extreme conduct on December 3, 2012. Zentner had never previously been asked to produce such documentation with respect to another employee. These circumstances give rise to an inference that Noeski knew that what she was doing needed support and was presumably prepared as a cover for the reasons for the termination of the Complainant.

The Respondent asserts that the Complainant's conduct and demeanor during the phone call of December 3, 2012 was so extreme that Noeski felt compelled to terminate the Complainant's employment. While until the complaints of November 28 and 29, 2012, the Complainant had apparently been relatively a trouble-free employee. It seems uncharacteristic for the Complainant to go from being pretty much no problem to a shrieking, swearing problem child in the space of a single telephone call.

Zentner's statement and testimony about the Complainant's subsequent phone call on December 3, 2012 seems somewhat contrived to the Hearing Examiner. The Hearing Examiner can accept that the Complainant may have been upset and concerned when she called Zentner. After all, she'd just had a phone call during which her manager, who had not previously criticized her, told her of concerns that had not been previously mentioned calling into question the Complainant's veracity and her work for the Respondent. However, that Zentner listened patiently for 45 minutes to a profane diatribe from the Complainant does not seem particularly credible. It is not clear how Noeski and Zentner made contact with each other after the Complainant's phone call to Zentner. That they spoke is clear from Zentner's testimony that Noeski asked Zentner to prepare the statement which is introduce as exhibit I. It appears from Noeski's testimony that by the time she spoke to Zentner, Noeski had already decided to terminate the Complainant. Given that, it's not clear what Zentner's statement might have done to add to the reasons for the Complainant's termination.

All in all, the Respondent's position that Noeski acted because the Complainant was insubordinate to her on a single phone call is not credible. That the Respondent alternatively claims that the Complainant was terminated due to irregularities on her time cards or in her closing procedures are equally incredible given Noeski's testimony.

The Complainant introduced the testimony of Roxane Rodgers, in part, to demonstrate that Noeski had acted in a similar manner when Rodgers brought complaints of sexual harassment to Noeski. While the record is temptingly close to such a comparable situation, there is sufficient doubt in the mind of the Hearing Examiner to accept the Complainant's position. Noeski testified that she decided to terminate Rodgers because money had been

missing from the gambling machines and from the till. Rodgers appeared to admit that she'd taken the money but had agreed to pay it back. The testimony of Noeski and Rodgers differ on the timing of events on the day Noeski fired Rodgers. Rodgers stated that she'd come to complain of sexual harassment to Noeski and did so and that Noeski then terminated her employment. Noeski testified that she fired Rodgers and only then did Rodgers tell Noeski of the harassment and threw a written complaint at Noeski.

In this transaction, neither Rodgers nor Noeski came across as particularly believable. Rodgers seemed to admit that she'd been guilty of stealing from her employer. Noeski's conduct in this circumstance does seem eerily similar to that complained of in this matter. However, as it is the Complainant's burden of proof, the Hearing Examiner finds that he will not utilize this incident in support of the Complainant's complaint. The Hearing Examiner is simply not convinced that Rodgers' version reflects what actually happened.

Notwithstanding the issues with Rodgers testimony, the Hearing Examiner finds that the Respondent terminated the Complainant because of the Complainant's complaints of sexual harassment had escalated to the potential for a call to the police and which required Noeski to bar from the premises, Bennett, a regular customer and friend of Noeski. At hearing, Noeski attempted to minimize the level of friendship between herself and Bennett. However, the Hearing Examiner finds that there was likely a close personal friendship as evidence by Noeski's having Bennett's telephone number programmed on her cell phone. That is not the action of merely a casual acquaintance. The Hearing Examiner believes that On December 3, 2012, Noeski called the Complainant with the pretext of laying a plan for the Complainant's termination by setting forth complaints about the Complainant's time cards and closing procedures. That the Complainant might have become upset about being wrongly accused of misconduct is understandable. Noeski's efforts to determine the best way to handle the Complainant's termination by contacting the Tavern League and the Equal Rights Division, further casts doubt on the Respondent's explanation for the Complainant's termination.

