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

Melissa Kidau
[redacted]

Complainant

v.

Starbucks Coffee Company
1 East Main Street
Madison, WI 53703

Respondent

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

CASE NO. 20183166

On January 6, 2021, the Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, held a public hearing on the merits via Zoom. The Complainant, Melissa Kidau, appeared in person and by her attorney by Carousel Andrea Bayrd of Community Justice, Inc. The Respondent, Starbucks Coffee Company (hereinafter, "Starbucks"), appeared by its attorney Nathaniel Cade, Jr. of Cade Law Group, LLC. Based upon the record of the proceedings, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Melissa Kidau, is an African American woman.

2. The Respondent, Starbucks, is a coffee shop. The Respondent maintains an operation or restaurant located at One East Main Street in Madison, Wisconsin (53703).

3. On November 17, 2017, Complainant entered Respondent's store at One East Main Street in Madison, Wisconsin, to purchase a beverage.

4. Complainant was a frequent customer at this and other Starbucks locations in the Madison area, and going to Starbucks was part of her regular life routine.

5. At the time of the subject incident, Complainant was a Starbucks Gold Card member, which was a status awarded to frequent customers.

6. Respondent's downtown location was only a few blocks from the Complainant's employment, and both are located on the Capitol Square of downtown Madison.

7. On November 17, 2017, Complainant was dressed professionally in business-casual slacks, sweater, and business-style black shoes. Complainant's hair was groomed, and she was wearing a red Columbia winter jacket.

8. The Respondent's store was busy when Complainant arrived. She got in line to order.

9. Complainant ordered a tall Very Berry Hibiscus Refresher with no ice, and a cup of ice on the side.

10. Complainant paid for her drink and moved to a side location to wait for it to be ready.

11. Complainant's name was called, and she was given her drink with no ice on the side as she had originally ordered.

12. Complainant then requested a cup of ice directly from the barista, as she had ordered originally.

13. Complainant's initial request was not responded to by staff, so she repeated her request.

14. Respondent's employee, Doug Maertz, pushed a cup of ice with no lid over to Complainant.

15. Complainant had to walk back to her office a few blocks away, so she asked for a lid for the cup of ice so that her drink would not be exposed to the elements.

16. Complainant's initial request went unanswered, so she asked a second time.

17. In response to this second request, Doug Maertz physically pulled the cup of ice back towards him, inviting Complainant to come closer to him by this action.

18. While leaning into Complainant, Mr. Maertz told Complainant that he would not give her a cup of ice in the future because, "I don't want you to get boozed up." Doug Maertz made this statement discreetly, just to Complainant while he was leaning close to her. Doug Maertz did give Complainant a lid.

19. Several other customers stood around Complainant, waiting for their drinks, during Complainant's interaction with Doug Maertz. None of them apparently witnessed the transaction or Maertz's statement.

20. Complainant asked to speak to a manager. Doug Maertz stated he was the manager. Maertz was not the Manager, but a Lead Worker. Complainant asked what his name was, and Doug Maertz pointed to his apron, which stated his name.

21. Complainant left the store and walked the two blocks back to her office immediately after the incident. Complainant was too distraught to concentrate, and she was unable to do work for the rest of the day.

22. Complainant shared an office at the time of the subject incident with co-worker Marcella Ziegler. Ziegler and Complainant had worked together for approximately a year at that time.

23. Complainant talked with Ziegler about the incident, and Ziegler observed that Complainant was distraught.

24. Complainant called Respondent's customer care line the same day of the incident, and Complainant conveyed what happened, that she was humiliated, and that she believed she was discriminated against.

25. Complainant returned home after work and her husband, Sai Kidau, could observe the Complainant was still distraught over the situation.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class race (African American) and is entitled to the protections of the City of Madison Equal Opportunities Ordinance 39.03.

2. The Complainant is a member of the protected class color (Black) and is entitled to the protections of the City of Madison Equal Opportunities Ordinance 39.03.

3. The Complainant is a member of the protected class sex (female) and is entitled to the protections of the City of Madison Equal Opportunities Ordinance 39.03.

4. The Complainant is a member of the protected class physical appearance (manner of dress) and is entitled to the protections of the City of Madison Equal Opportunities Ordinance 39.03.

5. The Complainant is a member of the protected class homelessness (perceived homelessness) and is entitled to the protections of the City of Madison Equal Opportunities Ordinance 39.03.

