June 14, 1985

Prof. Carin Clauss
c/o University of Wisconsin Law School
975 Bascom Mall, Room 407
Madison, WI 53703

Atty. Robert Hesslink
HESSLINK LAW OFFICES, S.C.
6000 Gisholt Drive
Madison, WI 53713

Subject: Whiteagle v. Badge Mechanical, #20133: Attorney Fees and Costs and Other Issues of Remedy

The attached Interim Recommended Decision is not appealable to the Commission until such time as the Examiner has made a determination regarding the following issues of remedy:

1. The amount of reasonable attorney fees (if any) and costs that the Complainant is entitled to;
2. The base amount of backpay (prior to computing any interest due) that the Complainant is entitled to receive pursuant to the Interim Recommended Order (see attached).

The complainant must file at the EOC offices and serve upon the Respondent its bill for attorney fees and costs along with its supporting arguments regarding the above-listed issues of remedy no later than fifteen (15) days from receipt of this letter by Prof. Clauss. The Respondent then has fifteen (15) days from receipt of the Complainant's bill and supporting arguments to file and serve its response. The parties will subsequently be notified of the examiner's rulings and when the appeal time for all issues begins to run.

The parties are encouraged to attempt to resolve this case without further proceedings. To that extent, the parties and/or their attorneys (advocates) are requested to discuss this matter prior to the submission of the Complainant's bill for attorney fees and costs.

Sincerely,

Allen T. Lawent
EOC Hearing Examiner

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

Marlys Whiteagle 1502 Williamson Street Madison, WI 53703 Complainant vs.	INTERIM RECOMMENDED DECISION Case No. 20133

Badger Mechanical 2046 Winnebago Street Madison, WI 53704 Respondent	

A complaint was filed with the Madison Equal Opportunities Commission (MEOC) on September 1, 1983 alleging discrimination on the basis of sex and race in regard to employment, specifically in regard to terms and conditions of employment and in regard to discharge from employment. Said complaint was amended on October 21, 1983 to further allege discrimination on the basis of the Complainant having filed a complaint with the MEOC pursuant to Sec. 3.23 of the Madison General Ordinances (i.e., retaliation) in regard to employment (specifically, in regard to failure or refusal to re-employ).

Said complaint was investigated by Mary Pierce of the MEOC staff and an Initial Determination dated March 15, 1984 was issued concluding that probable cause existed to believe that discrimination had occurred as alleged.[1] Conciliation failed or was waived and this matter was certified to public hearing.

A hearing was held commencing on August 8, 1984. Prof. Carin Clauss appeared as an advocate on behalf of the Complainant who also appeared in person. Atty. Robert M. Hesslink, now of HESSLINK LAW OFFICES, S.C.,[2] appeared on behalf of the Respondent. Based upon a review of the record, including consideration of the post-hearing briefs submitted by the parties, the Examiner issues the following Interim Recommended Decision:

INTERIM RECOMMENDED FINDINGS OF FACT

1. The Complainant, Marlys Whiteagle, is an adult female of Native American descent who resides in the State of Wisconsin.
2. The Respondent, Badger Mechanical, Inc., has its only business office at 2046 Winnebago Street in the City of Madison, State of Wisconsin. Badger Mechanical does business in the City of Madison and performs jobs both inside and outside the boundaries of the City of Madison.
3. The Respondent is engaged primarily in the business of construction work, both residential and commercial.
4. The Respondent has approximately ten permanent employees for which the Winnebago Street office in the City of Madison is the home office or headquarters.
5. In addition to its permanent employees, the Respondent hires other individuals on a job-by-job basis. The Respondent is a member of the Mechanical Contractors Association of Madison which is part of a state-approved apprenticeship program along with Steamfitters Local Union No. 394 (hereinafter, the union).
6. When the Respondent needs additional steamfitters, whether journeypersons or apprentices, the Respondent contacts the union which refers the steamfitters to the Respondent. An apprentice is referred on the basis of her/his position on the union's "out-of-work" list, i.e., the steamfitter apprentice who has been out of work the longest is referred first.
7. Once a steam fitter apprentice has been referred to the Respondent by the union, that apprentice becomes an employee of the Respondent on the particular job available. The Respondent also may reassign the individual to other jobs without having to go through the union. Once an apprentice starts working, the Respondent signs and issues the paychecks to the apprentice, supervises the apprentice's work and controls the manner in which the work is performed. All

payroll and other employee records for the apprentice are kept at the Respondent's Madison office, regardless of where the apprentice works, for the time that the apprentice is employed by the Respondent.

8. The Respondent's decision to hire the Complainant was made in the City of Madison.
9. The Complainant, an apprentice steamfitter, began work for the Respondent on April 14, 1983. The referral slip she received from the union did not specify a particular job site, and she reported to the Respondent's Winnebago Street office at 8:00 a.m. on April 14. She was given a W-2 (tax) form and introduced to Larry Shields, her foreman.
10. Shields drove the Complainant to the job site to which she was assigned. The job site consisted of four buildings on the University of Wisconsin-Madison Campus: Russell Hall, Physical Science, Microbiology and Birge Hall. The Complainant started at Russell Hall and worked there, at the Physical Science Building and at the Microbiology Building for approximately two weeks. After that time, she worked almost exclusively at Birge Hall.
11. After her first day, the Complainant always reported directly to the job site; i.e., she reported to the building where she was to start work for that day.
12. Shields made all the work assignments and made out the time cards for all the steamfitters at the job site, including apprentices. Shields distributed the checks, issued by Badger Mechanical, every Friday afternoon to the steamfitter journeypersons and apprentices at the job site, including the Complainant.
13. The Complainant was not an employee of the State of Wisconsin.
14. The Complainant was not an employee of the union (Local 394).
15. The Complainant was not an employee of the Madison Steamfitters Joint Apprenticeship and Training Committee.
16. At the time the Complainant first started work, there were 4 or 5 journeyperson steamfitters and one other steamfitter apprentice, Brett Sprecher. This same crew, except for steamfitter Gene Ruda who was replaced after the Complainant had been employed for about a week, also worked with the Complainant at Birge Hall. In addition, apprentice Ned Powell and journeyperson David Johnson were hired in late May of 1983 for a specific project at Birge Hall and then laid off after a couple of weeks.
17. The Complainant was employed by the Respondent until August 31, 1983 when she was laid off.
18. In the nine week period from April 14 to June 17, 1983, the Complainant missed one hour of work. On June 18, 1983, a Saturday, the Complainant was injured in a horseback riding accident resulting in "a fracture of the right transverse process of L4 and hematuria." The Complainant returned to work on July 13, 1983.
19. The Respondent hired apprentice steamfitter Mike Stanford on or about July 6, 1983.
20. The Complainant was assigned to work as a partner with journeypersons on a less frequent basis than Sprecher and/or Stanford.
21. The Complainant's overall job performance was at least satisfactory during the time she was employed by the Respondent.
22. During the approximately seven weeks - July 13 to August 31, 1983 - that Whiteagle and Stanford were simultaneously employed by the Respondent, Stanford worked with a journeyperson partner at least five of those weeks. At a minimum Stanford was partnered with journeyperson Skip Kreger for two weeks, with journeyperson Don Westbury for two weeks and with journeyperson Dick Dietrich for one week.
23. During the same seven week period (as denoted in Interim Recommended Finding of Fact 22 above) from July 13 to August 31, 1983, Sprecher worked with journeyperson partner Edward Martin the entire seven weeks. The Complainant, during that same seven week period, worked with journeyperson Don Westbury for 4-1/2 days, journeyperson Bill Bollfrass for 1 day,

journeyperson Dick Dietrich for 1-1/2 days, journeyperson Skip Kreger for 1/2 day and journeyperson Dick Dyer for 1 day, a total of 8.5 work days or 1.7 work weeks.

24. The Respondent had no permanent partnership arrangements between apprentices and journeypersons.
25. The Complainant was primarily assigned to perform demolition and material handling tasks which required minimal use of steamfitter skills and which were generally not performed with a partner. Sprecher and Stanford each spent a majority of their time on tasks which required and developed a much greater variety of steamfitter skills and which were typically performed with a journeyperson partner.
26. Sprecher was a certified welder. Neither Stanford nor Sprecher was assigned to do any tasks which the Complainant could not also do during the time that the three were simultaneously employed by the Respondent. Both Stanford and Sprecher are white males.
27. After the Complainant was laid off on August 31, 1983, she called James Ward, her union representative, and discussed her layoff with him. Ward subsequently called Shields and Ward also called either Tom McIntyre, the Respondent's president, or a Tom Thompson. A luncheon meeting between Ward and McIntyre was arranged and occurred within a few days of the layoff.
28. In the course of discussing the Whiteagle situation during said luncheon meeting, Ward told McIntyre that Whiteagle was considering filing a discrimination charge. Ward tried to convince McIntyre to re-employ Whiteagle. McIntyre told Ward that he (McIntyre) would take her (Whiteagle) back. It was understood between McIntyre and Ward that the offer to re-employ Whiteagle was subject to the condition that she not file a discrimination charge. McIntyre would have taken Whiteagle back without having to lay off any other steamfitter apprentice or journeyperson.
29. Upon returning to his office after the meeting with Ward, McIntyre found in the mail a copy of the complaint that Whiteagle had filed on September 1, 1983 with the Madison Equal Opportunities Commission. In a subsequent telephone conversation, Ward and McIntyre agreed that the Respondent's offer to re-employ Whiteagle no longer was valid as the offer had been contingent upon Whiteagle not filing a claim of discrimination.
30. On September 20, 1983 the Respondent sent Whiteagle a letter which read as follows:

    September 20, 1983

    Marlys Whiteagle
    1502 Williamson Street
    Madison, WI 53703

    Re: Resumption of Employment

    Dear Marlys Whiteagle,

    This letter is to confirm to you that we have expressed to Mr. James Ward, business agent UW 394, on September 6, 1983 our willingness to take you back to our employment. We might further add, that we stated to Mr. Ward that this agreement expressly did not include paying any retroactive backpay.

