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

Pauline Hilgers 1111 Park Circle Sun Prairie, WI 53590 Complainant vs. Laboratory Consulting, Inc. 2702 International Lane Madison, WI 53704 Respondent	FINAL ORDER ON REMAND - INTEREST RATE Case No. 20277

The Circuit Court has remanded this case to the Commission with instructions to enter on the record the basis for awarding Complainant interest at the annual rate of twelve percent (12%) on the sums awarded by the Commission in paragraph five (5) of its Final Order on Remand, dated November 10, 1986.[1]

Pursuant to MEOC Rule 15.45 and sec. 227.45(3), Wis. Stats., the Commission advised the parties of its intent to take judicial notice of the fact that in 1984 the prime interest rate, as reflected in the Federal Reserve Bulletin, averaged in excess of twelve percent (12%), and afforded them an opportunity to submit written arguments on this matter. The Commission has considered the written arguments submitted by the parties and now enters the following:

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1. See, Hilgers v. Laboratory Consulting, Inc., and Laboratory Consulting, Inc. v. Hilgers, Nos. 86-CV-6488 and 86-CV-6673, Dane Co. Circ. Ct., Hon. A. Bartell, Aug. 24, 1987; aff'd, No. 87-2260, Court of Appeals, Dist. IV, Dec. 22, 1988 (per curiam).

FINAL ORDER ON REMAND - INTEREST RATE

A. The Commission takes official notice that in 1984 the prime interest rate, as reflected in the Federal Reserve Bulletin, averaged in excess of twelve percent (12%).

B. The Findings of Fact, Conclusions of Law and Order are amended by inclusion of the following Finding of Fact:

34. In 1984, the prime interest rate averaged more than twelve percent (12%).

C. The Commission hereby affirms its Final Order on Remand, dated November 10, 1986, as modified by paragraphs A. and B. herein.

Commissioners Bauman, Gardner, McFarland and Zahner all join in entering the above order. Commissioners Anderson, Houlihan and Ruben dissent. Commissioners Iheukumere, MacPherson, Morales and Vang did not participate.

Dated at Madison this 29th day of March, 1989.

EQUAL OPPORTUNITIES COMMISSION

Booker Gardner
President

BG:233-IA

cc: William Haus
Jeffrey W. Younger

No. 87-2266

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

PAULINE HILGERS,

Plaintiff-Appellant,

v.

LABORATORY CONSULTING, INC.,
AND MADISON EQUAL OPPORTUNITIES
COMMISSION,

Defendants-Respondents

LABORATORY CONSULTING, INC.,

Plaintiff-Respondent,

v.

PAULINE HILGERS,

Defendant-Appellant,

MADISON EQUAL OPPORTUNITIES
COMMISSION AND CITY OF MADISON,

Defendants-Respondents.

APPEAL from an order of the circuit court for Dane county: ANGELA B. BARTELL, Judge. Affirmed.

Before Dykman, Eich and Sundby, JJ.

PER CURIAM. Pauline Hilgers appeals from an order affirming a decision of the Madison Equal Opportunities Commission. Hilgers originally received a favorable ruling from the commission on her retaliatory discharge claim against Laboratory Consulting, Inc. The circuit court vacated the commission's decision, however, and remanded for further proceedings. On remand the commission modified its findings and reduced Hilgers' remedy. The circuit court affirmed the modified decision and she now contends that the commission exceeded the scope of its authority on remand and acted arbitrarily by reducing her remedy. We disagree with both contentions and therefore affirm.

Hilgers filed an age discrimination complaint with Madison Equal Opportunities Commission. She later amended it to include a retaliatory discharge claim after LCI fired her during the proceeding. The commission's hearing examiner found for LCI on both claims.[1] The commission set aside the hearing examiner's finding as to the reason LCI fired her, and substituted a finding that the sole reason was retaliation. As a result it granted her remedies including reinstatement and full back pay.

On appeal the circuit court vacated the decision because the commission erred by reversing the hearing examiner's finding without considering his impressions of the witnesses' credibility. The court instructed the commission on remand to determine if a credibility issue existed, and if so, to record and properly defer to the hearing examiner's credibility impressions, to state the reasons for reversing the hearing examiner's finding whether or not it was based on credibility, and to state the basis for any substituted judgment.

On remand, the commission found that a credibility issue existed regarding the reasons LCI fired Hilgers. It consulted the examiner and, as a result, found that Hilgers' job performance was an additional factor in her discharge. Having modified its earlier finding that the discharge was solely retaliatory, the commission also relied on the hearing examiner's credibility impressions to find that LCI would have soon fired Hilgers in any event. It therefore reduced her remedy to six months back pay and benefits.

Hilgers contends that the commission erred by concluding that credibility was an issue in determining the reason for her discharge. She further contends that because

there was no credibility issue the commission had no authority under the mandate to modify its findings and remedy.

The commission properly determined that credibility was an issue. The question before the commission was LCI's motive for firing Hilgers. Several of LCI's witnesses testified that Hilgers' work performance was poor. The hearing examiner determined that this testimony was credible, and on remand, it was precisely that credibility determination which persuaded the commission to give more weight to LCI's position. The decision on remand therefore remained within the scope of the trial court's mandate.[2]

Limiting Hilgers' remedy to six months back pay was not arbitrary or capricious. Where a discharge is partly due to legitimate reasons, the agency may consider those reasons in fashioning its remedy. Employment Relations Dept. v. WERC, 122 Wis.2d 132, 143, 361 N.W.2d 660, 666 (1985). Although Hilgers contends that there was no evidence that LCI would have fired her within six months, the record indicates otherwise. In addition to ample testimony concerning her poor performance, her last work

evaluation stated that her "present attitude and demeanor make the work atmosphere barely tolerable." From that evidence the commission could reasonably project that LCI would have terminated her within a relatively short period regardless of the pending discrimination case. Because there was sufficient evidence to infer that her employment with LCI would have terminated shortly, it was not arbitrary or capricious to fashion her remedy accordingly.

By the Court.--Order affirmed.

Publication in the official reports is not recommended.

APPENDIX

[1]The proceeding also involved a third claim by Hilgers that is not relevant to this appeal.

[2]Even if there had not been a credibility issue, Hilgers fails to cite any authority or trial court directive preventing the commission from reconsidering its vacated decision.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

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PAULINE HILGERS,

Petitioner,

vs. Case No. 86-CV-6488

LABORATORY CONSULTING, INC. and
MADISON EQUAL OPPORTUNITIES COMMISSION,

Respondents.

and

LABORATORY CONSULTING, INC.,

Petitioner,

vs. Case No. 86-CV-6673

PAULINE HILGERS, MADISON EQUAL OPPORTUNITIES
COMMISSION, and CITY OF MADISON

Respondents.

****

MEMORANDUM DECISION AND ORDER

This is a review by writ of certiorari of a Madison Equal Opportunities Commission (MEOC) decision which orders Laboratory Consulting, Inc. (LCI) to pay Pauline Hilgers six months back pay and twelve percent interest. MEOC ordered the remedy upon finding that LCI violated Section 3.23, Madison General Ordinances by retaliating against Hilgers for filing an age discrimination complaint under the same ordinance.

For the reasons stated below, I find that MEOC did not act beyond the scope of its authority, contrary to law, or arbitrarily or unreasonably in ordering that LCI pay Hilgers six months back pay. I therefore affirm that portion of MEOC's decision. I also find that MEOC did act arbitrarily and unreasonably in ordering that LCI pay Hilgers twelve percent interest. I therefore remand that portion of MEOC's decision for further proceedings consistent with this opinion.

FACTS

Pauline Hilgers began working for LCI as a secretary/receptionist in March 1982. She received her first job evaluation in March 1983. In the evaluation, Hilgers' supervisor, Robert Swenson, rated her overall performance as satisfactory, but rated her attitude for the three months prior to the evaluation as less than satisfactory.

LCI then placed Hilgers under the supervision of a Focus Group consisting of five LCI employees who had some collective management responsibilities. The group placed one of its members, Cliff Thew, in charge of the day-to-day supervision of Hilgers. LCI hoped that transferring the supervision of Hilgers to the Focus Group would lead to improvement in Hilgers' attitude and job performance.