6. The Respondent is a place of public accommodation within the meaning of the City of Madison Equal Opportunities Ordinance 39.03 and is subject to its terms and conditions.

7. The Respondent did not discriminate against the Complainant on any of the bases alleged by the Complainant, but did afford her a poor customer experience.

ORDER

The complaint is dismissed. The parties shall bear their own costs and fees.

MEMORANDUM DECISION

In her complaint, filed on September 10, 2018, MEOD Case No. 20183166, the Complainant alleges that the Respondent, a public place of accommodation or amusement, discriminated against her on the bases of her sex (female), color (Black), race (African American), physical appearance (manner of dress) and homelessness (perceived as) in the denial of equal enjoyment of a place of public accommodation. The Initial Determination by the City of Madison Department of Civil Rights found that there was no probable cause to believe that the Respondent, a public place of accommodation or amusement, had discriminated against the Complainant in the denial of equal enjoyment by the Complainant on the bases of her sex, color, race, physical

appearance, or homelessness. The Hearing Examiner reversed the Initial Determination's conclusion that there was no probable cause to believe that the Respondent, a public place of accommodation or amusement, discriminated against the Complainant on the bases of the Complainant's race, sex, color, physical appearance or perceived homelessness in its denial of equal enjoyment of its place of public accommodation.

Cases of discrimination can be proven by either the direct or the indirect method. In the direct method, the parties present their cases and the Hearing Examiner examines the facts and, without reliance on inference, reaches a determination of liability or not. Cases utilizing the direct method usually have convincing testimony of discriminatory language or conduct. In a case presented by the indirect method, the parties present their facts and apply those facts, be they inferential or direct, to the respective burdens of proof and production that the law places on the parties. The indirect method of demonstrating discrimination is also known as the burden shifting approach and derives from the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and the cases that follow those decisions.

The Hearing Examiner finds that the proof in this matter is best analyzed using the indirect method. When analyzing a case using the indirect method, the Hearing Examiner first must determine for each allegation of discrimination if the Complainant has established a *prima facie* claim of discrimination.

The record in this matter is unusual in that the findings of the Hearing Examiner rely almost exclusively on the testimony of the Complainant and her witnesses. For a number of reasons related to its failure to comply with the orders of the Hearing Examiner, the Respondent was precluded from calling witnesses who might be expected to give testimony that is contrary to that of the Complainant. This tends to give the Complainant a clear path to conclude that her testimony is credible and must be believed as such. However, the Hearing Examiner in assessing the Complainant's credibility is limited in the extent to which he can extend this conclusion.

To the extent that the Complainant's testimony relates to a recitation of factual matters, the Hearing Examiner has no problem in finding the Complainant's testimony to be credible and in using that testimony in the application of the burden of proof assigned to the Complainant. However, the Hearing Examiner cannot extend the same automatic finding of credibility to the Complainant's interpretation of the facts. That task is reserved for the Hearing Examiner as the Finder of Fact. While the Complainant's testimony does cover much in the way of description of the events, her conclusion as to what those descriptions mean or how they fit into the structure of the burdens of production and proof do not bind the Hearing Examiner. It is the duty of the Hearing Examiner to receive the testimony of the parties, primarily that of the Complainant in this matter, and to determine the facts based upon that testimony and to apply those facts to the law to reach the ultimate conclusion of discrimination or no discrimination.

While, as noted above, the Hearing Examiner finds the Complainant's testimony as to factual issues to be credible, he is not necessarily convinced by the Complainant's application of those facts to the law.

On November 17, 2017, Complainant was a customer of the Starbucks Coffee Company located at One East Main Street, Madison, Wisconsin. Complainant stated she arrived at the store wearing a red Columbia jacket, dressed professionally for work. Complainant approached the counter and ordered her drink. Complainant ordered her drink with no ice and a cup of ice on the

side. When the Complainant's order was ready, it did not match what she ordered, as there was no cup of ice. Complainant asked the barista, Doug Maertz, for a cup of ice. Complainant stated that her initial request for ice went unanswered so she asked again, at which time Mr. Maertz gave her a cup of ice, with no lid or cover. Complainant testified she then asked Mr. Maertz for a lid or cover for the cup, and again Mr. Maertz initially failed to respond to her request. Complainant states that Mr. Maertz did ultimately give her a lid for her cup, and when he did, he pulled the cup closer to himself, leaned toward her and said that she would not be getting any ice next time because he didn't want her to go and get "boozed up."