    Please let us know if you require further information.

    Sincerely,

BADGER MECHANICAL, INC. DIV.
OF BADGER SHEET METAL OF MADISON LTD.
/s/
Thomas F. McIntyre
President

31. Whiteagle received the letter (see Finding of Fact 30 above) on the following day, September 21, 1983. She called McIntyre and expressed her willingness to take the job which had been offered. McIntyre indicated that things had gotten too complicated and that she (Whiteagle) should contact a lawyer because McIntyre had already contacted a lawyer.
32. The Complainant was not re-employed by the Respondent on September 21, 1983 in retaliation for having filed a complaint with the Madison Equal Opportunities Commission.
33. Aside from the issue of retaliation (see Finding of Fact 32 above) above, the Madison Equal Opportunities Commission does not have territorial jurisdiction under the specific facts of this case to address any of the other issues raised in the complaint, specifically, those issues relating to sex and/or race discrimination in regard to job assignments and/or discharge. (Consequently, I have not detailed all facts pertinent to liability issues over which I have determined the agency has no territorial jurisdiction. These additional facts would need be addressed only if it is later determined the agency has territorial jurisdiction and may enter liability findings on these issues.)

INTERIM RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of each of the protected classes of race and sex within the meaning of Sec. 3.23, Madison General Ordinances.
2. The Respondent is an employer within the meaning of Sec. 323, Madison General Ordinances.
3. The Respondent discriminated against the Complainant in violation of Sec. 3.23(8) - formerly Sec. 3.23(7)(e) - of the Madison General Ordinances, by failing or refusing to rehire her as a steamfitter apprentice because she made a discrimination complaint under Sec. 3.23, Madison General Ordinances.

INTERIM RECOMMENDED ORDER

1. That the Respondent shall cease and desist from discriminating against the Complainant on the basis of her having made a complaint under Sec. 3.23, Madison General Ordinances.
2. That the Respondent shall pay to the Complainant all amounts she would have earned, less ordinance setoffs, had she been re-employed by the Respondent from September 21, 1983 until such time as the last steamfitter apprentice was laid off at the Birge Hall site.
3. That the Respondent shall reimburse the Complainant for any and all other financial losses she incurred as a result of the Respondent's failure or refusal to re-employ her on September 21, 1983.
4. That the Complainant shall receive from the Respondent interest on all amounts due to her based on a rate of twelve percent per annum to be computed from the time the amount became due or would have become due, had she been re-employed on September 21, 1983, until such time as it is actually paid.
5. That the Respondent shall pay to the Complainant a sum equal to all reasonable attorney fees (if any) and costs which the Complainant incurred and/or is entitled to receive as a result of the liability findings entered previously in this decision. The Complainant shall also receive from the Respondent interest, to accrue from the date of this decision, at the rate of twelve percent per annum on all attorney fees and costs to which she is entitled.

MEMORANDUM OPINION

The jurisdictional issues raised by the Respondent may be divided into two categories:

(1) General Preemption by State Law
(2) Preclusion Based on the Specific Facts of This Case

A. Jurisdictional Issue 1: General Preemption by State Law

Very simply, it would be inappropriate for the Commission to rule that the fair employment provisions of Section 3.23, Madison General Ordinances (MGO), were preempted by state law, specifically, by Section 111.31, Stats., et seq. The local ordinance and the Commission were created by a legislative act of the City Council. The Commission is an administrative body to whom authority has been delegated by the Council. As such, the Commission may not usurp the Council's legislative function by ruling on the general validity of the ordinance. The Commission must assume that the ordinance passed by the City Council is lawful and must leave to the State courts a determination of whether any general state law preemption exists.

Nevertheless, I will discuss reasons why, in my view, the fair employment provisions of the Madison ordinance are not preempted by state law (i.e., by the Wisconsin Fair Employment Act or WFEA). As a prelude to my discussion, I note that the Attorney General also takes the position in 70 AG 226, 233 (1981) that cities are not preempted by the WFEA from adopting local equal employment opportunity ordinances. (See also 63 AG 182.)

To begin my discussion, I took to the reasoning of the Wisconsin Supreme Court in Wisconsin Association of Food Dealers vs. City of Madison, 97 Wis. 2d. 426, 293 N.W. 2d. 540 (1980) and Anchor Savings and Loan vs. E.O.C., 120 Wis. 2d. 391 355 N.W. 2d. 234 (1984), which hold that Sec. 62.11(5) of the Wisconsin Statutes, the "home rule statute", may authorize a municipal ordinance "notwithstanding statewide concern in the matter which it regulates." The test for determining whether an ordinance is valid in an area of mixed statewide and local concern, such as employment discrimination, is as follows:

(1) the legislature has not expressly withdrawn the power of the municipalities to act;
(2) the ordinance does not logically conflict with state law;
(3) the ordinance does not defeat the purpose of state legislation;
(4) the ordinance does not go against the spirit of state legislation.

The Respondent argues that Food Dealers, Anchor and Volunteers of America vs. Village of Brown Deer, 97 Wis 2d. 619, 294 N.W. 2d. 44 (Ct. App., 1980) stand for the proposition that the preemption doctrine does not require that an actual conflict between the state and local regulations be shown. It is sufficient, the Respondent argues, that local legislation be shown as inconsistent with the statewide scheme of uniform enforcement.

The Respondent's argument is essentially that the legislature intended the state administrative remedy, administered by the Equal Rights Division of the Department of Industry, Labor and Human Relations (ERD/DILHR), to be consistent and exclusive and that an ordinance which established an entirely different forum would infringe upon the spirit of the state law or the general policy of the state.

EXCLUSIVITY

There is no question that local enforcement, as well as state enforcement, of fair employment laws was contemplated as part of the federal scheme in this area. The Madison EOC, like the state ERD/DILHR, has been designated as a "706" agency by the federal EEOC. The question of whether the Madison EOC has general authority to enforce its fair employment ordinance is purely a question of state law.

The first place to start in determining whether the legislature intended ERD/DILHR to be the exclusive forum for employment discrimination cases is the WFEA itself. Section 111.375(1), Stats. provides in part that (except for State employees who are subject to the jurisdiction of the State Personnel Commission), ". . . this subchapter shall be administered by the department (DILHR)." The next sentence grants rulemaking authority to the department (DILHR), and the next sentence states that, "The department or the commission may, by such agents or agencies as it designates, conduct in any part of the State any proceeding, hearing, investigation or inquiry necessary to the performance of its functions." (Emphasis supplied.)

The Madison EOC has had a worksharing agreement with the state Equal Rights Division for over five years (since March of 1980). That worksharing agreement provides that, "The Equal Rights Division may administratively review the adequacy of the Madison Equal Opportunities Commission's final determination and the files or records upon which it was based and may give such final determination substantial weight in determining whether to process the case further." Additionally, the Equal Rights Division and the Labor and Industry Review Commission has given res judicata (or collateral estoppel) effect to decisions of the MEOC made subsequent to administrative hearings on the merits. (See ERD/DILHR Decision Digest IV, p. 32.)

In this Examiner's view, the phrase in Sec. 111.375(1), Stats., "by such agents or agencies" contemplated the utilization by DILHR of individuals or organizations, including municipal enforcement agencies like the MEOC, that were not state agencies. Although the MEOC enforces a local ordinance (Sec. 8.23, MGO), I find the worksharing agreement (that applies to cases where there is concurrent jurisdiction) between the ERD/DILHR and the MEOC to be consistent with the spirit of Sec. 111.375(1), Stats.

Further, the "Declaration of Policy" in sec. 111.31, Stats. was amended (effective in August of 1982) to include subsection (5) that states:

> (5) The legislature finds that the prohibition of discrimination on the basis of creed under s. 111.337 is a matter of statewide concern, requiring uniform enforcement at state, county and municipal levels.

In Sec. 111.337(3) it states that:

> (3) No county, city, village or town may adopt any provision concerning employment discrimination because of creed that prohibits activity under this section.

The implication of the statements by the legislature regarding creed discrimination is that the legislature contemplated that municipalities regulate in the area of employment discrimination and that the legislature wanted to make sure that all laws were uniform in the area of creed discrimination. The implication is also that in other areas of employment discrimination, the laws need not be uniform or - as described by the Court of Appeals in an unpublished decision cited below[3] - mere echoes of the WFEA.