The problems with Hilgers' attitude and job performance which arose after the first six to nine months of her employment included: (1) failure to proofread letters, (2) failure to transmit messages, (3) rudeness on the telephone, and (4) excessively slow turnaround time on some projects. These problems persisted up to the time LCI discharged Hilgers.

Thew conducted an evaluation of Hilgers' job performance from June 1, 1983 to March 1, 1984. His overall evaluation of Hilgers' performance was that: "Employee's work is good, when her attitude doesn't get in the way. Employee's present attitude and demeanor make the working atmosphere barely tolerable. . . ."

On April 4, 1984, Hilgers filed a complaint with MEOC alleging that LCI discriminated against her on the basis of age in regard to terms of employment. Sometime on or before April 26, 1984, LCI posted Hilgers' complaint on a company bulletin board. Hilgers amended her complaint to allege that LCI retaliated against her by posting the complaint. On May 17, 1984, a fact-finding conference was held by MEOC to investigate Hilgers' complaint. At or just prior to the conference, LCI's attorney announced that Hilgers would be terminated

effective May 18, 1984. Hilgers again amended her complaint to allege retaliation.

On December 4, 1984, a MEOC hearing examiner conducted a hearing on Hilgers' complaint. The hearing examiner found that LCI did not discriminate against Hilgers on the basis of age in regard to terms of employment, but that LCI did discriminate against Hilgers by posting her complaint. The hearing examiner also found that Hilgers' filing of a complaint with MEOC was not a factor in her being discharged, and therefore, that LCI did not discriminate against Hilgers in regard to her discharge from employment.

On appeal, MEOC reversed the hearing examiner. MEOC found that LCI's discharge of Hilgers was in retaliation for Hilgers' filing a complaint with MEOC, and therefore, that LCI did discriminate against Hilgers in regard to her discharge from employment. MEOC ordered LCI to reinstate Hilgers.

LCI sought review of the MEOC's decision. On review, Judge William D. Byrne held that LCI was denied due process of law by MEOC's failure to sufficiently document its reasons for reversing the hearing examiner's Recommended Findings of Fact. Judge Byrne remanded MEOC's decision with orders that MEOC:

> (1) make a determination, with an explanation on the record, of whether or not an issue of credibility exists.
> (2) if a credibility issue exists, enter on the record the hearing examiners (sic) impressions of the witnesses and give proper deference to those impressions.
> (3) set fourth on the record the reasons for setting aside or reversing the hearing examiner's finding of fact, whether or not those reasons are based on credibility, and referring particularly to the nature of the inadequacy of the hearing examiner's findings.
> (4) set forth on the record the basis for any substituted judgment.

On remand, MEOC determined that an issue of credibility existed in relation to the retaliatory discharge issue. MEOC noted that the hearing examiner was "skeptical" of the testimony of LCI's upper management (Dr. Hicks, LCI's president, Ronald Osowski, LCI's vice-president, and Robert Swenson) regarding LCI's motivation for discharging Hilgers. The hearing examiner was however

impressed by the credibility of the testimony of the Focus Group members. MEOC did not take issue with the hearing examiner's impressions of the credibility of the witnesses. MEOC stated that it had reversed the hearing examiner's finding that LCI's discharge of Hilgers was not motivated by retaliation because the hearing examiner failed to give sufficient weight to the timing and manner of Hilgers' discharge. Nonetheless, MEOC modified its finding that Hilgers' was discharged in retaliation for filing a discrimination complaint by adding that Hilgers' unsatisfactory job performance was also a factor in her discharge. MEOC also deleted its order that LCI reinstate Hilgers and substituted an order that LCI pay Hilgers six months back pay with twelve percent interest.

Both Hilgers and LCI sought review of MEOC's Decision on Remand. The two actions were consolidated upon stipulation among the parties. The issues raised in this consolidated action are: (1) whether MEOC acted beyond the scope of its authority, or arbitrarily or unreasonably in finding that Hilgers was discharged, in part, due to poor job performance, (2) whether MEOC acted contrary to law or arbitrarily and unreasonably in ordering LCI to pay Hilgers six months back pay, and (3) whether MEOC acted contrary to law or arbitrarily and unreasonably in ordering LCI to pay Hilgers twelve percent interest.

ORDINANCE AND STATUTE INVOLVED

The relevant portions of Section 3.23, Equal Opportunities Ordinance, **Madison General Ordinances**, are as follows:

(9) Equal Opportunities Commission. . . .

(b) The Equal Opportunities Commission shall have the following powers and duties:

4. To receive and initiate complaints alleging violation of this ordinance and to attempt to eliminate or remedy any violation . . . to make the complainant whole again. . . .

(c) 2. b. If, after hearing,, the Commission finds that the respondent has engaged in discrimination, it shall make written findings and order such action by the respondent as will redress the injury done to complainant in violation of this ordinance, bring respondent into compliance with its provisions and generally effectuate the purpose of this ordinance. In regard to discrimination in employment, remedies may include, but not be limited to, back pay.

The relevant portion of Section 68.13, **Stats.** provides that:

(1) Judicial review. Any party to a proceeding resulting in a final determination may seek review thereof by certiorari . . . The court may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision.

Section 138.04, **Stats.**, provides that:

Legal rate. The rate of interest upon the loan or forbearance of any money, goods or things in action shall be $5 upon the $100 for one year and according to that rate for a greater or less sum or for a longer or a shorter time; but parties may contract for the payment and receipt of a rate of interest not exceeding the rate allowed in ss. 138.041 to 138.056, 138.09 to 138.12, 218.01 or 422.201, in which case such rate shall be clearly expressed in writing.

DECISION

The court's review of MEOC's decision is governed by Section 68.13(1), Stats. The scope of review under this statutory writ of certiorari is identical to that under common law writ of certiorari. See, State ex rel. Ruthenberg v. Annuity & Pension Bd., 89 Wis. 2d 463, 464 (1979).

Under common law writ, court review of administrative decisions is limited to determining: (1) Whether the board kept within its jurisdiction; (2) whether it acted contrary to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the board might reasonably make the order or determination in question. **State ex rel. Ball v. McPhee**, 6 Wis. 2d 190, 199-200 (1958); **State ex rel. Kaczowski v. Fire & Police Comm.**, 33 Wis. 2d 488, 500 (1974). The first question requires the court to determine whether the board acted within the scope of its powers. **Ruthenberg supra**, at 473. The second question requires the court to determine whether the board's procedures and decision conformed to applicable statutes and due process requirements. **State v. Goulette**, 65 Wis. 2d 207, 215 (1974). Under the third question, the court must determine whether the board's action depended on facts in the record or reasonably derived by inference from the record. **See, Van Ermen v. DHSS**, 84 Wis. 2d 57, 64-65 (1977). The court, in other words, must determine whether the evidence is such that the board might reasonably have taken the action. **Palleon supra**, at 559; **State ex rel. Harris v. Annuity & Pension Bd.**, 87 Wis. 2d 646, 652 (1979).

The court may not review issues of weight and credibility when considering whether the evidence is such that the board might reasonably have made a given determination. **Id.** at 652. The court is limited to considering whether, in view of all the evidence in the record, reasonable minds could reach the same determination as the board. **Palleon supra**, at 549; **State ex rel. Beierle v. Civil Service Comm.**, 41 Wis. 2d 213, 218 (1969). Where two conflicting views may each be sustained by the evidence, it is for the board, not the court, to determine which view to accept. Samens v. LIRC, 117 Wis. 2d 646, 660.

A. Finding that Poor Job Performance was a Factor in Hilgers' Discharge

The first issue is whether MEOC kept within the scope of its authority on remand when it found that Hilgers' poor job performance was a factor in her discharge. Hilgers contends that MEOC's authority on remand was limited to modifying determinations involving an issue of credibility and that the record does not support MEOC's finding that its determination of the discharge issue involved an issue of credibility.

In its Decision on Remand, MEOC stated that it reversed the hearing examiner's finding of no retaliatory discharge because the hearing examiner failed to give sufficient weight to the timing and manner of Hilgers' discharge. Whether the hearing examiner gave sufficient weight to the timing and manner of Hilgers' discharge depends, in part, on the credibility of the testimony supporting LCI's assertion that Hilgers was discharged due to poor performance. The record therefore does support MEOC's finding that its determination of the discharge issue involved and issue of credibility.