Having found that the Respondent has violated the provisions of the Ordinance by permitting the Complainant's sexual harassment (Mad. Gen. Ord. 39.03(8)(k)) and retaliating against the Complainant for her exercise of a right protected by the Ordinance (39.03(9)), the Hearing Examiner must now determine an appropriate remedy to make the Complainant whole. Mad. Gen. Ord. 39.03(10)((b)4, 39.03(10)(c)(2)b.

At the end of her post-hearing brief, the Complainant asks the Hearing Examiner to schedule further proceedings to determine an appropriate remedy. The Notice of Hearing has one of its issues for hearing provided that if discrimination or retaliation is found, to what damages, if any is the Complainant entitled? This is a clear indication that the Complainant was obligated to present evidence setting forth her damages. The Hearing Examiner finds no agreement between the parties to bifurcate these proceedings along the lines of liability and damages. The Complainant did present some evidence on the issue of damages and argued that evidence in the Complainant's post-hearing brief. Accordingly, the Hearing Examiner is prepared to address, to some degree, the issue of damages and a make whole remedy.

A "make whole" remedy includes a calculation of economic loss experienced by the Complainant, such as back pay and other out-of-pocket losses. Mad. Gen. Ord. 39.03(10)(c)(2)b. A "make whole" remedy also includes damages to compensate a prevailing

Complainant for his or her noneconomic damages, or emotional distress for the humiliation and emotional impact of discrimination. Mad. Gen. Ord. 39.03(10)(c)(2)b.

When the Complainant began work for the Respondent, she was a part-time employee being paid $6.50 per hour plus tips. The Complainant's tips were not reportable to the Respondent and she did not report them. In October of 2012, the Complainant worked eight shifts. In November of 2012, the Complainant worked 16 shifts. In December of 2012, it appears from Exhibit H that the Complainant was scheduled to work eight shifts beginning on December 1 and running through December 26, 2012. From the record, we know that the Complainant did not work on December 1 for an unexplained reason. She did work on December 3 and was paid for that day. The remaining six shifts were not worked due to the Complainant's termination.

The Complainant calculated that she was paid an average of $53.15 per shift. The Complainant derived this figure by taking the total amount of wages paid the Complainant as reflected on the Complainant's W2 statement from the Respondent and dividing that number by 25, the total number of days worked by the Complainant, eight in October, 16 in November and one in December. The Hearing Examiner finds that this method of calculation appears to be a reasonable process for determining the Complainant's wages.

Respondent's Exhibit H indicates that the Complainant was scheduled to work six more shifts during December that she could not work due to her termination. Multiplying the Complainant's per-shift average income by the six remaining shifts, yields a wage loss of $318.90 for the month of December 2012.

Given that the Complainant worked for eight days in October and 16 days in November and was scheduled to work eight days in December, the Hearing Examiner is comfortable in projecting that the Complainant would continue to work a minimum of eight shifts per month had she not been terminated. This works out to an average of two shifts per week.

The testimony at hearing was that the Complainant found part-time work as of the middle of January 2013 at both the Orpheum Theater and at the Great Dane Pub at the Dane County Airport. Though the testimony does not reveal the per hour wage paid at the Orpheum Theater, the Complainant was paid $7.00 per hour at the Great Dane Pub, an hourly wage higher than that paid at the Respondent's.

This testimony leads the Hearing Examiner to the conclusion that the Complainant would have been scheduled for a minimum of two shifts per week for the first two weeks of January 2013. That she was not scheduled for those shifts is attributable to her termination. This results in a calculation of an additional wage loss of $212.60. Adding the December and January wage loss figures together results in a total wage loss of $531.50.That the Complainant fairly promptly found employment to mitigate her wage loss minimizes this element of damages owed to the Complainant. However, in order for the Complainant's wage loss to reflect the lost opportunity cost of these wages, the Hearing Examiner will additionally order that the Respondent pay pre-judgment interest on the Complainant's wage loss. It has been some time since the Hearing Examiner was called upon to fix an interest rate for calculating pre-judgment interest. Rather than the Hearing Examiner speculating on an appropriate rate, the Hearing Examiner will direct the parties to confer in an attempt to reach an agreement on an appropriate rate for calculating pre-judgment interest. Should the parties not be able to come to an agreement on this figure,

the Complainant shall petition the Hearing Examiner for further proceedings on this matter. Miller v. CUNA, MEOC Case No. 20042175 (Ex. Dec. 5/16/08).