The Complainant stated that she was "taken aback" by this statement and asked Mr. Maertz what he meant by that comment. Complainant stated that Mr. Maertz told her that it was Starbucks policy not to give ice to customers because customers will use it to put booze in the cups. The Respondent states it was Starbucks policy not to give ice to customers only at this particular Starbucks location. This Starbucks is located in downtown Madison on the Capitol Square. It had been requested by a local alderperson, liquor license subcommittee, and Chief of Police, that due to persons experiencing homelessness gathering outside of establishments on the Square that opened early, these establishments not give out cups of ice unless there was also liquid in the cup. The reason given to Capitol Square businesses for this directive was persons experiencing homelessness in the area were requesting cups of ice to put liquor in, creating a public health and safety issue. Following, Mr. Maertz's comment of getting "boozed up," the Complainant asked for the store manager. Mr. Maertz pointed to his apron and stated that he was the manager. Mr. Maertz was not the store manager at the time of this incident rather he was a shift supervisor or lead worker. The Complainant then left the store with her drink and cup of ice feeling angry, humiliated, and embarrassed.

When the Complainant returned to work, she was unable to focus and to do work for the rest of the day. Complainant shared an office at the time with co-worker Marcella Ziegler, who observed Complainant was not acting in her usual manner. Complainant talked with Ziegler about the incident, and Ziegler observed that Complainant was distraught. Complainant then decided to call the Respondent's customer care line. Complainant called Respondent's customer care line the same day of the incident, conveyed what happened, that she was humiliated, and that she believed she was discriminated against. According to Ziegler, for several days after the incident the Complainant was distraught at work. Sai Kidau stated the Complainant was still distraught when she returned home from work that day and was unable to fully take care of her family for several days after the incident. Complainant shared she felt helpless and stressed following the incident, and was concerned how she would convey to her children what she experienced.

In order to establish a *prima facie* case of discrimination in the form of denial of equal enjoyment of a place of public accommodation on the bases of sex, race, color, physical appearance, or perceived homelessness the Complainant must show that 1) she is a member of a protected class, 2) she suffered an adverse action, and 3) the adverse action suffered was, at least in part, causally connected to her protected class.

The Complainant must prove each element of the *prima facie* claim by a preponderance of the evidence. The burden to prove a claim of discrimination lies with the Complainant.

Presuming the Complainant meets this burden of proof, the burden then shifts to the Respondent to present a legitimate, nondiscriminatory explanation for its actions. This is a burden of production and not one of proof.

If the Respondent carries its burden of production, the Complainant might still prevail if she can point to evidence in the record demonstrating that the Respondent's proffered explanation is either not credible, or represents a pretext for an otherwise discriminatory motive.

In a typical case, the Hearing Examiner would take each allegation of discrimination individually. In the present matter, however, the Hearing Examiner sees a benefit in partially aggregating some of the discussion, while in some areas, addressing the allegations more individually.

First, the Hearing Examiner will address the element of the *prima facie* claim that requires proof of the Complainant's membership in her protected classes.

The Complainant's membership in the protected classes of race, color and sex are not disputed on this record. The Complainant is a Black, African American female, which brings her directly in these three classes. The Respondent does not contend differently. What the Respondent does contest is the Complainant's membership in the protected classes of physical appearance and homelessness.

Before addressing the Respondent's contentions, the Hearing Examiner will take a short diversion with respect to race and color. Customarily, complaints that present allegations of both race and color discrimination are treated by combining those two claims into a single claim of discrimination on the basis of race. Generally speaking, claims of discrimination on the basis of color arise where there are two or more members of the same race, but with different skin tones. That does not appear to be the circumstance in the complaint before us. For purposes of the present complaint, it doesn't matter whether the Complainant's skin tone is lighter or darker, it's the fact that she is an African American and that is reflected, in part, by the color of her skin. The Complainant does not make any specific claim concerning color outside of her identity as an African American. The Hearing Examiner will consider the two claims, that of discrimination on the basis of race and that of discrimination on the basis of color, to be merged into the claim of discrimination on the basis of race.

The Hearing Examiner has no problem finding that the Complainant is a member of the protected class physical appearance. We all have a specific physical appearance and it is whether that physical appearance triggers an act of discrimination that is critical.