MEOC's actions on remand further support its determination that an issue of credibility existed. In its initial decision MEOC found that LCI discharged Hilgers out of retaliation. MEOC apparently did not consider any testimony regarding Hilgers' poor job performance credible since MEOC made no finding that Hilgers' job performance was a factor in her discharge. On remand, MEOC consulted with the hearing examiner and noted that he was impressed with the credibility of the testimony of the Focus Group members. Their testimony supported LCI's assertion that Hilgers' job performance had been unsatisfactory for some time prior to her having filed a complaint against LCI. As a result, MEOC modified its decision to include a finding that Hilgers' poor performance was a factor in her discharge.

MEOC's actions on remand were consistent with Judge Byrne's orders that MEOC: (1) "make a determination, with an explanation on the record, of whether or not an issue of credibility exists" and (2) "if a credibility issue exists,

enter on the record the hearing examiners impressions of the witnesses and give proper deference to those impressions." I therefore find that MEOC acted within the scope of its authority when it found that Hilgers' poor job performance was a factor in her discharge.

The next issue is whether the record supports MEOC's finding that Hilgers' poor performance was a factor in her discharge.

The only witnesses who may have been involved in the decision to discharge Hilgers were Hicks, Osowski, and Swenson. All of them testified that Hilgers' job performance began deteriorating sometime before the end of her first year and continued to deteriorate until the time of her discharge. Return of Writ Vol. II at 61, 84 & 102 - 03. Hicks and Swenson testified that the decision to terminate Hilgers was made prior to her having filed a complaint with MEOC and was based on Hilgers' poor work and attitude. Return of Writ Vol. II at 79 & 116, The record, however, indicates that the hearing examiner was "skeptical" of this testimony.

The hearing examiner did find credible the testimony of the Focus Group members. None of the members participated in the decision to discharge Hilgers, so they could not testify directly regarding LCI's motivation for discharging Hilgers. Their testimony did, however, corroborate the other witnesses' testimony that Hilgers' work had been deficient for a long period of time leading up to her discharge. Hilgers' two job evaluations, both of which were completed prior to her having filed a complaint with MEOC (Return of Writ Vol. II at 102 & 132 - 33), further corroborate the testimony that Hilgers' work was deficient. Based on all of this evidence, MEOC could reasonably infer that Hilgers' poor job performance was a factor in her discharge.

Counsel for Hilgers admits that the evidence in the record indicates that "Hilgers' job performance may or may not have been a factor in the discharge decision. . . ." Brief for Hilgers at 22. Where two conflicting views may each be sustained by the evidence, it is for MEOC, not the court, to determine which

view to accept. **Samens supra**, at 660. I therefore conclude that the evidence is such that MEOC might reasonably have made its determination that Hilgers' poor job performance was a factor in her discharge.

B. Order that LCI Pay Hilgers Six Months Back Pay

The next issue is whether MEOC acted contrary to law when it ordered LCI to pay Hilgers six months back pay. Hilgers argues that, given MEOC's finding that LCI discharged her out of retaliation, she is entitled to reinstatement. LCI argues that, given MEOC's finding that Hilgers' poor job performance was a factor in her discharge, Hilgers is not entitled to a remedy.

Section 3.23(9)(C)2a, **Madison General Ordinances**, provides that MEOC shall "order such action by the respondent as will redress the injury done to complainant in violation of this ordinance, bring respondent into compliance with its provisions and generally effectuate the purpose of this ordinance." The Supreme Court has never interpreted this language to determine whether an employee who is discharged for both discriminatory and legitimate reasons is entitled to a remedy, and if so, what remedy. However, in Employment Relations Dept. v. WERC, 122 Wis. 2d 132 (1985), the Court applied the "in part" test to the State Employment Labor Relations Act (SELRA), Section 111.80 - 111.94, **Stats.**, by holding that an employee who was discharged, in part, due to her union activities was entitled to a remedy under the Act. The court went on to state that "in dual-motive cases, evidence that legitimate reasons contributed to the employer's decision to discharge the employee can be considered . . . in fashioning an appropriate remedy." **Employment Relations Dept.** supra, at 143.

In reaching its decision, the Employment Relations Dept. court noted that the State should be a "paragon of fairness" toward labor unions, yet "the laws of this state must also be flexible enough to allow for efficiency and productivity in the marketplace." Id. at 141-42. The Court believed that

the "in part" test properly balances the interests of management and labor because the test:

> recognizes the practical difficulty that a discharged employee may have in proving a violation of SELRA . . . and refuting an allegation of misconduct. The discharged employee and the employer do not stand on equal footing in cases alleging unfair labor practice, because of the employer's advantage of being able to monitor the employee's work performance and document any bona fide basis for discipline. . . . 'However, an employe has no comparable ability to monitor the employer's behavior. An employe will not be privy to various management discussions regarding the employe's work performance, attitude, or perhaps even his union activities.
>
> **Id.** at 142 (emphasis omitted) (quoting Amicus Curiae Brief of Wisconsin Education Association Council)

The court however recognized that, in dual-motive cases, the employer's interests must also be protected. One means of protecting the employer's interest is to allow an administrative agency to fashion a remedy which takes into account evidence that legitimate reasons contributed to an employer's decision to discharge an employee. **Id.** at 143.

All of the above policy considerations apply with equal force to employment discrimination cases. I therefore conclude that MEOC did not act contrary to law when it limited Hilgers' remedy in order to take into account LCI's legitimate reasons for discharging Hilgers. In reaching this conclusion, I give proper deference to MEOC's order, in light of MEOC's experience and specialized knowledge in fashioning remedies which effectuate the purpose of the Equal Opportunities Ordinance. **Nottelson v. ILHR**, 94 Wis. 2d 106 (1980).

Hilgers contends that MEOC's order limiting Hilgers' remedy to six months back pay is, nonetheless, unwarranted because the record does not support a finding that, absent discrimination, Hilgers would have been discharged within six months.

There is unrefuted evidence in the record that Hilgers' job performance began deteriorating six to nine months after she was hired. LCI attempted to improve Hilgers performance by transferring supervision of her to the Focus Group. Over the course of nine months, the Focus Group made a considerable

effort to rehabilitate Hilgers. Nonetheless, Hilgers' performance continued to deteriorate. An evaluation which was conducted two months before Hilgers' discharge concluded that Hilgers' "present attitude and demeanor make the working atmosphere barely tolerable."

Based on this evidence, MEOC could reasonably conclude that Hilgers' performance would not have improved had she continued to work for LCI. MEOC also could reasonably infer that LCI would not permit a "barely tolerable" working atmosphere to continue for an extended period of time. Indeed, there is evidence that LCI's management took no more then six months to respond to problem situations. Hicks, LCI's president, testified that he began to avoid using Hilgers' services no more than six months after he became dissatisfied with Hilgers work. Return of Writ Vol. II at 61 - 62. There was additional testimony that, no more than six months after Hilgers' performance began to deteriorate, LCI attempted to rehabilitate her by placing her under the supervision of the Focus Group. Return of Writ Vol. II at 101.

Based on the above evidence, I conclude that MEOC could reasonably infer that, absent discrimination, LCI would not have employed Hilgers for more than six months beyond the time she was discharged. I therefore find that MEOC did not act arbitrarily or unreasonably when it limited Hilgers remedy to six months back pay. Again, in reaching this conclusion I give proper deference to MEOC's order, in light of MEOC's experience and specialized knowledge in fashioning remedies which will effectuate the purpose of the Equal Opportunities Ordinance. Id.

C. Order that LCI Pay Hilgers Twelve Percent Interest

The final issue is whether MEOC acted contrary to law when it ordered LCI to pay Hilgers twelve percent interest on all amounts due Hilgers. LCI contends that, in the absence of express provisions to the contrary, Section 138.04, Stats., places a limit of five percent on an award of interest.