Another source of implied statutory authority that municipalities may regulate in the area of employment discrimination and that the legislature did not intend the field to be preempted by the state law is found in Sec. 66.433, Stats. That section is discussed in the previously-referenced unpublished opinion by the Fourth District Court of Appeals entitled Federated Rural Electric Insurance Corporation vs. MEOC, et al.[4] The case was affirmed by virtue of a three to three division on the Wisconsin Supreme Court (see per curiam opinion filed March 26, 1982).

Sec. 66.433, Stats., according to the Court of Appeals, did not purport to confer power or to delegate authority to municipalities to regulate on the subject of "employment discrimination". Rather, the court found Sec. 66.433, Stats. assumed the existence of the police powers conferred by the general charter laws and issued a broad invitation to municipalities to direct those powers toward ameliorating a broad variety of problems caused by discrimination at the local level.

The Court of Appeals also found that it was irrelevant that neither Sec. 66.433, Stats., nor the WFEA contained an express declaration, comparable to those contained in the statutes concerning housing discrimination,[5] that municipalities were not preempted from enacting employment discrimination ordinances. The court found that the legislature contemplated a diversity of local enactments and that there was no suggestion in the statute (sec. 66.433) that the legislature intended to decree uniformity of municipal regulation, to preempt the field of employment discrimination, or to limit municipalities to enacting mere echoes of the WFEA provisions.

In light of the reasoning of the Court of Appeals in Federated, the provisions added to the state statute creed discrimination certainly make sense. Because the legislature wanted uniformity in the area of creed discrimination, it explicitly stated so in the WFEA when it was amended. The clear implication is that the legislature contemplated local fair employment regulation and enforcement and that such regulation need not mirror the WFEA (except where the legislature designated uniformity, as in the area of creed discrimination). (It should also be noted here that the previously-cited Anchor case was addressed solely in the context of credit discrimination and did not address sec. 66.433, Stats. which is aimed at employment, housing and public accommodations discrimination).

Also, sec. 66.433 Stats.[6] indicates a legislative cognizance of the existence of state or federal agencies (such as the State ERD/DILHR and the Federal EEOC) having similar or related anti-discrimination functions and requires cooperation by municipal agencies with those state or federal agencies. This too, I find, indicates a clear legislative acknowledgement that the state employment discrimination law (WFEA) and the state enforcement agency (ERD/DILHR) were not to be the exclusive remedy and forum for employment discrimination cases in Wisconsin.

The Madison Equal Opportunities Commission is clearly the type of agency contemplated to evolve from the discretion granted to municipalities by the state legislature pursuant to sec. 66.433. The MEOC operates pursuant to a municipal ordinance enacted to ensure all municipal residents (and other persons working within the City) equal employment opportunity. The MEOC cooperates with state and federal fair employment agencies, conducts public hearings and administers oaths to persons testifying before it and employs such staff as is necessary to implement the (fair employment) duties assigned to it. These are all items and characteristics included in sec. 66.433(3), Stats.

CONSISTENCY

The legislature contemplated consistent enforcement of employment discrimination laws, but the legislature did not require identical (or uniform) enforcement by municipal agencies except in the area of creed discrimination. Not only was this the holding of the Wisconsin Court of Appeals in

Federated, but I also find this the clear implication of the creed discrimination amendments (recited earlier) to the WFEA.

Although the WFEA is silent as to the limits of municipal regulation in areas other than creed (including sex, race, handicap, arrest and conviction record, national origin, ancestry, marital status, sexual orientation), any municipal regulation would still be bound by the parameters of the case law which requires that a local ordinance does not "forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden." Fox v. Racine (1937) 225 Wis. 542, 545. This is the issue dealt with in an unpublished decision entitled St. Vincent De Paul Society v. MEOC, No. 83-1105 (Wisconsin Court of Appeals, District IV, filed 10/25/84). In St. Vincent, the Court of Appeals ruled that the Madison ordinance prohibiting age discrimination in employment could not be applied to an employer who was (then) expressly exempt from the coverage of the WFEA. The St. Vincent decision does not, however, prevent a municipality from regulating along the lines of the WFEA or from going further than the WFEA where the WFEA had no express limitations. Fox does not require uniformity, either. Consequently, even in areas of concurrent jurisdiction (other than creed), the ordinance need not be a mere echo of the WFEA, so long as it complements state legislation[7] and is not a locomotive on a collision course.[8]

(Also, the municipality may regulate in areas outside of those covered by the WFEA.[9] However, that is not at issue in this case which involves forms of discrimination also regulated by the WFEA - sex discrimination, race discrimination and retaliation.)

It is important to consider that there is a strong similarity between the MEOC and ERD/DILHR processes, with each providing for investigation, conciliation, conference and persuasion, administrative hearing and administrative appeal. Ultimately, a final administrative decision in either forum can be appealed to the state Circuit Court and on through the court system. It is the same state court system that reviews cases where there is concurrent local and state jurisdiction, regardless of whether the case originated through the MEOC or the ERD/DILHR. The fact that any case may ultimately end up in state court, regardless of which agency it was initially processed through, assures consistency of interpretation of the law. The requirement of each agency to give deference to court decisions as well as the interagency worksharing agreement between the MEOC and ERD/DILHR eliminates any potential for unnecessarily duplicative case processing.

It should be noted that only between one to two percent of all cases filed with the MEOC end up in state court. Of 1,006 discrimination cases filed with the MEOC in the years 1980 through 1984, 810 or slightly over 80% have been employment discrimination cases. Approximately 92 percent of all cases are resolved (either by settlement or some form of dismissal) short of a full administrative hearing.[10] A resolution almost always results in the case being closed at the state and/or federal levels when there is concurrent jurisdiction. In this Examiner's view, that so small a percentage of cases ever go to court (much less even to administrative hearing) is an indication of both the effectiveness and consistency of application of the Madison Equal Opportunities Ordinance.

Jurisdictional Issue 2: Preclusion Based on the Specific Facts of This Case

A. The City is not, by Enforcing its Local Ordinance, Exercising Jurisdiction over the State Apprenticeship Program

I find that the scheme of the state statutes regarding fair employment law is to establish a fair employment mechanism in the Department of Industry, Labor and Human Relations (DILHR) and to encourage the existence of local agencies to augment the DILHR enforcement effort in the area of fair

employment (within the parameters of Fox and of Sec. 62.11(5), Stats., as interpreted by Food Dealers).

It is the Equal Rights Division of DILHR (ERD/DILHR) and local agencies such as the MEOC which the legislature intended to become experts in the area of employment discrimination law with a focus on investigating and conciliating discrimination complaints and also providing resort to a hearing and appeals process with ultimate review in the courts. It is ERD/DILHR and the local agencies which the legislature (in step with the federal scheme) contemplated to provide make-whole remedies in equal employment opportunity cases.

State licensing agencies, such as the Department of Apprenticeship and Training (DAT/DILHR), serve an anti-discrimination function complementary to the function of ERD/DILHR and the local enforcement agencies. The anti-discrimiation function of the Division of Apprenticeship and Training is to promote affirmative action and compliance with fair employment laws, as well as to exercise authority ancillary to its primary duties, such as deregistration or decertification of offending employers who participate in the program. Neither the local MEOC nor the State ERD/DILHR could deregister or decertify an employer from participating in the apprenticeship program. But the DAT/DILHR is generally not empowered to grant to a successful Complainant the make-whole remedies for discrimination she or he would be entitled to before the MEOC or ERD/DILHR.

Specifically, IND 95.20(1) of the Wisconsin Administrative Code (WAC) provides that the DAT/DILHR may accept complaints from any person alleging that an (apprenticeship) agreement entered into under Chapter 106, Stats. is not being complied with by a party to the agreement. It should be noted that, a finding of sex or race discrimination by either ERD/DILHR or the MEOC does not in any way obligate DAT/DILHR to take any action. DAT/DILHR retains complete authority over the deregistration process, but it certainly is free to consider any findings of ERD/DILHR or the MEOC. Consequently, the Respondent's argument that the MEOC is exercising any authority over the state apprenticeship program is not persuasive. If anything, the MEOC is assisting and cooperating with the program by conducting an investigation in an area that the MEOC has expertise and which may be of interest to the DAT/DILHR.

Also, IND 95.20(4) lists examples of violations which may be considered appropriate subject matter and violations which are not appropriate subject matter for a hearing by DAT/DILHR. While neither list is all inclusive, the list of violations that are not appropriate subject matter includes employee absenteeism or tardiness at work or at school, employee use of drugs and alcohol on the job at work or school, insubordination, refusal to perform work as assigned, and employee violations of the employer's printed work rules.

Given that those items which are not appropriate subject matter for hearing before the DAT/DILHR may well be appropriate subject matter in a discrimination case (especially in cases alleging disparate treatment), I find that IND 95 was clearly not intended to provide a comprehensive forum for an apprentice's discrimination hearing.

IND 96.11 also discusses a compliance procedure. This section, however, is no more than a grievance procedure with no right for a hearing to remedy discrimination against the individual. Essentially an apprentice or applicant for apprenticeship may file a complaint alleging (among other protected classes) sex and/or race discrimination. A private review body, if one exists that has been approved by DAT/DILHR, is then convened to review and attempt to resolve the complaint. If no review body exists or the complaint is not satisfactorily resolved, the DAT/DILHR may conduct such compliance review and attempt to resolve the complaint.