What is somewhat confusing on this record is the Complainant's failure to clearly identify what it was about the Complainant's physical appearance that she alleges triggered a discriminatory response from the Respondent. The record repeatedly describes the Complainant as being professionally dressed in slacks, sweater, professional shoes and a Columbia coat. That describes a physical appearance of a person of a certain general class and stature. The Complainant hints that it is because the Complainant, a Black, African American female was attired as previously described, that it created an impression of someone less than a professional in the mind of the Respondent's employee, Doug Maertz. From this oblique discussion, it is not entirely clear to the Hearing Examiner whether it is the manner of the Complainant's dress or her protected characteristics in combination with her attire that forms the basis of her claim of physical appearance discrimination.

The Complainant does contend that her appearance lead Maertz to conclude that she was homeless. This argument is a form of intersectional analysis tying together the two protected classes to form a basis for the Respondent's action. This position is based upon one note in the

Respondent's Customer Service file indicating that Lisa Greco understood Maertz to have concluded that the Complainant was homeless because of her mode of dress or appearance.

Given the record as a whole, the Hearing Examiner concludes that the Complainant's claim is really focused upon her attire. It seems unreasonable to believe that someone who regularly deals with a wide range of individuals from the public would find that someone attired as professionally as the Complainant's appearance is that of a homeless person. The reference in the Respondent's Customer Service notes, while seeming to support the Complainant's position, is difficult for the Hearing Examiner to assess. The context of the discussion in the Respondent's customer care office and how that was embodied in the notes was not supported by the actual testimony of Ms. Greco and such, the Hearing Examiner does not give it the same weight as that given by the Complainant. There are too many foundational questions for the Hearing Examiner to fully accept the reading of the statement given by the Complainant.

The bottom line is that the Hearing Examiner concludes that the Complainant is a member of the protected class physical appearance based upon her attire. How that membership played into the Respondent's actions is yet to be determined.

Finally, the Hearing Examiner turns to the issue of whether the Complainant is a member of the protected class homelessness. As the Respondent points out, the Complainant was not actually homeless. From this fact, the Respondent concludes that the Complainant cannot claim membership in the protected class. The Hearing Examiner disagrees.

Membership in a protected class can be bestowed by either actually being a member of the protected class, being perceived as being a member of the protected class, or as being regarded as being a member of the protected class even when actual membership in the class is not the case.

This distinction is made clear in the case of a person with a disability. The ordinance's definition of disability found at MGO Sec. 39.03(2) clearly identifies "being perceived as having a disability" as part of the definition. Despite this being the only specific reference to this theory of membership in a protected class, common sense dictates that it be extended to other protected classes. If one thinks that a person is a member of a given protected class and then acts upon that belief, it does not matter to the effected individual that they are not actually a member of the protected class. A simpler way of putting this is perception is reality.

While the statement attributed to Maertz clearly demonstrates that Maertz thought the Complainant to be a member of the homeless population, it is not clear why he believed this to be the case. The Complainant clearly believes that it was the manner of her dress based upon the Customer Service notes entered into the record. The Hearing Examiner concludes that it was more likely to be because of the specifics of the order placed by the Complainant.

A bit of history from the record is necessary at this point. During the months leading up to the incident that forms the basis of this complaint, especially during the preceding summer months, the downtown area of Madison experienced concerns about the homeless population, and the tendency of those who were homeless, to congregate in front of public buildings and in other public areas in downtown Madison. Part of this grouping that the City of Madison was concerned with was that the homeless would gather at restaurants in downtown Madison once the overnight shelters closed. The homeless, it was believed, would get ice for alcoholic beverages from the restaurants in the area, and they would then overindulge in public places.

To combat this rash of public drunkenness, the Mayor's Office along with the Police Department requested that downtown restaurants not give or sell cups of ice to the public unless the ice was in a drink. From the record, the Respondent's restaurant in question in this complaint, attempted to cooperate with the request of the public officials. It does not appear from this record that the Respondent had an actual written policy concerning the serving of ice outside of a cup with a drink in it, but the record does appear clear that the Respondent was aware of the request from the public officials, and that it sought to comply with the request.

That Maertz specifically referred to a desire not to see the Complainant "get boozed up" leads the Hearing Examiner to infer that it was the specific transaction sought by the Complainant that led to Maertz's assumption that the Complainant was homeless. As previously stated, the Hearing Examiner does not believe that the manner of the Complainant's attire would lead a reasonable person to the conclusion that the Complainant was homeless. However, for whatever reason, the Hearing Examiner concludes that Maertz did believe that the Complainant was homeless and, therefore, a member of the protected class homelessness.