Sections 3.23, Madison General Ordinances makes no provision for awarding interest. Wisconsin's Fair Employment Act, Section 111.31-111.395, Stats., also contains no provision for awarding interest. However, in Anderson v. LIRC, the Supreme Court held that the Act gives the Labor and Industry Review Commission authority to award interest on back pay. The court based its holding on the rationale that victims of discrimination should be "made whole." The court went on to state that interest should be awarded at a rate of seven percent, clearly implying that Section 138.04, Stats., does not apply to interest awarded under the Fair Employment Act.

The reasoning in Anderson is applicable to the ordinance at issue in this case. Madison's Equal Opportunities Ordinance is similar in language and purpose to the Fair Employment Act. Moreover, the language of the Ordinance explicitly directs MEOC to remedy any violation of the Ordinance in order "to make the complainant whole again." I therefore conclude that Section 138.04, Stats. does not apply to interest awarded under the Equal Opportunities Ordinance. I, however, do not view the Anderson court's adoption of a seven percent interest rate as controlling in light of the court's failure to provide its reasoning for adopting that rate.

The Equal Opportunities Ordinance grants MEOC authority to fashion remedies which will redress the injury done to victims of discrimination and generally effectuate the purpose of the ordinance. Section 3.23(9)(c)2.b., Madison General Ordinances. Therefore, it is appropriate that MEOC be allowed some discretion in awarding interest under the Equal Opportunities Ordinance. An agency's exercise of discretion, however, must be based on facts in the record and conclusions based on proper legal standards. Van Ermen supra, at 65. The record contains no facts or fixed legal standard, see, Anderson supra, at 260, from which MEOC could reasonably conclude that an award of twelve percent interest would make Hilgers whole. I therefore must conclude that MEOC acted

arbitrarily and unreasonably in ordering LCI to pay Hilgers twelve percent interest.

CONCLUSION AND ORDER--

For the reasons stated above, I find the MEOC did not act beyond the scope of its authority, contrary to law, or arbitrarily or unreasonably in ordering LCI to pay Hilgers six months back pay. I therefore affirm that portion of MEOC's decision. I also find that MEOC did act arbitrarily in awarding Hilgers twelve percent interest. Based on the reasoning presented above MEOC is ordered to enter on the record the basis for its award of twelve percent interest.

Accordingly, the decision and order of MEOC is remanded in part for further proceedings consistent with this opinion.

Dated this 24th day of August, 1987.

BY THE COURT:

Angela B. Bartell, Judge
Circuit Court Branch 10

cc: Atty. William Haus, 121 E. Wilson St., Madison WI 53703
Atty. Jeffrey W. Younger, P.O. Box 2189, Madison WI 53701
Asst. City Attorney Eunice Gibson, Rm. 401, City County Bldg., Madison WI 53710

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE
MADISON, WISCONSIN

Pauline Hilgers 1111 Park Circle Sun Prairie, WI 53590 Complainant vs. Laboratory Consulting, Inc. 2702 International Lane Madison, WI 53704 Respondent	**DECISION ON REMAND** Case No. 20277

This case is again before the Madison Equal Opportunities Commission (MEOC) as a result of a remand from the Dane County Circuit Court (see Case No. 85 CV 6300, Laboratory Consulting Inc. v. Hilgers, et al, Hon. Wiliam D. Byrne, "Memorandum Decision and Order," August 20, 1986).

On remand, we do not disturb our previous rulings that the employer did not discriminate on the basis of age in any of the manners alleged. We also do not disturb our ruling that the employer discriminatorily intimidated and harassed the Complainant by posting copies of her initial (April 4, 1984) and (first) amended (April 27, 1984) complaints on a company bulletin board. These rulings of no liability for age discrimination and liability for retaliatory posting were consistent with the rulings of the Hearing Examiner.

Therefore, we address on remand only the retaliatory discharge issue which is the issue on which we previously reversed the Hearing Examiner as part of our Final Decision (dated November 18, 1985).

Judge Byrne directed that the MEOC do the following (in relation to the retaliatory discharge issue):

(1) make a determination, with an explanation on the record, of whether or not an issue of credibility exists;

(2) if a credibility issue exists, enter on the record the hearing examiner's impressions of the witnesses and give proper deference to those impressions;

(3) set forth on the record the reasons for setting aside or reversing the hearing examiner's findings of fact, whether or not those reasons are based on credibility, and referring particularly to the nature of the inadequacy of the hearing examiner's findings;

(4) set forth on the record the basis for any substituted judgment.

In light of Judge Byrne's directions and after consulting with the Hearing Examiner regarding his impressions of the credibility of the witnesses, the Commission now enters the following:

FINAL ORDER ON REMAND

A. Finding of Fact No. 32 is hereby deleted and the following is substituted therefore:

32. The Complainant was discriminatorily discharged on May 18, 1984 in part because she had filed discrimination complaints (dated April 4, 1984 and April 27, 1984) under Sec. 3.23, Madison General Ordinances. The Complainant's unsatisfactory job performance was also a factor in her discharge.

B. Order No. 5 is hereby deleted and the following is substituted therefor:

5. That the Respondent shall:

(a) pay to the Complainant the amount, less ordinance setoffs, she would have earned in the next six months had she not been discharged on May 18, 1984;

(b) compensate the Complainant for any and all amounts, less ordinance setoffs, she would have been entitled to receive in the next six months as a fringe benefit or because she was covered by a fringe benefit plan (e.g., insurance, pension and so on) had she not been discharged on May 18, 1984;

(c) pay all reasonable attorney fees and costs to which she is entitled for prosecution of all issues upon which she was successful in proving discrimination;

(d) pay interest of twelve percent (12%) on all amounts due (compensation, attorney fees or otherwise) from the time the amount became due until the time the amount is paid. Compensation shall be considered to have become due on the date the Complainant would have received it had she not been discharged on May 18, 1984; attorney fees and costs will be considered to have become due as of November 18, 1985 (the date of our previous "Final Decision").

C. Subject to the modifications contained in A and B, above, we affirm the Final Findings of Fact, Conclusions of Law and Order(s) as stated in our previous (November 18, 1985) "Final Decision." (For purposes of clarification, this includes Findings of Fact 1 through 31 as they appear in the Examiner's "Interim Recommended Decision," Finding of Fact 32 as it appears in this "Decision on Remand," Finding of Fact 33 as it appears in the Examiner's "Interim Recommended Decision," Conclusions of Law 1 through 4 as they appear in the Examiner's "Interim Recommended Decision," Conclusion of Law 5 as it appears on page 2

of our previous "Final Decision," Conclusion of Law 6 as it appears in the Examiner's "Interim Recommended Decision," Order 1 as it appears in the Examiner's "Interim Recommended Decision," Order 2 as it appears on page 2 of our previous "Final Decision," Orders 3 and 4 as they appear in the Examiner's "Interim Reocmmended Decision," Order 5 as it appears in this "Decision on Remand" and Order 6 as it appears in the Examiner's "Interim Recommended Decision.")

Ten Commissioners participated in the deliberations on this remand. Commissioners Anderson, Bauman, Connor, Elvord, Gardner, Olson, Sturm, and Zahner all joined in entering the "Final Order on Remand" as stated above. Commissioner Ruben dissented and would not find the employer liable for retaliatory discharge. Commissioner Pasdo abstained from the decision.

BASIS FOR DECISION ON REMAND

Item 1: Does a Credibility Issue Exist

The Commission finds, on remand, that an issue of credibility exists in relation to the retaliatory discharge issue. The Complainant alleges that she was discharged for having filed complaints of discrimination under Sec. 3.23, Madison General Ordinances. The employer contends that she was discharged on the basis of job performance deficiencies which the Complainant denies. We find that the testimony of the witnesses has a bearing on our decision for the reasons explained below (under Items 3 and 4).

Item 2: The Hearing Examiner's Impressions of the Witnesses

In accordance with Judge Byrne's directions, the Commission consulted with the Hearing Examiner regarding his impressions of the credibility of the witnesses. We discuss those impressions in the explanation that follows (under Items 3 and 4).