The Hearing Examiner now turns to the issue of damages for emotional distress, embarrassment and humiliation. Determining what award of damages will adequately compensate a prevailing Complainant for emotional damages or injuries stemming from discrimination is more an art than a science. In making such awards, the Hearing Examiner reviews the history of such awards made under the Ordinance in the past. In addition, there is a significant element in weighing one's personal experiences and comparing them to those of the Complainant. Finally, one must try to quantify the totality of the record regarding the impact of discrimination on the Complainant and assess how badly the Complainant suffered as a result of the discrimination.

It is tempting to simply assess a single amount of damages for the case as a whole. However, the Hearing Examiner believes that given the fact that he has found two separate violations of the Ordinance and that each violation relies on separate circumstances, the Hearing Examiner will attempt to address damage awards for both the Complainant's sexual harassment and for the retaliation she experienced.

Perhaps the closest case of harassment decided by the Commission to the present matter is that of Leatherberry v. GTE Directory Sales, Co., MEOC Case No. 21124 (Comm. Dec. 4/14/93, Ex. Dec. 1/5/93). In Leatherberry, the Complainant was a young woman with a family who was racially harassed by her supervisor because of her relationship with a Hispanic male. The harassment was sufficiently severe that the Complainant constructively discharged herself rather than endure the harassment further. At hearing, both the Complainant and her then-husband testified as to the impact of the harassment on her, her family and their relationship. The Hearing Examiner awarded the Complainant $25,000.00 in damages for her emotional distress stemming from the harassment. The Hearing Examiner was taken by the fact that the Complainant had to forego the career path on which she'd been working and that her supervisors failed to take seriously the Complainant's complaints of harassment.

Another case that might provide some guidance with regard to the issue of damages is Laitinen-Schultz v. TLC Wisconsin The Laser Center, MEOC Case No. 19982001 (7/1/2003). In Laitinen-Schultz, the Complainant was constructively terminated after she was harassed by her supervisor because of her disability. The Hearing Examiner awarded Laitinen-Schultz $15,000.00 for her emotional distress. The Hearing Examiner found that though the Complainant experienced an intense period of emotional distress, it was relatively short-lived as evidence by other factors in the record.

The present case shares elements that track with each of the above-discussed cases. In all three, the Complainants experienced harassment that was personal in nature. While Laitinen-Schultz's was more limited in scope and time, both Leatherberry and the present Complainant experienced harassment over a longer period of time and repeated incidents of it. While neither the Complainants in Laitinen-Schultz or Leatherberry experienced physical contact or threats, the Complainant in this case did. All three Complainants had the testimony of another to corroborate the testimony given by the Complainant.

One factor that differs in the present matter from Leatherberry and Laitinen-Schultz is a history of abuse. It is well settled that one must take a Complainant as that individual is found

and to not attempt to overlay the notion of a "reasonable person" over the Complainant. Undoubtedly, the Complainant's experiences as a person with a history of past physical and sexual abuse aggravate the impact of the sexual harassment experienced by the Complainant. Ellis's testimony supports the Complainant's testimony of a substantial adverse affect on the Complainant. There were tears, anxiety, trouble sleeping and perhaps some medication. The Complainant testified that she'd seen a counselor over the sexual harassment that she experienced.

On the other hand, the Complainant was able to continue to work and meet her daily needs. Subsequent to her termination she actively sought work and was able to continue with her life.