The Hearing Examiner now turns to the second element of the *prima facie* claim of discrimination, that of whether the Complainant experienced an adverse action. In the context of this complaint, it is not merely that the Complainant experienced an adverse action that is important. The adverse action suffered by the Complainant must also deprive the Complainant of the "full and equal enjoyment" of the goods or services of a public place of accommodation or amusement. See MGO Sec. 39.03(5)(a).

The parties first disagree as to whether the Complainant experienced an adverse action or not. The Complainant takes the view that the conduct of Maertz, when taken as a whole, from invading the Complainant's personal space to his statement about why he would not provide her a cup of ice in the future, was sufficiently severe to represent an adverse action, and one that denied Complainant the full and equal enjoyment of the Respondent's goods and services. As part of the Complainant's argument, she points to the effect upon her emotional state of her transaction at the Respondent's restaurant.

The Respondent, on the other hand, contends that the Complainant requested a beverage, with an additional cup of ice, and a lid for her drink, and that is exactly what she received. The Respondent concludes from this formulation of the facts that the Complainant suffered no adverse action and was not denied the full and equal enjoyment of a public place of accommodation or amusement. In short, the Respondent takes the view that in order for there to be a violation of the ordinance, the Complainant must experience a failure to receive the goods or service that the Complainant requested.

In attempting to sort out the proper standard for deprivation of the full and equal enjoyment of a public place of accommodation or amusement, both parties cite to the case of Thompson v. Burlington Coat Factory, MEOC Case No. 20053210 (Ex. Dec. 9/11/06). In that case, the Complainant sought to pay for a large purchase of goods from the Respondent with cash. The amount was so large that one of the clerks commented in a public voice that the Complainant must be a drug dealer to afford to pay cash for his transaction. The Respondent also called the police to investigate the Complainant's transaction. The Complainant left the Respondent's store in response to the attention given his purchase without completing the transaction. Subsequently, he filed a complaint of discrimination with the Department.

The Respondent sought to have the complaint dismissed asserting that the Complainant was not denied the opportunity to purchase the goods he sought. The Hearing Examiner concluded that the actions of the clerk and the Respondent represented a potential denial of the full and equal enjoyment of the Respondent's public place of accommodation or amusement by creating an environment that was publicly embarrassing and uncomfortable to the Complainant. This created an environment that was not the full service or service that was equal to that of other customers not of the Complainant's protected class.

The Hearing Examiner agrees that the basic holding in Thompson is applicable to this case, but finds that it is in some respects distinguishable from the case at hand. First, in the present matter, Maertz's actions in drawing the Complainant closer to him, and speaking in a voice intended only for the Complainant, can be seen as an attempt to not make a public scene or draw attention to his interaction with the Complainant. In Thompson, the clerk openly announced her opinion as to the Complainant's status as a drug dealer and made the transaction into a public spectacle. Second, there was no testimony demonstrating that any of the other customers in the shop heard what Maertz said or observed anything out of the normal. Third, the Respondent did not call the police or in any other manner seek to highlight the Complainant's transaction.

Having drawn the distinctions between the present matter and the Thompson case, the Hearing Examiner does find that the ordinance's protections involving public places of accommodation or amusement are intended to apply to conduct that amounts to less than a full or complete denial of the goods or services of a public place of accommodation or amusement. The clear language of the ordinance indicates that members of the public are guaranteed the "full and equal enjoyment" of the goods and services of a public place of accommodation or amusement. Given the broad public policy stated in MGO 39.03(1) with respect to preventing the humiliation and embarrassment that comes from discrimination in a public place of accommodation or amusement, the Hearing Examiner is convinced that some types of conduct that fall short of a total denial of service are intended to be covered by the ordinance.

That is not to say that any transaction which is displeasing, even substantially so, to the Complainant will violate the protections of the ordinance. One must bear in mind that even important social justice legislation such as the Equal Opportunities Ordinance represents a balancing of the interests of the protected public and the regulated public. In this regard, it is only common sense that the Common Council did not intend to create an ordinance that makes any dissatisfaction with a transaction at a public place of accommodation or amusement, the subject of a complaint under the ordinance. If that were the case, there would be almost no business that would be willing to serve the public, if each slight or failure of service might generate a lengthy complaint process.