Items 3 and 4: Reasons for Reversing the Hearing Examiner and Basis for Substituted Judgment

In order to prevail on the liability issue in this case pertaining to retaliatory discharge, the Complainant must show by a preponderance of the evidence that the Complainant's having filed a complaint(s) of discrimination under Sec. 3.23, Madison General Ordinances was a motivating factor in her discharge. The Complainant can establish liability (under the "in-part" test) even where other legitimate motivating factors also existed.[1] However, in a mixed-motive case, the legitimate motivating factors may have a bearing on the fashioning of the remedy.[2]

We first address whether the Complainant carried her burden of proof to establish that retaliation was a motivating factor in her discharge. The Hearing Examiner made a contrary finding in his Recommended Finding of Fact No. 32. This is the only finding of fact by the Examiner with which the Commission did not agree in our previous "Final Decision" (dated November 18, 1985).

The Examiner did not find credible the testimony of the Respondent's upper management witnesses (Hicks, Osowski and Swenson) regarding the employer's motivation for having posted Hilger's complaints while she was still employed. The Examiner found and the Commission previously affirmed a finding of discriminatory retaliation in regard to the posting.

As a result of the credibility problems on the retaliatory posting issue, the Examiner was also skeptical of the testimony of Hicks and Swenson regarding the

1. State v. WERC, 122 Wis. 2d 132 (1985); Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis 2d 540, 151 N.W. 2d 617 (1967). These cases have applied the "in-part" test to state and municipal labor relations acts (SELRA and MERA). Also, in Wisconsin Dept. of Agriculture v. LIRC, 17 EPD par 8607 (1978), the Hon. George R. Currie applied the Muskego-Norway (in-part) test to an employment discrimination case under the Wisconsin Fair Employment Act (WFEA), sec. 111.31, et seq. The Commission has also applied this test to cases under sec. 3.23, Madison General Ordinances.
2. See State v. WERC, supra.

motivation for the discharge (the Examiner also concluded that Osowski knew little direct information about the discharge).

However, the Examiner was impressed by the credibility of the Focus group members whose testimony supported upper management's contention that Hilgers' job performance had been unsatisfactory for some time prior to her having filed any discrimination complaints. The Examiner also believed the Focus group's testimony to be more credible than Hilgers' own assessments of her job performance.

The Examiner concluded from the demeanor of the employer's witnesses that they found it extremely difficult to discharge even an employee whose job performance had not been satisfactory. Also, the management style of the company dispersed responsibility in a manner which we find contributed to further delay in making a decision, particulary one that management was reluctant to make in the first place.

Nevertheless, the evaluation done by the Focus group (see Finding of Fact 26) covering the period from June 1, 1983 to March 1, 1984 (and prior to the Complainant's having filed any discrimination complaints) combined with the employer's witnesses' testimony regarding her unsatisfactory performance ever since six to nine months after she began her employment helped persuade the Examiner that she would more likely than not have been terminated even had she not filed a complaint of discrimination. The Examiner made this finding even though he acknowledged that the employer's manner of terminating the Complainant was harsh and insensitive.

We disagree with the Examiner's Recommended Finding of Fact No. 32, even though we do not take issue with his impressions of the basic credibility of the witnesses.

The Examiner's Finding of Fact No. 32 failed to give sufficient weight to the timing and manner of the Complainant's discharge. Although the Complainant's job performance had been unsatisfactory for at least fifteen months prior to her filing her

initial complaint[3] and there is testimony that her discharge had been discussed between Hicks and Swenson before she filed a complaint, the Complainant had not been advised of an impending termination. Further, the employer had treated her in an appalling and insulting manner subsequent to her filing of the complaints by posting two of her complaints and by having its attorney abruptly inform her of her discharge at or just prior to an MEOC investigative fact-finding conference. Also, the Focus group, though having recently supervised the Complainant, was not consulted regarding the discharge.

The combination of these factors convinces us that the filing of the discrimination complaints were a catalyst that led to the Complainant's discharge. The employer had tolerated her less than adequate work performance for more than fifteen months prior to her filing her initial complaint, yet fired her within two months of her having filed the initial complaint.

In conclusion, we do find that the Complainant has proved, by a preponderance of the evidence, that her having filed a complaint(s) of discrimination under Sec. 3.23, Madison General Ordinances was a motivating factor in her discharge. But we also find, based in part on the credibility impressions of the Examiner, that this is a "mixed-motive" case; i.e., that the Complainant's job performance was also a motivating factor in her discharge.

Remedy

There is a presumption that a complainant who has carried her heavy burden to prove discrimination (including discriminatory retaliation) is entitled to a full, make-whole remedy[4] which is what we previously had awarded the Complainant. However,

3. The Complainant began her employment on March 22, 1982. The Complainant's performance deteriorated after six to nine months of employment. Even giving the Complainant the benefit of the doubt and assuming her performance did not deteriorate until after nine months (some time after approximately December 22, 1982), a period of more than 15 months elapsed until the filing of her initial complaint on April 4, 1984.

4. Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S. Ct. 2362 (1975).

that entitlement may be diminished where the employer can show by clear and convincing evidence[5] that there are circumstances which require that the Complainant should receive less than a full remedy.

The employer does not diminish the Complainant's entitlement simply by showing that this is a "mixed-motive" case. The employer's burden is to show, by clear and convincing evidence, that even absent the discriminatory motive it would have discharged her anyway.

After re-examining this matter and having the benefit of the Examiner's credibility impressions, we now modify our order. This is an instance where the Complainant likely would not have been discharged quite as soon as she was had she not filed a complaint, but would likely have been discharged not long after. Despite attempts to salvage the Complainant's employment by assigning her to Focus group supervision, the Complainant's performance had not improved in more than 15 months. While we cannot be sure exactly how much longer the Complainant would have been employed, it was written, even prior to her having filed a discrimination complaint, that her present attitude and demeanor had made the working atmosphere barely tolerable. And the testimony of the Focus group, found to be very credible by the Examiner, supported upper management's version that the problems had been going on for some time.

As a result, we have struck the order for reinstatement. Also, we have limited the Complainant's backpay and fringe benefits recovery to a six-month period. While it is difficult to know exactly when the Complainant would have been discharged had she not filed any complaints, we are now convinced that, in this case, the Repondent has carried its burden to show by clear and convincing evidence that the Complainant more likely than not would have been discharged in a short time, anyway. While the employer

5. Silvers (f/k/a Setzen) v. LIRC (Madison Metropolitan School District), No. 83-CV-3644 (Dane Cir., Hon. Daniel R. Moeser, 1/31/84), affirmed on other grounds, No. 84-883 (Wisconsin Court of Appeals, District IV, 10/28/85). Judge Moeser's Circuit Court opinion cites Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976).

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE
MADISON, WISCONSIN

Pauline Hilgers
1111 Park Circle
Sun Prairie, WI 53590

Complainant

vs.

Laboratory Consulting, Inc.
2702 International Lane
Madison, WI 53704

Respondent

FINAL DECISION

Case No. 20277

A Recommended Decision dated July 12, 1985 was issued by the Hearing Examiner in the above-entitled matter. Both parties timely appealed to the Madison Equal Opportunities Commission (MEOC). Oral arguments were heard before ten (10) members of the MEOC on October 24, 1985. Based upon a review of the record, including consideration of the oral and written arguments of the parties, the MEOC enters the following:

ORDER

A. Recommended Finding of Fact No. 32 is deleted and the following is substituted therefor:

32. The Complainant was discriminated against (i.e., retaliated against) by the Respondent on the basis of having filed discrimination complaints (dated April 4, 1984 and April 27, 1984) under Sec. 3.23,

Madison General Ordinances, in regard to discharge from employment.

B. Recommended Conclusion of Law No. 5 is deleted and the following is substituted therefor:

5. The Respondent discriminated against the Complainant in regard to discharge from employment in violation of Sec. 3.23, Madison General Ordinances on the basis that she made (filed) discrimination complaints under Sec. 3.23, Madison General Ordinances.

C. Recommended Order No. 2 is deleted and the following is substituted therefor:

2. That the Respondent cease and desist its discrimination against the Complainant as described in Conclusions of Law 5 and 6.