The harassment suffered by the Complainant did not occur over so long a period of time as that experienced by Leatherberry, and did not cause the Complainant to constructively terminate her employment or to abandon a career for which she was working. The Complainant's harassment was of a more substantial kind than that experienced by Laitinen-Schultz though it was for a somewhat longer period of time.

The Hearing Examiner does not wish to minimize the impact of the harassment upon the Complainant. Placing a dollar amount on one's emotional pain is never an easy or precise exercise. The record in this matter is not so extensive as the Hearing Examiner might wish. However, the Complainant's testimony is clear and sufficient to support an award of emotional distress damages. Chomicki v. Wittekind, 128 Wis. 2d 188, 381 N.W. 2d 561 (Ct. App. 1985).

Because the Complainant's harassment was more severe than that experienced by Laitinen-Schultz and of a somewhat different type and effect than that of Leatherberry, the Hearing Examiner will award the Complainant damages for her emotional distress in the amount of $20,000.00.

It is somewhat difficult to separately assess damages for the emotional distress of the Respondent's termination of the Complainant's employment. In some respects, a claim of retaliation is more serious than the underlying sexual harassment. Retaliation causes one to question the structure of the law established to encourage those to complain when they believe they've been injured. To do what one is encouraged to do to redress his or her grievances and then be penalized for it, upsets the underpinnings of the system. The Hearing Examiner does not wish to minimize the impact of sexual harassment, but to express the serious nature of a claim of retaliation. Were the Hearing Examiner given the authority to assess punitive damages, it is in retaliation claims that they would be most appropriate as retaliation, by its nature, represents an act after contemplation.

The range of damages assessed by the Hearing Examiner in cases of retaliation stretches from $4,000.00 in Morgan v. Hazelton Labs, MEOC Case No. 21005 (Ex. Dec. 4/2/93) to $75,000.00 in Miller v. CUNA, MEOC Case No. 20042175 (Ex. Dec. . 5/16/2008) The differences in these cases demonstrate the importance of the facts in a given case in analyzing the damages to be awarded. In Miller, the Complainant was a Vice President of a national company whose career was entirely ruined by the actions of the Respondent. His responsibilities to his family for income and insurance were affected. The Complainant testified eloquently about the emotional distress he felt when he tried to explain to his young son why he no longer went to his office. The Complainant's social structure was damaged due to his

ostracism from his former colleagues. These personal factors all combined to support the substantial award for emotional distress in Miller.

On the other hand, in Morgan, the Hearing Examiner found that the record was limited and did not support a substantial award of damages for emotional distress. The Complainant was not particularly forthcoming about the impact of the Respondent's termination of his employment on him or his family. Given the lack of explicit testimony on the part of the Complainant in Morgan, the Hearing Examiner's hands were tied in making an award.

In the present matter, the Complainant testified that she was shocked and that it took several days before she started to recover her equilibrium and start the steps necessary to continue with her life. Given the record, it is somewhat difficult to separate the emotional impact of the harassment and that of the retaliation. However, the Hearing Examiner concludes that the Complainant did experience some degree of emotional distress separate and distinct from that caused by the harassment when the Respondent terminated her employment.

The Hearing Examiner in reviewing the record as a whole finds that the emotional distress experienced by the Complainant for her retaliation is more closely aligned with that in the Morgan case than that of the Miller case. However, the Complainant's testimony was somewhat supportive of a higher award than that in Morgan. The Hearing Examiner awards the Complainant $10,000.00 as a compensatory award for the damages related to her termination. This amount is separate and distinct from that awarded for the emotional distress related to the Complainant's sexual harassment.

In order to make the Complainant whole, the Hearing Examiner awards her the customary costs and fees in bringing this action including a reasonable attorney's fee. It has been long settled that a prevailing Complainant must receive such costs and fees in order to further the important social purposes of the Ordinance and to encourage individuals to act as public Attorneys General to prevent discrimination and its related effects on society. Miller, supra, Morgan, supra.

Signed and dated this 15th day of August, 2016.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Randall B Gold
Timothy J Yanacheck