In the context of employment discrimination cases, it is clear that merely boorish conduct or language is insufficient to rise to the level of discrimination. Mostly, the courts have found that we are all subject to the momentary bumps and bruises of modern society, and that civil rights statutes such as Title VII and the Equal Opportunities Ordinance are not intended to shield individuals from slights or relatively transitory offenses. In the matter of Hilt-Dyson v. City Of Chicago, 282 F.3d 456 (2002), the Court opined that in determining whether the contested conduct created an objectively hostile [work] environment, a number of factors needed to be considered. Those factors included the frequency and severity of the conduct, as well as whether the conduct was physically threatening or humiliating, or whether it was a mere offensive utterance. The Court goes on to state that the alleged discriminatory conduct cannot be

considered in a vacuum, but rather should be evaluated in light of the social context in which the events occurred.

In Rhodes v. Illinois Dept. of Transp., 359 F.3d 498 (2004), the Court addresses whether a temporary inconvenience constitutes an adverse action to establish *prima facie* in an employment discrimination case. The Court in Rhodes opined that in order to show an adverse employment action, the aggrieved must show that the adverse action was more than a mere temporary inconvenience or alteration of [job] responsibilities. In the case of Rhodes, the Court determined that the Complainant failed to establish a *prima facie* complaint of discrimination after failing to establish any significant change in employment status or benefits.

In Somerville v. City of Chicago, 291 F.Supp.2d 737 (2003), the Court addresses the continuum upon which potentially harassing acts may fall. The continuum in the Somerville matter ranged from sexual assault on one end as actionable harassment and "vulgar banter […] of coarse or boorish workers" on the other end of the continuum as not actionable. In Somerville, the Complainant alleged use of the term "expectations" by her manager fell within the actionable category. The Court disagreed stating that the use of the term "expectations" without any additional supporting words or actions, failed to render the Complainant's interpretation of this word plausible. The Court held that without evidence of some additional or secondary meaning in the use of that term by Complainant's manager, the court could not find the use of that term to rise to the level of actionable harassment.

In the present matter, we have a transaction that was a single instance and could not have taken more than a small handful of minutes to transpire. The Respondent's representative appears to have taken some pains to limit his discussion with the Complainant to avoid making a public scene and the words reportedly spoken to the Complainant, while unwelcome and disturbing, on their face do not truly represent the type of shocking or disruptive language that an independent observer would find deeply offensive. Taken as a whole, the Hearing Examiner concludes that the Complainant did not experience an adverse action that deprived her of the "full and equal enjoyment" of the Respondent's public place of accommodation or amusement as that term is used and intended in the ordinance.

That is not to say that the Complainant was not deeply offended by the circumstances and the words uttered by Mr. Maertz. The testimony of the Complainant, Ziegler, and Sai Kidau is all compelling with respect to the effect that this transaction had upon the Complainant, but the Hearing Examiner sees this as an example of poor customer service, and not one of the type of conduct sought to be covered by the Equal Opportunities Ordinance.

The impact upon the Complainant is not completely the deciding factor in whether the actions of the Respondent are violative of the ordinance. Of course, the Complainant's substantial distress demonstrates that something unfavorable occurred, but it does not demonstrate that it was the type of action covered by the ordinance.

While it is sufficient to dismiss the complaint at this stage for failure to make out a *prima facie* claim of discrimination, the Hearing Examiner will examine the third and final element of the *prima facie* claim; that of a causal link between the Complainant's protected classes and the alleged adverse action. This element of the *prima facie* analysis is also a critical stumbling block for the Complainant. Even if the Hearing Examiner had found that the Complainant had experienced an adverse action sufficient to deprive her of the full and equal enjoyment of the Respondent's public place of accommodation or amusement, there is doubt that the Complainant

has established the causal link between her protected classes and the alleged discriminatory action.

To establish the causal link between a protected class and adverse action, Complainants often point to the treatment of another similarly situated person not of their protected class for comparison. This is not the only way to demonstrate the causal link, but it is a common method. For other methods, one might look for explicit language or conduct evincing a discriminatory attitude, or look for policies that are focused on individuals of the Complainant's protected class.

In the present matter, the Complainant focuses on demonstrating the causal connection by asserting that the Complainant was not treated as favorably as other customers not of her race, color or sex. Unfortunately, the Complainant fails to demonstrate that the other customers with whom the Complainant wishes to compare herself were similarly situated with her. The Complainant points out that she was the only African American in the restaurant to the best of her recollection. However, this does not establish that those other customers were treated any differently than she was or that they placed orders that were sufficiently similar to the Complainant's to make comparison meaningful. The fact that the Complainant is a Black, African American of itself does not demonstrate the required difference in treatment to establish the causal link between her race or color and Maertz's treatment of her.