D. Recommended Order No. 5 is deleted and the following is substituted therefor:

5. That the Respondent shall:

(a) reinstate the Complainant to the next available position as a secretary-receptionist at a salary comparable to what she would be making had she not been discharged on May 18, 1984; and the Complainant shall be reinstated with all rights, benefits and perquisites of employment (including, but not limited to, seniority) as if she had never been discharged by the Respondent;

(b) pay to the Complainant all amounts, less ordinance setoffs, she would have earned had she not been discharged on May 18, 1984 until the time she is reinstated;

(c) compensate the Complainant for any and all amounts, less ordinance setoffs, she would have been entitled to receive as a fringe benefit or because she was covered by a fringe benefit plan (e.g., insurance, pension, and so on) had she not been discharged on May 18, 1984;

(d) pay all reasonable attorney fees and costs to which she is entitled for prosecution of all issues upon which she was successful in proving discrimination;

(e) pay interest of twelve percent (12%) on all amounts due (compensation, attorney fees, or otherwise) from the time the amount became due until the time such amount is paid. Compensation shall be considered to have become due on the date the Complainant would have received it had she not been discharged on May 18, 1985; attorney fees and costs will be considered to have become due on the date of this Final Order.

E. Subject to the modifications contained in A, B, C and D above, the Recommended Findings of Fact, Conclusions of Law and Order are hereby affirmed and shall stand as the Final Findings of Fact, Conclusions of Law and Order.

SUMMATION

The Commissioners took the following positions regarding the issues presented on appeal:

(1) Commissioners Amato, Anderson, Bauman, Cox, Gardner, Olson, Piediscalzzi and Sturm join in reversing the Examiner's ruling on the retaliatory discharge issue and entering Finding of Fact No. 32 and Conclusion of Law No. 5 as recited above; Commissioners Pasdo and Ruben dissent and would have affirmed the Examiner's ruling that the Respondent was not liable for retaliatory discharge;

(2) Commissioners Amato, Anderson, Bauman, Cox, Gardner, Olson, Pasdo, Piediscalzzi and Sturm join in entering Order No. 2 and Order No. 5 above; while Commissioner Pasdo would not have found the Respondent liable for retaliatory discharge, he agrees with the majority as to the remedy in light of the majority's ruling on liability; Commissioner Ruben dissents on the remedy issue to the extent that retaliatory discharge is remedied;

(3) All ten Commissioners join in affirming the Examiner's other liability rulings (determining that the Respondent was liable for retaliatory posting but was not liable for any of the alleged age discrimination in regard to promotion, compensation and/or discharge); all ten Commissioners also affirm the Examiner's rulings on remedy for the retaliatory posting issue;

(4) All ten Commissioners agree that the Complainant is entitled to all reasonable attorney fees and costs for prosecution of all issues upon which she was successful in proving discrimination, and that the Respondent is

not entitled to any fees for the reasons stated on pp. 3-6 of the Examiner's Memorandum Opinion.

RETALIATORY DISCHARGE

The Commission has reversed the Examiner on the retaliatory discharge issue and has entered an appropriate remedial order for that issue (in addition to the retaliatory posting which was affirmed).

Prior to the Complainant's discharge (effective May 18, 1984), she had filed a discrimination complaint on April 4, 1984 (alleging age discrimination in regard to compensation, promotion and discharge) and a discrimination complaint on April 27, 1984 (alleging unlawful retaliation by the Respondent for having filed the April 4 complaint in that the Respondent had posted the April 4 complaint on its bulletin board). She was discharged at or just prior to the commencement of an MEOC investigative fact-finding conference on May 17, 1984 by a pronouncement made by the Respondent's attorney.

While the Complainant had received at least satisfactory and even high marks on her evaluations for various aspects of her work, she also had attitude problems which began after she had been employed about six to nine months (in the latter part of 1982) and continued throughout the remainder of her employment. These attitude problems were manifested in a variety of ways (see Finding of Fact 27).

Viewing the totality of circumstances in this case, we find that the discrimination complaints filed by the Complainant were at least significant motivating factors (if not the sole motivating factors) that led the Respondent to discharge the Complainant. The Respondent's evidence is not clear that there were any specific plans or intent on the part of the Respondent to discharge her prior to her filing of the discrimination complaints and the Respondent reacted vindictively to her complaints as evidenced by

the retaliatory posting and the abrupt manner she was discharged at (or just prior to) the MEOC fact-finding conference.

While the filing of a discrimination complaint may not be used as some sort of an insurance policy by an employee to thwart an employer's ability to terminate that employee for legitimate reasons, we find the facts in this case show that the employer - notwithstanding the deficiencies it had identified in the Complainant's attitude and performance - terminated her in retaliation for filing the discrimination complaints, as there is an absence of any other precipitating event or activity.

Signed and dated this 18th day of November, 1985.

EQUAL OPPORTUNITIES COMMISSION

A. J. (Nino) Amato
EOC President

AJA:mh-I

Equal Opportunities Commission

City of Madison

James C. Wright, Executive Director

August 5, 1985

Atty. William Haus
Kelly, Haus and Katz
121 East Wilson Street
Madison, WI 53703

Atty. Donald Johnson
Lee, Johnson, Kilkelly and Nichol, S.C.
One West Main Street
Madison, WI 53703

Subject: Hilgers v. Laboratory Consulting, Inc., #20277:
TECHNICAL CORRECTIONS

Following are two technical corrections to the "Recommended Decision" (dated July 12, 1985) in the above-entitled matter:

A. The last sentence of Recommended Finding of Fact No. 15 (incorporated from Interim Recommended Finding of Fact 15) is corrected to read as follows:

A copy of said complaint was received by the Respondent on or about April 9, 1984.

B. On page 8 of the Recommended Decision under the heading "Memorandum Opinion" (in the section discussing attorney fees), the first full sentence is corrected to read as follows:

Certainly it is reasonable to assume that if the posting issue had been the only issue tried the Complainant would have spent 11.70 hours preparing for and administratively litigating the case.

The above technical corrections are made to cure a typographical error (see correction A, changing "1935" to 1984) and a typographical omission (see correction B, adding the word "and"). In all other respects, the Recommended Decision (dated July 12, 1985) stands as issued.

Allen T. Lawent
EOC Hearing Examiner

ATL:mh-IV

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EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE
MADISON, WISCONSIN

Pauline Hilgers 1111 Park Circle Sun Prairie, WI 53590 Complainant vs. Laboratory Consulting, Inc. 2702 International Lane Madison, WI 53704 Respondent	RECOMMENDED DECISION Case No. 20277

An "Interim Recommended Decision" dated April 11, 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 Complainant to submit its bill for attorney fees and costs and allowing the Respondent an opportunity to submit its response. In this particular case, the Examiner also exercised the discretion to hear and did hear oral arguments by the parties on the attorney fees and costs issue. 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" - contained in the attached "Interim Recommended Decision" (dated April 11, 1985) - are hereby incorporated in their entirety into this Recommended Decision and shall stand as the Recommended Findings of Fact.

RECOMMENDED CONCLUSIONS OF LAW

The "Interim Recommended Conclusions of Law" - contained in the attached "Interim Recommended Decision" (dated April 11, 1985) - are hereby incorporated in their entirety in this Recommended Decision and shall stand as the Recommended Conclusions of Law.

RECOMMENDED ORDER

A. Item 5 of the "Interim Recommended Order" - contained in the attached "Interim Recommended Decision" (dated April 11, 1985) - is hereby deleted and the following is substituted therefor:

5. That the Respondent shall pay to the Complainant all reasonable costs and reasonable attorney fees attributable to the prosecution of the issue upon which the Complainant was successful in proving discrimination. The amounts of reasonable costs and reasonable attorneys fees which the Complainant is entitled to for work performed thus far in the proceeding are:

   a. Two Hundred and Ten Dollars and Twenty-Five Cents ($210.25) in reasonable costs;

   b. One Thousand and Eight Hundred and Thirty-Four Dollars and Fifty Cents ($1,834.50) in reasonable attorney fees.

B. That the "Interim Recommended Order" (Items 1 through 6) - contained in the "Interim Recommended Decision" (dated April 11, 1985) - as subject to the modification (of Item 5) above is hereby incorporated in its entirety into this Recommended Decision and shall stand as the Recommended Order.