What is crucial is that if there is no resolution of the complaint, the individual has no right to pursue any individual remedy (backpay, reinstatement, etc.) through DAT/DILHR. Rather, DAT/DILHR may only attempt to deregister or decertify the violator (employer-sponsor).

In order for the person complaining to preserve their right to pursue any individual sex or race discrimination remedies, s/he would have to have timely filed the complaint with the ERD/DILHR, the federal EEOC and/or a local enforcement agency such as the MEOC.

I conclude, therefore, that the scheme of the statutes was to establish a fair employment mechanism in ERD/DILHR and to encourage the existence of local agencies to augment the DILHR enforcement effort, and that state licensing agencies have specific but limited powers (such as the power to decertify or deregulate) which may be exercised to complement the federal, state and local enforcement of employment discrimination. Reading IND 96 in accordance, this Examiner finds that IND 96 was designed to permit DAT/DILHR to impose a specific sanction which is beyond the authority for ERD/DILHR to impose under Sec. 111.31. This sanction is the sanction that DAT/DILHR can order and enforce.

B. The Application of the City's Fair Employment Ordinance Does Not Constitute Regulation of a State Contract

The Respondent argues that the employment at issue cannot be regulated by the City of Madison because it was related to a state contract and state bidding procedures. It is the Respondent's position that the Department of Administration (DOA) of the State of Wisconsin is given supervisory responsibility over such projects by virtue of Wisconsin Stats. sec. 16.855, et seq. that the state DOA has adopted rules governing state contracts and bidding procedures, including provisions setting forth fair employment and affirmative action requirements applicable to contractors who bid on state construction projects, and that it would conflict with state policy to superimpose additional employment requirements on only a portion of those bidders solely based on the location of their administrative offices.

I do not find the Respondent's argument persuasive because the MEOC, in exercising its jurisdiction to regulate sex discrimination in the City limits, is neither regulating a state contract nor superimposing an additional employment requirement on only a small portion of bidders. ADM 21.09 (7) states that, "Any contractor or subcontractor who enters into a contract on a state construction project shall assume an obligation to take whatever affirmative action is necessary to assure equal employment opportunity in all aspects of employment irrespective of . . . race (or) sex . . . . It is expected that all contractors and subcontractors will carry out that part of their contract pertaining to equal employment opportunity and affirmative action with the same amount of thought and diligence as with any other part of the contract." (Emphasis supplied.)

ADM 21.02(7)(c)5 defines a responsible bidder as a bidder who, "is not presently on an ineligible list maintained by the Department of Administration for noncompliance with equal employment opportunity and affirmative action requirements as provided in sec. 16.765(9), Stats."

I find the Respondent's argument to be as similarly unpersuasive as its argument about the DAT/DILHR. Rather than a state licensing agency, this time it is a state contracting agency. The DOA has passed an administrative rule which effectively promotes affirmative action and compliance with equal employment law. The DOA does not provide a forum for an individual to seek his or her remedy for unlawful sex or race discrimination. The DOA is free to consider, however, findings of the ERD/DILHR or the MEOC in determining whether or not to place a contractor on the ineligible list.

The DOA, therefore, plays a well-defined and important role, but nevertheless a limited role, in furthering the legislature's employment anti-discrimination scheme. The DOA is able to impose a sanction ancillary to its contracting powers and beyond the scope of the ERD/DILHR or the MEOC to impose, but the DOA is not the forum where an individual seeks make-whole redress for alleged discrimination.

This Examiner is also not persuaded that the local law superimposes any requirement on a contractor such as to constitute interference or competitive disadvantage in the state contracting procedure. The contractor is subject to the WFEA. The legislature has also impliedly authorized municipal ordinances to regulate sex and race discrimination under various statutes previously discussed. The DOA's administrative rule also proscribes race and sex discrimination. Consequently, there is no additional burden imposed on the contractor who is obligated to refrain from sex and/or race discrimination in employment whether or not its offices are in a jurisdiction subject to a local ordinance.

C. The City Lacks Authority to Regulate Employment Practices on the University of Wisconsin Campus

There is no question in this Examiner's mind that the City of Madison may not regulate employment practices on the University of Wisconsin Campus. The ordinance has no extraterritorial effect (see Anchor at p. 401 and see 70 AG 226 at 234). The question in this case is which of the employer's acts (if any) are attributable to having occurred in the City of Madison and which are not. The attribution turns on the specific facts of this case, and each alleged act of discrimination must be analyzed separately. I find that the hiring actions made by the employer are clearly attributable to having occurred within the City of Madison. Accordingly, the retaliation claim of refusal to re-employ is also attributable to the City of Madison. This is because this employer essentially acts as its own employment agency for certain jobs. Its only offices are located in the City of Madison where, in addition to its permanent employees, it hires people to perform specific jobs. Although many of these jobs are outside of the City of Madison, the evidence supports the finding that the hiring decision is attributable to the main office which is located within the City of Madison. This is no different than an employment agency located within the City of Madison which may refer clients for jobs outside the City of Madison.

However, because the individuals such as the Complainant are hired on a job-by-job basis, and because 100% of the work which the Complainant was assigned to perform was located outside of the City of Madison (on the University of Wisconsin Campus), I find that all the other decisions made by the employer are attributable to the job site and have to be considered as having occurred outside of the City of Madison. This case is different than an instance where an individual is employed in the City of Madison but performs some duties outside and some duties within the City of Madison (e.g. salespeople, delivery people, even some of the Respondent's "permanent" employees, and so on). I need not address the issue of under what circumstances an employee based in the City of Madison but who performs duties both inside and outside the City would come under the local employment discrimination ordinance. This must be taken up on a case-by-case basis and will turn on the facts of the particular situation. However, in this case 100% of the job for which the Complainant was hired was performed outside of the City of Madison. Therefore, even though the Respondent retained more control than an employment agency generally would over the Complainant's terms and conditions of employment, decisions other than hire or hire-related activities are attributable to the location of the job site under the facts of this case (although the location of the job site will not always be the main consideration).

UNCONDITIONAL JOB OFFER

The Respondent, on the issue of the unconditional job offer, takes inconsistent positions in an attempt to escape liability. The Respondent essentially argues that it made an unconditional offer at a luncheon meeting about two weeks prior to September 20 of 1983 and that the Complainant refused. I find, however, that the Respondent first made an unconditional offer via a letter dated September 20 of 1983, the Complainant accepted it, and the Respondent then reneged on its offer without a legitimate, non-discriminatory reason. In effect, the Respondent retaliated against the Complainant when its attempt to limit its backpay exposure failed.

There is no dispute that Whiteagle filed her original complaint with the MEOC on September 1, 1983. Nor is there any dispute that prior to realizing that a complaint had already been filed (because it had not reached them in the mail), Ward and McIntyre had a luncheon meeting about two weeks prior to September 20 during which meeting Ward informed McIntyre that Whiteagle was contemplating filing a discrimination complaint. McIntyre then eventually offered to re-employ Whiteagle during said meeting. The question is whether or not McIntyre's offer, on behalf of Badger Mechanical, constituted an unconditional job offer to Whiteagle.

Although the Respondent claims that an unconditional offer was made at the luncheon meeting, neither McIntyre's nor Ward's testimony support such a finding. The main reason is that both Ward and McIntyre agree that the offer to re-employ Whiteagle was contingent on Whiteagle not filing a discrimination complaint. In fact, as soon as it was discovered that Whiteagle had filed a complaint (which had been filed prior to the luncheon meeting but which McIntyre became aware only after the meeting), both Ward and McIntyre agreed that McIntyre's offer to rehire Whiteagle was no longer valid. In fact, McIntyre's offer to take Whiteagle back had been a settlement (conditional) offer and not an unconditional offer.

Consequently, Ward's later discussions with the Complainant and McIntyre (she wanted back pay, he refused to pay back pay) after the luncheon meeting and prior to September 20 of 1983 may at most be construed to be settlement negotiations. In other words, Whiteagle's statement(s) prior to September 20 of 1983 that she would not return to work without receiving backpay cannot be construed as a refusal of an unconditional offer because no unconditional offer was made by the Respondent prior to September 20, 1983.

On September 20, 1983, however, a new event occurred. McIntyre sent a letter directly to Whiteagle (see Finding of Fact 30). This letter constituted the first and only unconditional offer of employment by the Respondent.

This case raises what this Examiner believes is an issue of first impression as far as discrimination laws are concerned in Madison and in the State of Wisconsin; that is, what happens when an unconditional offer is accepted and the employer unjustifiably reneges. In Anderson v. State of Wisconsin Labor and Industry Review Commission, 111 Wis. 2d. 245, 330 N.W. 2d 594 (1983), the Wisconsin Supreme Court set forth the criteria to be used in determining whether a job offer may be considered an unconditional offer. Those criteria were essentially as follows:

> (1) First the offer of reinstatement must be for the same position or a substantially equivalent position . . .
> (2) Second, the offer of reinstatement must be unconditional . . .
> (3) The employee must be afforded a reasonable time to respond to the offer of reinstatement . . .
> (4) Finally, the offer should come directly from the employer or its agent who is

> authorized to hire and fire, rather than from another employee or other unauthorized individual.

The facts of this case are that the Respondent sent a letter to the Complainant dated September 20, 1983 confirming an offer of employment made to Ward. The Respondent had retained legal counsel by this time, but claims the letter was sent on the advice of Ward.