The Hearing Examiner is painfully aware of the long and disgraceful history of everyday discrimination experienced by Black African Americans in the United States. The frequent repetition of such treatment is undoubtedly much more obvious to those who have experienced it for their entire lives. However, as expert as this life of experience has made Black African Americans, the litigation process used in the United States requires more than the ability to say that one recognizes discrimination when it occurs to him, her or them. The American system as amplified by the McDonnell Douglas burden shifting framework requires production of facts or evidence sufficient to convince the notional "reasonable person" of the conclusion that discrimination has occurred by the greater weight of the credible evidence.

The burden of proof to demonstrate discrimination rests with the Complainant. It is not the burden of the Respondent to demonstrate that discrimination did not occur. In this regard, the Hearing Examiner concludes that the Complainant has failed to carry her burden of proof to show that there is a causal connection between her race or color and Maertz's actions on November 17, 2017.

The Complainant's allegation that there is a causal connection between the Complainant's sex and Maertz's actions are not demonstrated to the requisite degree. Essentially, the Complainant's claim of discrimination on the basis of sex rests on the Complainant's belief that Maertz would not have treated her in the manner in which he did if she was a man and not a woman. The Complainant's beliefs, no matter how well founded in her life experiences, falls short of the burden of proof required by the law to demonstrate the critical causal link between Maertz's actions and the Complainant's sex.

It is impossible to discuss the potential causal link between the Complainant's physical appearance and her perceived homelessness outside of the context of intersectionality. As noted above, intersectional analysis requires the Hearing Examiner to look at how, if at all, one or more of the Complainant's protected classes might act together to result in a discriminatory action. The burden of proof on such an analytical framework rests on the Complainant. It is the possibility that an analysis based upon intersectionality might demonstrate discrimination such that the Hearing

Examiner found there was probable cause to believe that discrimination had occurred in the present matter in his Decision and Order on Review of Initial Determination dated February 13, 2020.

Despite the Hearing Examiner's finding in his Decision and Order, the Complainant failed to demonstrate that such an analytical framework had proven discrimination occurred instead of the lower standard of proof at the Initial Determination stage. The Complainant's case rests on speculation and surmise, two actions forbidden to the Hearing Examiner.

The one area in which there is some level of proof of the interconnected nature of two of the Complainant's protected classes is the Customer Service note indicating that it was the Complainant's appearance that caused Maertz to believe that the Complainant was homeless. As discussed above, this note fails to indicate or prove what aspect of the Complainant's appearance caused Maertz to believe that the Complainant was homeless. Was it the manner of the Complainant's attire? Or the entirety of the Complainant's appearance, including her race and sex, or possibly her race or color in combination with her attire? The record does not disclose and because the Complainant did not call Maertz or Greco as witnesses, the record remains incomplete.

What the Hearing Examiner can conclude from the record is that Maertz made his statement to the Complainant because he thought she was homeless. It seems immaterial whether it was because of the specifics of the Complainant's attire, or her attire in connection with other factors, or because of the specifics of how and what she ordered, that Maertz drew the conclusion that the Complainant was homeless. The problem for the Complainant is that despite Maertz's reason for making the statement that he did, the fact is that it is unreasonable to conclude that it represented a sufficiently adverse action that it deprived the Complainant of the full and equal enjoyment of the Respondent's public place of accommodation or amusement.

This has been a difficult case for the Hearing Examiner to reach a conclusion. It is clear that the Complainant was deeply affected by the incident, and because of her life experiences, came to a conclusion that she had experienced discrimination. The Hearing Examiner can feel compassion for the Complainant's reaction to this incident, but his duty as the Hearing Examiner is to consider the facts as presented in the record of the proceedings, apply those facts to the law as he understands it, and reach a conclusion. That the Hearing Examiner's conclusion is different from that of the Complainant reflects the Hearing Examiner's duty to remain neutral and make his determinations on the basis of the facts in the record and the reasonable inferences to be drawn from those facts. The Hearing Examiner concludes that the Complainant has failed to meet her burden of proof and that the complaint must be dismissed.

Signed and dated this 15th day of April 2022.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner
cc: Attorney Carousel Andrea Bayrd
Attorney Nate Cade