MEMORANDUM OPINION

The "Interim Memorandum Opinion" - contained in the "Interim Recommended Decision" (dated April 11, 1985) - is hereby incorporated in its entirety into this Recommended Decision and shall stand as the Memorandum Opinion, subject to the following addition:

Attorney Fees: Who is Entitled

A. Complainant's Fees

In Watkins v. LIRC[1], 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 sec. 3.23 of the Madison General Ordinances. This is particularly true in cases of concurrent jurisdiction (where both the state DILHR and the 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) 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 passed an administrative rule, adopted subsequent to the Watkins decision, authorizing an award of attorney fees and costs.[2]

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1. Watkins v. LIRC, 117 Wis. 2d 753 (1984).
2. See MEOC Rule 17 which reads in part: ". . ., reasonable attorney fees and costs may be ordered along with any other appropriate remedies where the Commission finds that a Respondent has engaged in discrimination. . ."

This Examiner further finds that a prevailing Complainant under the local fair employment ordinance ordinarily is to be awarded attorney fees in all but special circumstances consistent with the U. S. Supreme Court's decision in Christianburg Garment.[3] This is because the Complainant, in addition to his/her private stake, is acting as a private attorney general (or, on the local level, as a private city attorney) vindicating a public policy that the Madison Common Council considered to be of the highest priority.[4] (The Complainant's role as a "private attorney general" is also discussed in Watkins.)

In the case at hand, the Complainant prevailed on only one issue: discriminatory retaliation for having filed a discrimination complaint by virtue of the Respondent's posting of her complaint. The Complainant did not prevail on four other issues: age discrimination in regard to compensation, age discrimination in regard to promotion, age discrimination in regard to to discharge, and retaliatory discharge. The fact that the Complainant prevailed on only one central and distinct issue out of five does not by itself constitute a special circumstance that serves to deny her an award of attorney fees. If this were true, Complainants would simply file a separate case for each issue, contributing to additional costs and inconvenience for the parties as well as the agency. In other words, the fact that various issues are consolidated for hearing does not serve to deny to a Complainant attorney fees when the Complainant prevails on less than a majority of the central issues.

The Respondent also argues against the Complainant's attorney fees on the grounds that the Complainant's retaliation issue would not have arisen but for the Complainant having filed an age discrimination complaint which she ultimately lost. This argument is also unpersuasive. The retaliatory act is a separate and distinct unlawful act. Regardless of how the underlying complaint turns out, the issue of retaliation has a life of its own. Even had the Complainant withdrawn her original complaint, she could

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3. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 98 S. Ct. 694 (1978)
4. One indication that the Common Council considered fair employment a policy of the highest priority is found in sec. 3.23 (1) of the Madison General Ordinances which states in part:

> (1) Declaration of Policy. . . . The denial of equal opportunity intensifies group conflict, undermines the foundations of our democratic society, and adversely affects the general welfare of the community. (Emphasis supplied.)

have maintained her retaliation complaint (as regarded the posting of her complaint) by itself.[5]

B. Respondent's Fees

The Watkins case did not address the issue of attorney fees for prevailing Respondents. It is uncertain in Wisconsin if an award of attorney fees to a Respondent for successfully defending a local or state administrative complaint of employment discrimination can be made under any circumstances. However, assuming arguendo that an award of attorney fees to a prevailing Respondent would be possible, surely that award would be subject to similar constraints as those outlined in Christianburg Garment.

In Christianburg Garment, the U. S. Supreme Court ruled that a prevailing defendant (in Federal Title VII[6] fair employment cases) was entitled to attorney fees only where the Court found that the plaintiff's claim was "frivolous, unreasonable, or without foundation."[7]

The reason for the different tests applied to a Respondent's and a Complainant's fee recovery can be explained by equitable considerations discussed in Christianburg Garment. While the Complainant (in addition to any private interests) is cast in the role of a "private attorney general" who is vindicating a public interest of the highest priority, the Respondent does not play such a role. Also, a prevailing Complainant is being awarded fees against a violator of the law which is not true for a prevailing Respondent.

At the same time, it is necessary to deter the bringing of administrative complaints which are frivolous. It is important, however, because a public interest of the highest priority is involved, not to deter Complainants to the point where only the most airtight suits are brought. The U. S. Supreme Court recognized in Christianburg Garment that, "no matter how honest one's belief that (s)he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The

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5. Czarnowski v. DeSoto, 28 EPD par. 32,504 (1981), citing Berg v. La Crosse Cooler Co., 612 F. 2d. 1041, 21 EPD par. 30,542 (7th Cir., 1980)
6. 42 U.S.C. sec. 2000e, et. seq.
7. Christianburg Garment Co. v. EEOC, 434 U.S. 412 at 421.

law may change or clarify in the midst of litigation. Even when the law or facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing a suit."

Consequently, the Respondent (Defendant) is entitled to fees under Title VII only where the Complainant's (Plaintiff) claim is (1) frivolous, (2) unreasonable, (3) groundless, or the Complainant continues to litigate after it has become clear that the claim is one of those three. I find this test is appropriate for determining Respondent's fee awards under the local ordinance as well (if Respondent's fees are awardable at all).

In this case, there is no evidence that any of the Complainant's claims (upon which she did not prevail) were frivolous, unreasonable, or groundless, or had been litigated after they clearly became so. Therefore, the Respondent is not entitled to recover any attorney fees or costs, even though the Respondent successfully defended against four of the five claims.

Calculation of Complainant's Fees

In calculating the amount of attorney fees to which the Complainant is entitled, I divide the Complainant's bill into two periods:

1. Period Prior to Issuance of "Interim Recommended Decision" (dated 4/11/85);

2. Period After Issuance of "Interim Recommended Decision" (commencing 4/12/85)

1. Period Prior to Issuance of Interim Recommended Decision (dated 4/11/85)

Complainant's bill claims 125.75 total hours (see Complainant's June 3, 1985 submission) were spent on this case in this period (beginning 5/24/84 and including work through 3/18/85). The Complainant requests fees to be paid for 59.5 hours (see Complainant's April 22, 1985 submission) or approximately 47% of the total hours for work in successfully litigating the posting (retaliation) issue.

The Respondent opposes that request as excessive, and the Respondent speculates that the Complainant should be paid for only 10% of the total time spent. Further the Respondent argues that Complainant's total hours spent are excessive and unreasonable, pointing specifically to the amount of time spent by the Complainant in the post-hearing briefing phase.

There is no dispute about the reasonableness of the rate of remuneration requested for attorney fees in this case which is $75 per hour.

Consequently, I am left having to determine what a reasonable number of hours for work on the posting issue is (as there are no other issues raised regarding upward or downward adjustment of fees).

I find the Complainant's request to be reimbursed for 47% of the total time spent is excessive. This case involved issues of age discrimination in terms and conditions of employment (promotion and compensation) and discharge. This case also involved an issue of retaliation in regard to discharge as well as the issue of retaliation in regard to posting. While it may be difficult, in hindsight, to go back and sort out what amount of time would have been spent if the posting issue had been the only issue litigated, certainly that amount would not have been 47% of the entire time spent on this case.

Instead, I find that a reasonable measure of the percentage of time devoted to the posting issue may be found in the Complainant's post-hearing brief (submitted 3/6/85). In that brief, the Complainant devotes approximately five of 28 pages to the posting issue (pp. 11-15). Those five pages are essentially a recapitulation of facts and testimony and comentary thereon. The issue was straightforward and not complex. The ratio of 5 to 28 is approximately 18%. Eighteen percent of the total time spent on the case is a reasonable percentage to attribute to work on the posting issue.

Before using the apportionment figure (5/28 or 18%), I must look at the reasonableness of the total hours spent (see Complainant's June 3, 1985 submission). While claiming that the Complainant has billed for excessive hours, the Respondent does not make any specific challenge to the Complainant's time from May 24, 1984 through January 30, 1985 (65.50 hours) or March 8 through March 18, 1985 (3.25 hours). Consequently, the Complainant is entitled to 65.50 hours times 5/28 or 11.70 hours to cover work from 5/24/84 through 1/30/85 and almost exclusively related to representation prior to and

through the hearing. Certainly it is reasonable to assume that if the posting issue had been the only issue tried the Complainant would have spent 11.70 hours preparing for administratively litigating the case. Additionally, the Complainant is entitled to 3.25 hours times 5/28 or 0.58 hours apportioned to the posting issue for work from 3/8/85 through 3/18/85.