The Complainant received the letter on the following day (September 21, 1983). The Respondent argues that this letter confirmed an unconditional offer of employment. This Examiner finds instead that this letter was itself the first and only proper unconditional offer of employment that met the Anderson test. There is no dispute that the letter involved an offer for the same or a substantially equivalent position; there is no real dispute that at the time the letter was sent, the offer of reinstatement was intended by the Respondent to be unconditional. Although the letter references McIntyre's conversation with Ward which was previously analyzed to involve a conditional (settlement) offer, Respondent's purpose in writing the letter was to commit to writing an offer of employment that it wanted to have on record as unconditional. The Complainant understood the offer to be unconditional and responded to it as such. She accepted the offer without condition (specifically, she would have returned to work without backpay and could have maintained her administrative discrimination complaint to try and recover any back pay, if she chose).

Having determined that the letter dated September 20 of 1983 constituted an unconditional offer of employment, the issue is whether the Respondent can legitimately renege on the offer when the Complainant unconditionally accepted the offer in a reasonable time.

Theoretically, if a Respondent makes an unconditional offer of employment and circumstances change in the interim so that it can no longer employ the Complainant (i.e., business bankruptcy, etc.), that could hypothetically give the employer a nondiscriminatory reason to refuse to hire the Complainant even if the Complainant had unconditionally accepted the offer in a reasonable time. In this case, however, no intervening circumstances occurred to justify the Respondent's refusal to employ the Complainant.

The Complainant responded to the offer in a reasonable time (the same day she received it) and the Respondent simply reneged. To permit the Respondent to renege without sanction would grant to the employer a one-sided tool to minimize its backpay exposure in discriminatory discharge cases without obligation. Very simply, the employer could make offers to re-employ after discharge cases are filed and hope to toll the backpay of the Complainant without intending or being required to follow through on its offer if the Complainant were to accept.

ATTORNEY FEES AND OTHER REMEDY ISSUES

The Respondent argues that the Complainant is not entitled to attorney fees because she was not represented by an attorney to practice law in Wisconsin.

In Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W. 2d 42 (1984), the Wisconsin Supreme Court first construed the WFEA to permit an award of attorney fees. Similarly, I find the logic of Watkins applies to the local ordinance, at least for cases such as this one where local and state coverage are concurrent. The Commission has also passed a rule allowing for attorneys fees.[11]

A prevailing Complainant is presumed to be entitled to attorney fees.[12] It has not yet been resolved whether the Complainant is entitled to attorney fees when assisted at the administrative level by

someone not licensed to practice law in the State of Wisconsin.

Consequently, I will set up a briefing schedule allowing the parties to brief the attorney fees issues. I will also allow the parties to address the issue of the appropriate wage rate at which backpay should be awarded to the Complainant.

Signed and dated this 14th day of June, 1985.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
EOC Hearing Examiner

[1]The investigator's conclusion, contained in the March 15, 1984 Initial Determination, reads as follows, "There is probable cause to believe that the Respondent discriminated against the Complainant because of her sex and race in violation of Section 3.23, Madison General Ordinances." Also, Finding Q of said Initial Determination states, ". . . It appears this offer was not followed through in retaliation for the Complainant's pursuit of a discrimination complaint." The Respondent did not, prior to the hearing, raise any objection to the inclusion of the retaliation issue at the hearing. Thus, any objection that the Respondent may have had to require a more definitive conclusion by the investigator on the retaliation issue, prior to allowing that issue to proceed to hearing, would now have to be deemed as waived.

[2]At the time of the hearing, Atty. Hesslink worked at DeWitt, Sundby, Huggett, Schumacher and Morgan, S.C.

[3]Federated Rural Electric Insurance Corporation v. MEOC, et al, No. 79-538 (Wisconsin Court of Appeals, District IV, 4/27/81).

[4]Same as Footnote 3.

[5]Section 66.432, Stats. explicitly authorizes municipalities to regulate in the area of housing discrimination notwithstanding the existence of s. 101.22, Stats. (which authorizes ERD/DILHR to administer and enforce fair housing provisions on a statewide basis).

[6]Section 66.433(3)(c) reads in part as follows:

> The Commission shall:
> 2. Co-operate with state and federal agencies and non-governmental organizations having similar or related functions.

[7]Same as Footnote 3.

[8]State ex rel. Michalek v. LeGrand, 77 Wis. 2d 520.

[9]Same as Footnote 3.

[10]In other words, short of a hearing involving in-person, sworn testimony.

[11]See Rule 17 of the Madison Equal Opportunities Commission.

[12]Christianburg Garment v. EEOC, 434 U.S. 412,98 S. Ct. 694 (1978); Uvideo v. Steve's Sash and Door Co., 36 EPD par. 35,025 (1985)

210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Marlys Whiteagle 1502 Williamson Street Madison, WI 53703 Complainant vs. Badger Mechanical 2046 Winnebago Street Madison, WI 53704 Respondent	RECOMMENDED DECISION Case No. 20133

An "Interim Recommended Decision" dated June 14, 1985 was issued by the Examiner in the above-entitled matter. A cover letter was sent along with said "Interim Recommended Decision" setting up a timetable for the parties to brief issues of attorney fees and costs as well as back pay. Upon reviewing the various arguments and submissions by the parties, the Examiner now enters the following Recommended Decision:

RECOMMENDED FINDINGS OF FACT

The "Interim Recommended Findings of Fact" (1-33) - contained in the attached "Interim Recommended Decision" (dated June 14, 1985) - are hereby incorporated in their entirety and shall stand as Recommended Findings of Fact (1-33).

Also, the following additional Recommended Findings of Fact are entered for the purpose of determining remedy:

34. The Complainant, had she been re-employed by the Respondent on September 21, 1983, would have worked until June 21, 1984 which was the date apprentice Stanford was laid off by the Respondent.
35. The Complainant, had she been re-employed by the Respondent on September 21, 1983, would have worked the following additional hours at the following rates of pay:
    50 hours at $13.52/hr. = $678.50
    1200 hours at $15.95/hr. = $19,140.00
    174 hours at $16.79/hr. = $2,921.46
    104 hours at $16.94/hr. = $1,761.76
    Total $24,501.72
    The Complainant would have received $24,501.72 in compensation from the Respondent had she been re-employed on September 21, 1983.
36. In the period between September 21, 1983 and June 21, 1984, the Complainant earned $9,441.07 from other sources.
37. As a result of her discharge on August 31, 1983, the Complainant received $6,664 in unemployment compensation. (This finding is being entered subject to verification by the state Unemployment Compensation Division.)
38. The Complainant supplied to the Respondent a doctor's authorization (see Respondent's Exhibit 24) dated July 6, 1983 which authorized her to return to work on July 13, 1983. The

Complainant had been off from work due to a horseback riding accident that occurred on June 18, 1983. The Complainant had timely and adequately kept the Respondent informed about her absence. The Complainant's absence from work between June 18, 1983 and July 13, 1983 was not "unexcused." The July 6, 1983 date on the doctor's authorization to return to work reflected the date the authorization had been made out by the doctor, but was not intended to denote that July 6, 1983 had been the commencement of her absence due to the horseback riding injury.

39. Shortly after returning to work, the Complainant notified Shields, her immediate supervisor, that she intended to go on vacation commencing on August 22 through August 28, 1983. She gave Shields the requisite 30-days notice of her vacation. The Respondent at no time objected to the Complainant taking vacation. The Complainant later was also permitted by the Respondent to take off Friday afternoon, August 19 of 1983.
40. The Complainant missed one hour of "day" apprenticeship school sometime prior to her horseback riding accident on June 18, 1983. This was the only hour of paid time that the Complainant missed between the time of her hire by the Respondent on April 14, 1983 and the horseback riding accident on June 18, 1983. The Complainant timely reported her absence to Shields.
41. Based on a request by the local Joint Apprenticeship Training Committee and relying on information about the Complainant's attendance record provided by the Respondent, the state Division of Apprenticeship and Training of the Department of Industry, Labor and Human Relations (DAT/DILHR) was misled into cancelling the Complainant's apprenticeship on January 4, 1984 (retroactive to August 31, 1983). Said cancellation was rescinded on January 6, 1984 by Charles T. Nye, the Administrator of DAT/DILHR. Said rescission totally wiped the cancellation off the DAT/DILHR books.

RECOMMENDED CONCLUSIONS OF LAW

The "Interim Conclusions of Law" - contained in the attached "Interim Recommended Decision" (dated June 14, 1985) - are hereby incorporated in their entirety and shall stand as the Recommended Conclusions of Law.

RECOMMENDED ORDER

1. That the Respondent shall cease and desist from discriminating against the Complainant on the basis of her having filed a complaint under Sec. 3.23, Madison General Ordinances.
2. That the Respondent shall pay $15,060.65 distributed as follows:
   (a) Eight Thousand and Three Hundred and Ninety-Six dollars and Sixty-five cents ($8,39.65) to the Complainant;
   (b) Six Thousand and Six Hundred and Sixty-Four Dollars ($6,664) to reimburse the state unemployment compensation fund;
3. That the Respondent shall pay interest on all amounts due pursuant to Recommended Order No. 2 (above). Said interest shall be computed at a rate of twelve percent per annum from the time the amount became due or would have become due, had she been re-employed on September 21, 1983, until such time as it is actually paid.
4. That the Respondent shall pay to the Complainant Four Hundred and Fifty-Eight dollars and Eighty Cents ($458.80) as reimbursement for reasonable costs plus 12% annual interest thereon, said interest to accrue from June 14, 1985 (the date that the "Interim Recommended Decision" was issued) until such time as the costs are paid.
5. That the Respondent shall pay the sum of Five Thousand and Five Hundred and Eighty Dollars ($5,580) as reasonable attorney fees plus twelve percent annual interest thereon, said interest to accrue from June 14, 1985 until the date said attorney fees are paid; and that said attorney fees

and interest shall not be paid to the Complainant or to Prof. Clauss but shall be paid to an account to be administered by the University of Wisconsin-Madison School of Law to be used solely as disbursements for costs other than attorney fees by law school faculty members (or students under their supervision) in litigating employment discrimination cases pro bono before the Madison Equal Opportunities Commission or the Wisconsin Equal Rights Division; that in the event the UW-Madison Law School declines to administer said account, other suitable administrator for these attorney fees shall be proposed by the Complainant subject to Commission approval before the fees are paid by the Respondent.

6. The Respondent shall submit to the Hearing Examiner evidence of compliance with all provisions of the Recommended Order no later than ten (10) days from the date this Order becomes final.
7. The above provisions of this Recommended Order supercede and replace in their entirety the "Interim Recommended Order" contained in the "Interim Recommended Decision."

OPINION ON REMEDY

The Complainant carried the burden of proof to establish the Respondent's liability. Once she established that liability, it is presumed that she is entitled to a make-whole remedy (whatever that remedy is shown to be) and the Respondent has the burden to establish any mitigations to the make-whole remedy.

I. BACKPAY AND SETOFFS

A. Period of Backpay

That the backpay period runs from September 21, 1983 to June 21, 1984 is not disputed by the parties in their briefs. The Complainant and Respondent differ on the total number of hours they assert the Complainant would have worked during the period.

1. Total Number of Compensable Working Hours in Period

The Respondent claims there were 1,560 (195 days times eight hours per day) potentially compensable working hours (before subtracting holidays) in the period.[1] The Complainant seems to be using a base of 1,576 hours (197 days times 8 hours per day). The difference appears to be whether the day of September 21, 1983 and the day of June 21, 1984 are to be included. Because September 21, 1983 is the date on which the Complainant accepted the Respondent's unconditional offer to be re-employed, it is not likely that the Complainant would have started work until the next working day. As for June 21, 1984, that is the date that apprentice Stanford was laid off. It is not clear whether Stanford worked on June 21, 1984 or not. I will, therefore, also not include June 21, 1984.

In summary, the Respondent's figure of 1,560 hours (195 days times 8 hours per day) is the figure I find applicable because neither September 21, 1983 nor June 21, 1984 are includible in calculating total potential compensable working hours (before subtracting holidays) in the period.

2. Deduction For Holidays

The Respondent claims there were six holidays (48 hours) in the period; the Complainant appears to subtract only four holidays (32 hours). The Respondent's six holidays are: Veterans Day (1983), Thanksgiving Day (1983), Christmas Day (1983), New Years Day (1984), Presidents Day (1984) and Memorial Day (1984). Christmas Day (1983) and New Years Day (1984) each fell on a Sunday

(presumably, not a working day). Therefore, I find that four holidays - 32 hours - are appropriately deducted from the total potential compensable working hours; i.e., there were 1,528 (1,560 minus 32), compensable working hours in the period.

3. No Proration Appropriate Based on Past Attendance

The Respondent argues that the number of compensable working hours should be prorated at 85% based on the Complainant's attendance record during the period (April 14 - August 31, 1983) she actually worked for the Respondent.

Aside from her vacation, the Complainant missed time from work primarily due to an injury she suffered in a horseback riding accident (June 18, 1983-July 13, 1983). The Respondent has presented not even a scintilla of evidence to show that the Complainant would have missed any work due to injury or illness or any other reason in the period of September 21, 1983 to June 21, 1984. Consequently, a reduction of hours is not appropriate.

5. No Reduction Due to Mistaken Cancellation From Apprenticeship Program

The Complainant's suspension from the steamfitter apprenticeship program does not warrant a reduction for the reasons explained below.

The Complainant's apprenticeship was cancelled on January 4, 1984. Said cancellation was rescinded on January 6, 1984 by Charles T. Nye, the Administrator of the Division of Apprenticeship and Training (DAT/DILHR). Nye testified that the rescission totally wiped the cancellation off the books.

The DAT/DILHR involvement arose out of a request by the local Joint Apprenticeship and Training Committee to cancel Whiteagle's apprenticeship. This request was based on a letter written by the Respondent's Project Manager, Patrick Kapaun. Said letter (see Respondent's Exhibit 23), was addressed to the Madison Equal Opportunities Commission, Attention Mary Pierce who was the MEOC investigator. Said letter was supplied to DAT/DILHR by the "Contractor's Association" and indicated the Complainant had been absent from work 22% of the time while employed by Badger Mechanical. The DAT/DILHR initially believed the absenteeism might constitute a violation of administrative rule IND 95.20 (Wisconsin Administrative Code) which permitted the DAT/DILHR to terminate an apprenticeship without a termination hearing.

DAT/DILHR Dist. Representative Gloria Geiger then sent a notice - dated November 11, 1983 - to the Complainant that indicated DAT/DILHR's intent to cancel her apprenticeship retroactive to August 31, 1983 (the date of her termination from Badger Mechanical).

The Complainant timely objected - December 6, 1983 - to the cancellation and her file was forwarded to the DAT/DILHR Adminsitrator's (Nye's) office for further investigation. Based primarily on Kapaun's letter and a phone call made by DAT/DILHR to Badger Mechanical to verify the absenteeism figures in the letter, Nye sent a letter to Whiteagle dated January 4, 1984 which informed her that her apprenticeship was cancelled pursuant to IND 95.20(c1)(d). The cancellation was based solely on her absenteeism while employed by Badger Mechanical.

Prof. Clauss, on behalf of the Complainant, then called Nye and asked him to investigate further. Nye contacted Pierce (the MEOC investigator) and some other people whose names he could not recall. Nye testified that after the January 4, 1984 cancellation letter left his office:

> **. . . that the information we had been given was, I guess, in doubt as to whether or not we had properly interpreted it and whether it was accurate. Subsequently it was brought to my attention that the information relating to the hours of employment and our interpretation of the absences was at least questionable. At least questionable. In other words, the question of whether or not there were-they were in fact unexcused absences, opportunities of work, to the point where it certainly raised serious question as to whether or not the cut and dried termination process as spelled out in 95.20 (IND 95.20) in our rules was valid. (Nye's testimony, Tr., pp. 629-630)**

Nye rescinded the cancellation of Whiteagle's apprenticeship only two days after it had been issued.

The implication of the evidence is that Badger Mechanical was responsible for providing DAT/DILHR with information about Whiteagle's attendance - apparently having to do with whether or not her absences were excused - which misled DAT/DILHR into believing there were grounds for a summary cancellation (without a hearing) pursuant to IND 95.20. DAT/DILHR corrected its action and rescinded the cancellation on January 6, 1984, only two days after the cancellation letter had been sent.

Surely, the Respondent should not benefit from the additional unwarranted misery that it caused the Complainant. Because I find the Respondent was primarily responsible for causing the erroneous summary termination of the Complainant's apprenticeship, do not reduce the Complainant's backpay on account of said cancellation which was rescinded.

6. Compensable Amount (Prior to Deduction of Interim Earnings)

There does not appear to be any dispute over the hourly wage rates the Complainant would have been paid by the Respondent had she continued to be employed. Therefore, the backpay computations are as follows:

50 hours at $13.52 - = $678.50
1200 hours at $15.95 = $19,140.00
174 hours at $16.79 = $2,921.46
104 hours at $16.94 = $1,761.76
Total $24,501.72

7. Deduction for Interim Earnings

There appears to be no dispute that the Complainant's interim earnings during the backpay period were $9,441.07. Therefore, the Complainant's backpay (prior to computing interest) is $15,060.65 (the difference between $24,501.72 less $9,441.07 interim earnings).

8. Distribution of Backpay

There was a stipulation at hearing that the Complainant received $6,664 in unemployment compensation. Therefore, the Respondent must distribute the $15,060.65 of backpay as follows:

$8,396.65 plus interest (12%) must be paid directly to the Complainant
$6,664.00 plus interest (12%) must be paid to the state unemployment compensation fund

It should be noted that the parties stipulated in the record that the Complainant had received $6,664 (Tr., p. 637) in unemployment compensation. I do not know where the $5,292.00 figure alleged in the Complainant's "Bill For Fees and Costs, and Memorandum of Points and Authorities" came from. But if the Complainant can substantiate that the unemployment compensation amount is less, then she will receive more and the unemployment compensation fund will receive less.

INTEREST

The award of interest in this case is supported by Anderson v. LIRC.[2]

REASONABLE ATTORNEY FEES

There is no dispute that Prof. Carin Clauss, a law professor at the UW Law School, is not a member of the Wisconsin Bar. However, there also appears to be no dispute that Prof. Clauss is representing the Complainant pro bono and that there is nothing in the law to prevent her from pro bono representation of an individual before the MEOC, a local administrative agency. The issue is whether the Complainant can receive attorney fees on the basis of Prof. Clauss' work in order to compensate Prof. Clauss for her work. The answer to that question is clearly no. However, I nevertheless find the Respondent is obliged to pay attorney fees to a fund that will be earmarked to aid other employment discrimination litigants who are being represented pro bono.

In Watkins v. LIRC,[3] the Wisconsin Supreme Court held that the Department of Industry, Labor and Human Relations (DILHR) had the authority to award reasonable attorney fees to a Complainant who prevails in an administrative fair employment proceeding brought pursuant to the Wisconsin Fair Employment Act (WFEA), Sec. 111.31 et seq., Stats. The Watkins decision was made notwithstanding the absence of an express statutory provision authorizing reasonable attorney fees in fair employment cases.

While the Watkins case did not address the propriety of a local administrative award of reasonable attorney fees (and costs), I find the logic of Watkins similarly applies to the fair employment provisions of See. 3.23 of the Madison General Ordinances. This is particularly true in cases of concurrent jurisdiction (where both the state DILHR and local MEOC have jurisdiction). As there is a worksharing agreement between the DILHR and the MEOC and the DILHR has given res judicata (and/or collateral estoppel) effect to the decisions of the MEOC (see p. 32 of DILHR's "Decision Digest IV-Fair Employment and Housing-Wisconsin Case Law"), it would constitute an inefficient administration of justice to require a Complainant who had prevailed on an employment discrimination case before the MEOC to have to separately pursue the attorney fees portion of his/her remedy before the state agency. The MEOC has also adopted an administrative rule, passed subsequent to the Watkins decision, authorizing an award of attorney fees and costs.

The Watkins decision, however, does not appear to address the issue of whether attorney fees may be awarded where the Complainant is being represented pro bono.[4] There are federal cases, however, which have awarded attorney fees to legal aid organizations in civil rights cases although the representation was pro bono (see page 10 of the "Complainant's Bill For Fees and Costs, and Memorandum of Points and Authorities" where she cites various cases). Even these cases are not entirely on point, however.

In the case at hand, Prof. Clauss is not licensed to practice law in Wisconsin (nor was she assisting someone who is licensed to practice in the state). While Prof. Clauss' pro bono representation before a local administrative agency was permissible, to award the Complainant attorney fees in order to

compensate Prof. Clauss for her work would appear to be in contravention of Sec. 757.30(2), Wis. Stats. which states:

> **(2) Every person who . . . otherwise, in or out of court, for compensation or pecuniary reward gives professional legal advice not incidental to his or her usual or ordinary business, or renders any legal service for any other person . . . shall be deemed to be practicing law within the meaning of this section.**

Consequently, Prof. Clauss' representation or assistance of the Complainant in a quasi-judicial administrative proceeding would constitute the unauthorized practice of law if she were to receive attorney fees (a pecuniary reward) in this case. Sec. 757.30(1), Stats. reads in relevant part:

> **(1) Every person, who without having first obtained a license to practice law as an attorney of a court of record in this state, as provided by law, practices law within the meaning of sub. (2). . . shall be fined not less than $50 nor more than $500 or imprisoned not more than one year in county jail or both, and in addition may be punished as for a contempt.**

However, while Prof. Clauss may be ineligible for fees, the Respondent should not be relieved of the duty to pay them. As pointed out in Watkins, supra, an award of reasonable attorney fees both serves to make a Complainant whole and to discourage discriminatory purposes in employment.

I find it unjust to allow the Respondent the windfall of not having to pay attorney fees solely because the Complainant was fortunate enough to have pro bono assistance from an individual ineligible to receive compensation under Sec. 757.30, Stats. The result would be that the Complainant would be less successful in discouraging the employer's discriminatory practices than another individual in a similar situation who could afford an hourly rate or who had made a contingency agreement with some attorney or who possibly had pro bono representation by an attorney (or a legal aid society) otherwise eligible for a fee award. I find the reasoning that fees may be awarded to discourage discriminatory purposes in employment sufficient by itself to support the Respondent having to pay the fee award, even where the Complainant (unlike Watkins) will not be stuck with an attorney fee bill at the end of the litigation. Indeed, if a successful Complainant is prevented from discouraging the discriminatory practices of the employer to the full extent allowed by law, she has not truly received a make-whole remedy.

In order to avoid a violation of Sec. 757.30, Stats., however, I have ordered the attorney fees paid to a fund to benefit other employment discrimination litigants who are being represented pro bono before the state and local agency in that the money will be used to defer costs (other than attorney fees; i.e., other than payment for services to the individuals representing the litigants in the administrative proceedings).

AMOUNT OF FEES

There appears to be no dispute with the reasonableness of Prof. Clauss' sixty-dollar ($60) per hour rate nor her listing of 93 hours spent on the litigation (up through the time of her fee request). I find Prof. Clauss' rate to be not only reasonable but also modest in light of her reputation and expertise in the area of employment discrimination as well as the skill with which she presented the Complainant's case. The Respondent does argue, however, that the attorney fees should be reduced to one-fifth of the requested amount because the Complainant prevailed on only one issue out of five. The Complainant alleged that she was discriminated against as follows:

(1) race discrimination in regard to terms and conditions of employment (discriminatory job assignments);
(2) sex discrimination in regard to terms and conditions of employment (discriminatory job assignments);
(3) race discrimination in regard to discharge from employment;
(4) sex discrimination in regard to discharge from employment;
(5) retaliation for having filed an administrative discrimination complaint in regard to failure or refusal to rehire.

Although prevailing on the fifth issue (retaliation), the Complainant's other four liability issues were dismissed for lack of territorial jurisdiction. However, the Respondent's contention that the Complainant should receive an award of only one-fifth of the attorney fees is simplistic and inconsistent with the "results" analysis in Hensley v. Eckerhart.[5]

As the U.S. Supreme Court points out in Hensley:

> **. . .Any system for awarding attorney fees that did not take account of the relationship between results and fees would fail to accomplish Congress' goal of checking insubstantial litigation.**
>
> **At the same time, however, courts should recognize that reasonable counsel in a civil rights case, as in much litigation, must often advance a number of I related legal claims in order to give plaintiffs the best possible chance of obtaining significant relief . . . And even where two claims apparently share no "common core of facts" or related legal concepts . . . the actual work performed by lawyers to develop the facts of both claims may be closely intertwined. For instance, in taking a deposition of a state official, plaintiffs' counsel may find it necessary to cover a range of territory that includes both the successful and the unsuccessful claims. It is sometimes virtually impossible to determine how much time was devoted I to one category or the other, and the incremental time I required to pursue both claims rather than just one is likely to be small.**

This Examiner finds it is precisely because of a "results" analysis that the Respondent should pay the entire fee. Even had the Complainant prevailed on the other four liability issues, she at most would have been entitled to approximately three additional weeks of backpay (between August 31, 1983 through September 21, 1983). Consequently, the Complainant won approximately 90%[6] of her potential backpay recovery. And based on the above-quoted language in Hensley v. Eckerhart,[7] an award of full fees is justifiable in this case.

Signed and dated this 25th day of September, 1985.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
EOC Hearing Examiner

[1]See Footnote 1 of the "Respondent's Brief in Opposition to Complainant's Assessment of Damages and Bill for Fees and Costs."

[2]Anderson v. LIRC, 111 Wis. 2d 245, 330 N.W. 2d 594 (1983)

[3]Watkins v. LIRC, 116 Wis. 2d 753, 345 N.W. 2d 482 (1984)

[4]Pro bono representation, where the legal services are performed free of charge regardless of the outcome of the case, is, of course, distinguishable from a contingency fee arrangement where the attorney expects to share in a successful outcome.

[5]Hensley v. Eckerhart, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)

[6]Without painstakingly calculating exactly what the Complainant would have won, the approximately 90% figure is based on the fact that the Complainant's backpay recovery period has been determined to be 191 days (195 days less 4 holidays). Had the Complainant prevailed on all the issues, her backpay recovery period would have been 205 days (210 days less 5 holidays as Labor Day of 1983 would also be included as a holiday). The 191 days is approximately 93% of the 205 day maximum recovery had the Complainant prevailed on all issues. If the dollar figures were calculated (including setoffs), the total should be around 93% of the Complainant's backpay award in this case (though there will be some variation).

[7]See Footnote 5.

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

Marlys Whiteagle 1435 Rutledge Street, Apt. 1 Madison, WI 53703 Complainant vs. Badger Mechanical 2046 Winnebago Street Madison, WI 53704 Respondent	RECOMMENDED DECISION ON REMAND Case No. 20133

An "Order on Appeal," dated January 31, 1986, was issued by the Madison Equal Opportunities Commission (MEOC) effectively affirming the Respondent's liability for retaliation (and ordering appropriate remedies) while remanding four other claims of sex and/or race discrimination back to this Examiner (who had originally found that the MEOC had no jurisdiction over the four remanded issues). The Respondent appealed to Dane County Circuit Court (Case No. 86 CV 1039). Because the Commission's rulings on the liability and remedy issues pertaining to the retaliation claim are final for purposes of appeal, they are no longer at issue before me (but are part of the court appeal). The only issues before me at this time are the four remanded claims: race discrimination in regard to terms or conditions of employment (job assignments), sex discrimination in regard to terms or conditions of employment (job assignments), race discrimination in regard to discharge (layoff) from employment and sex discrimination in regard to discharge (layoff) from employment.

After a telephone conference on March 14, 1986, with both Prof. Clauss and Atty. Hesslink, it was agreed that no further testimony need be taken and the four remanded issues would be decided based

on the existing record. Pursuant to a review of the record, I enter this Recommended Decision on Remand:

RECOMMENDED FINDINGS OF FACT - REMAND

A. The Findings of Fact as adopted by the Commission's "Order on Appeal" (dated January 31, 1986) are hereby incorporated in their entirety. All Findings of Fact may apply to liability and/or remedy issues.

B. The following additional Recommended Findings of Fact are hereby entered (although the Commission deleted Recommended Finding of Fact No. 33, I begin with No. 42 in order to avoid confusion):

42. Although Shields believed she could do the work, Shields intentionally did not assign the Complainant to work in the tunnel because of her sex, specifically because he "didn't feel it was her place to be down in that tunnel anyways" and because he "did not want to put a girl in the hole down there . . ." (see Transcript, p. 260).
43. At the time of the Complainant's discharge, Sprecher was a certified welder and Stanford was well on his way to becoming a certified welder, while the Complainant had minimal welding training.
44. During the time that she was assigned to the Birge Hall project, the Complainant was once warned by the employer about removing scrap metal from salvage for personal use without the employer's permission.
45. Prior to laying off the Complainant, Patrick Kapaun, the Project Manager, discussed with Shields the job performance of Stanford, Sprecher and the Complainant. Based primarily on his discussion with Shields, Kapaun chose Whiteagle for layoff.
46. The Respondent was not obligated to consider seniority in laying off steamfitter apprentices.
47. The Complainant's race was not a motivating factor in her job assignments.
48. The Complainant's race was not a motivating factor in her discharge (layoff).
49. The Complainant's sex was a motivating factor in her job assignments.
50. The Complainant's sex was not a motivating factor in her discharge (layoff).

RECOMMENDED CONCLUSIONS OF LAW - REMAND

A. The Conclusions of Law as adopted by the Commission's "Order on Appeal" (dated January 31, 1986) are hereby incorporated in their entirety.

B. The following additional Recommended Conclusions of Law are hereby entered:

4. The Respondent discriminated against the Complainant on the basis of sex in regard to terms or conditions of employment - specifically, in regard to job assignments - in violation of Sec. 3.23 (7)(a), Madison General Ordinances.
5. The Respondent did not discriminate against the Complainant on the basis of sex in regard to discharge in violation of Sec. 3.23, Madison General Ordinances.
6. The Respondent did not discriminate against the Complainant on the basis of race in regard to terms or conditions of employment - specifically, in regard to job assignments - in violation of Sec. 3.23, Madison General Ordinances.
7. The Respondent did not discriminate against the Complainant on the basis of race in regard to discharge in violation of See. 3.23, Madison General Ordinances.

RECOMMENDED ORDER - REMAND

A. The Orders as adopted by the Commission's "Order on Appeal" (dated January 31, 1985) are hereby incorporated in their entirety.

B. The following additional Recommended Conclusions of Law are hereby entered (I begin with Recommended Order No. 8 to avoid confusion; it is noted that Recommended Order No. 5 was deleted by the Commission):

8. The claim of race discrimination in regard to terms or conditions of employment - specifically, in regard to job assignments - is hereby dismissed.
9. The claim of race discrimination in regard to discharge (layoff) is hereby dismissed.
10. The claim of sex discrimination in regard to discharge (layoff) is hereby dismissed.
11. The Respondent shall cease and desist from discriminating against the Complainant on the basis of sex in regard to terms or conditions of employment - specifically in regard to job assignments.
12. That, in addition to those costs authorized by Order No. 4, the Respondent shall pay to the Complainant all additional costs which she has incurred related to the additional issues upon which she has prevailed and twelve percent (12%) interest thereon.

MEMORANDUM OPINION - REMAND

A. Race Discrimination

The record simply does not support a finding of race discrimination; i.e., discrimination because the Complainant is a Native American. There is no evidence of racial remarks, no evidence of differential treatment of other Native Americans who were employed by the Respondent and no other direct or circumstantial evidence to support that the Complainant's race was a factor in her job assignments or her discharge (layoff).

B. Sex Discrimination

1. Job Assignments

The Complainant has clearly proved that her sex was a determining factor in her job assignments as an apprentice steamfitter. She was not paired to work with an experienced journeyperson as frequently as male apprentices Stanford and Sprecher. In addition, Shields (her supervisor) admits on the record that he did not permit her to work in the tunnel because of her sex.

However well-intentioned Shields thought he was, he admitted Whiteagle was capable of doing the work in the tunnel and it was not the employer's role to arbitrarily shield Whiteagle from the hard tasks of her chosen profession. Whiteagle was entitled to sink or swim on her own merits, and Shield's protectionist decision had the potential of hindering Whiteagle's professional development which would require her to be able to do hard as well as easy tasks.

The employer claims that Stanford's and Sprecher's welding backgrounds also had an impact on their job assignments as opposed to Whiteagle. The record simply does not support that any of the tasks that Stanford or Sprecher performed as steamfitter apprentices while Whiteagle was also employed required any special training in welding. Very simply, Whiteagle was capable of doing all the tasks that Sprecher and Stanford were assigned during the time Whiteagle was employed by Badger Mechanical, and the employer's failure to assign Whiteagle as frequently to work with journeypersons

and to perform the more challenging type of tasks that Sprecher and Stanford were assigned to was on account of her sex.

2. Discharge (Layoff)

The employer presented credible evidence that Whiteagle was chosen for discharge (layoff) instead of Stanford and Sprecher for a number of reasons:

(a) Whiteagle had been warned about removing scrap metal from salvage for personal use without the employer's permission;
(b) Sprecher and Stanford had welding backgrounds and Whiteagle did not.

While Whiteagle contests that she did have permission from Shields to remove the scrap material, she did not adequately show by her evidence that she had permission. The record is clear that she was warned about the removal of the scrap metal. She did not show that either Stanford or Sprecher had been warned or otherwise disciplined for similar infractions or that she had been discriminatorily singled out for discipline.

A more major reason articulated by the Respondent for choosing to lay off Whiteagle rather than Stanford or Sprecher were the far more substantial welding backgrounds of the latter two in comparison to the Complainant. While, as previously explained, the welding backgrounds did not justify the disparate job assignments given to Whiteagle, the welding backgrounds were a legitimate consideration in the context of the discharge. Although steamfitter apprentices were first hired on a job-by-job basis from a union hiring list, once hired an apprentice could be retained to work on additional jobs without going through the union hiring list. Thus, in the context of layoff it was legitimate to consider the welding skills which Stanford and Sprecher possessed in the event that other jobs might arise (after the Birge Hall job was over) in which the welding skills of Stanford and Sprecher might be of value to the employer.

The employer additionally tries to argue that the Complainant committed various procedural improprieties regarding her time off for injury (pertaining to keeping the employer informed and adequacy of her doctor's excuse) and vacation (adequacy of notice). The Complainant was never advised during the course of her employment that her medical information or vacation notice were ever problems, and I do not find any credibility to the employer's assertions that those issues were factors in her discharge.

In summary, the Respondent has posited two credible non-discriminatory reasons for the Complainant's discharge (layoff) and the Complainant has not been able to carry her burden to show, by a preponderance of the evidence, that the Respondent's reasons were not credible or were otherwise a pretext for sex discrimination. While the Complainant need only show that her sex was a motivating factor (not necessarily the only motivating factor) in the Complainant's layoff (discharge), the Complainant has not persuaded this Examiner on the layoff issue.

I will point out, however, that the Respondent has taken great pains to attempt to attack the Complainant's abilities because she was completing her apprenticeship schooling and her apprenticeship program more slowly than many of the other apprentices who started at about the same time she did. While it may be true that the Complainant was completing her program more slowly, the record is clear that the Complainant's on-the-job performance was nothing less than adequate and satisfactory at all relevant times.

IMPACT OF DISCHARGE (LAYOFF) RULINGS ON RETALIATION CLAIM

The ultimate result of my decision is that the Complainant prevailed on only one of four of the remanded claims. Furthermore, she failed to prevail on either the sex discrimination or the race discrimination claim in regard to discharge.

However, her failure to prevail on the discharge claims has no bearing on the retaliation claim which was previously affirmed by the Commission and is now pending in Dane County Circuit Court. The retaliation claim is completely independent of the merits of the underlying discrimination claims.[1] One primary purpose of the retaliation provision of the ordinance is to prevent employers from taking action against employees who assert their rights under the discrimination laws in order not to chill good-faith opposition to discriminatory practices. That some or all the practices challenged may later not be found to be discriminatory as a matter of law does not excuse the employer for retaliatory conduct against an employee because she asserted her right to file a complaint.

Signed and dated this 28th day of April, 1986.

Allen T. Lawent
MOC Hearing Examiner

[1]Czarnowski v. DeSoto, 28 EPD par. 32,504 (1981), citing Berg v. LaCrosse Cooler Co., 612 F.2d 1041, 21 EPD par. 30,542 (7th Cir., 1980).