What the Respondent does dispute is the 57 hours (see Complainant's June 3, 1985 submission) which the Complainant claims for reviewing the transcript, research and briefing between February 13, 1985 and March 6, 1985. The Respondent claims it spent only about one third as much time (19.75 hours) on similar work, and that the Complainant's request is therefore unreasonable.

I reject the Respondent's argument for a number of reasons. First of all, the issue is whether the Complainant's request is reasonable. That the Respondent spent substantially fewer hours briefing the case than the Complainant does not of itself make the Complainant's request unreasonable. Also the Respondent's hours are, by its own admission, an estimate. The Respondent concedes it was billed by its law firm on a periodic basis for services rendered, and those periodic bills did not separate out the total time spent on this EOC matter. Consequently, the Respondent's estimation is likely to be less accurate than a bill specifically and contemporaneously itemizing work done on this particular case, as the Complainant's bill appears to be. Finally, when applying the 5/28 apportionment (57 hours x 5/28), I find that 10.18 hours are attributable to the posting issue for the briefing phase. If the posting issue had been the only issue litigated, it is not unreasonable that it would have taken 10.18 hours to review the transcript, do research, and write a (5-page) brief. The Complainant has requested 29.5 hours (see Complainant's April 22, 1985 submission) for the briefing work on the posting issue, and the award of 10.18 hours is a substantial reduction.

Therefore, the Complainant is entitled to the following number of hours in the first period: (65.50 + 3.25 + 57) x 5/28 = 22.46 hours. The Complainant is entitled to the following fee for the first period: 22.46 hours x $75/hour = $1,684.50 in attorney fees. The Complainant is entitled to the following costs: $164.90 for a transcript and $41.35 for photocopying.

2. Period After Issuance of "Interim Recommended Decision" (commencing 4/12/85)

Because the Complainant's bill substantially exaggerated the reasonable attorney fees attributable to the posting issue, I am allowing the Complainant compensation for only two of the eleven total hours claimed for work after April 12, 1985 (see Complainant's submission dated June 3, 1985). The two hours I am allowing are for the work done on June 3, 1985 ("Review file; correspondence re 'total' current attorneys fees"), as this document was the most useful submission on the Complainant's behalf. While I do not find the Complainant's bill (see submission dated April 22, 1985) so exaggerated as to warrant the exercise of my discretion to deny fees altogether (see Zabkowicz v. West Bend Co., et al, 37 EPD par. 35,242), I do find the exaggeration warrants reducing the number of compensable hours spent in litigating the attorney fees issue in this second period.

Thus, the Complainant is entitled to $150.00 (which is two hours times $75) in attorney fees plus four dollars in costs for the second period. The four dollars in costs for the second period comes from subtracting the $41.35 (first period) photocopy cost request (see Complainant's April 22, 1985 submission) from the $45.35 (total) photocopy request (see Complainant's June 3, 1985 submission).

Therefore, the Complainant is entitled to the following amounts (combining both the first and second period):

(a) Reasonable Attorney Fees:
$1684.50 + $150 = $1,834.50

(b) Reasonable Costs:
$164.90 (transcript) + $41.35
(photocopy in first period) + $4.00 (photocopying in second period) =
$210.25

Signed and dated this 15th day of July, 1985.

EQUAL OPPORTUNITIES COMMISSION

/s/

Allen T. Lawent
Hearing Examiner

cc: State Equal Rights Division
AL:mr-I

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE
MADISON, WISCONSIN

Pauline Hilgers 1111 Park Circle Sun Prairie, WI 53590 Complainant vs. Laboratory Consulting, Inc. 2702 International Lane Madison, WI 53704 Respondent	INTERIM RECOMMENDED DECISION No. 20277

A complaint was filed with the Madison Equal Opportunities Commission (MEOC) on April 4, 1984 alleging discrimination on basis of age in regard to employment. Said complaint was amended on April 27, 1984 to allege retaliation and was again amended on May 22, 1984 to add further allegations of retaliation.

Said complaint, as amended, was investigated by Mary Pierce of the MEOC staff and an Initial Determination dated July 27, 1984 was issued concluding that probable cause existed to believe that discrimination had occurred as alleged.

Conciliation failed or was waived and this matter was certified to hearing. A public hearing was held commencing on December 4, 1984. Attorney William Haus of KELLY, HAUS and KATZ appeared on behalf of the Complainant who also appeared in person; Attorney Donald D. Johnson of LEE, JOHNSON, KILKELLY and NICHOL, S.C. appeared on behalf of the Respondent. Based upon a review of the record, including

consideration of any posthearing written arguments submitted by the parties, the Examiner enters the following:

INTERIM RECOMMENDED FINDINGS OF FACT

1. The Complainant, Pauline L. Hilgers, whose date of birth is July 8 of 1940, is an adult female who resides in the State of Wisconsin.

2. The Respondent, Laboratory Consulting, Inc. (LCI) is an employer doing business in the City of Madison, State of Wisconsin.

3. The Complainant, then 41 years of age, began her employment with LCI on March 22, 1982 as a secretary-receptionist at an $11,000 annual salary.

4. The Complainant received her first job evaluation at LCI in March of 1983. The evaluation was conducted by her supervisor, Robert Swenson. Swenson was LCI's comptroller.

5. Swenson rated the Complainant's overall performance as satisfactory for the first twelve months of her employment. Swenson also rated her attitude as less than satisfactory for the three months prior to the date of the evaluation.

6. Subsequent to Swenson's evaluation, Hilgers received a 5.5% pay raise.

7. Hilgers believed, at the time of Swenson's evaluation, that her overall performance warranted a rating better than satisfactory and that she should have received a salary increase of more than 5.5%. Hilgers resented Swenson's evaluation throughout the remainder of her employment at LCI.

8. On May 23, 1983, the Respondent hired Annette Wiemann, then 22 years of age, as a secretary-receptionist at a salary of $12,600 annually. Wiemann was assigned to perform the duties that Hilgers had been performing under Swenson's supervision. Just prior to Wiemann's hire or about the same time, the Respondent transferred the Complainant's direct supervision from Swenson to the Focus group. The

Respondent hoped the transfer of the Complainant's supervision would lead to improvement in her attitude and job performance.

9. The Focus group consisted of approximately five LCI employees and had some collective management responsibility to the extent authorized by the company president, G. Phillip Hicks, and vice-president, Ronald Osowski. Swenson was technically a member of and supervisor of the Focus group, but he rarely attended Focus meetings or actively participated with the group.

10. The Focus group designated Cliff Thew as its spokesperson to directly handle the day-to-day supervision of Hilgers.

11. Prior to the time of Hilgers' hire, she had been employed as a clerk at the First Wisconsin Bank from 1963 to 1967; she had also been employed as a receptionist/clerk typist for Anchor Savings and Loan from 1978 to 1980.

Prior to the time of Wiemann's hire, she had been employed as a clerk typist at the State of Wisconsin (DHSS) from May, 1980 to August, 1981; as a bookkeeper at Dierk's Florist from August, 1981 to December, 1981; as an office manager/secretary at Century 21 Key Realty from January, 1982 to September, 1982; and as an office manager at Life Style Services from September, 1982 to May, 1983 (when she was hired by LCI). Wiemann left Century 21 Key Realty because of a business consolidation and she left Life Style Services to take the job at LCI.

12. Hilgers graduated from Madison Area Technical College in 1959 where she had taken Business Math, English, Typing and Letter Composition. Wiemann graduated from Madison Area Technical College in 1981 where she had taken office mid-management courses. Wiemann also studied business administration for one year at Evangel College.

13. Wiemann, who was directly supervised by Swenson, received an evaluation and a five percent raise after approximately six months of employment.

After approximately three additional months, Wiemann was promoted to the position of Administrative Assistant and received a 13.4% raise.

14. When the Complainant learned that Wiemann was making more money than she (the Complainant) was, the Complainant discussed her concerns with Thew.

15. Subsequent to her discussion with Thew, Hilgers filed a complaint with the Madison Equal Opportunities Commission (MEOC) on April 4, 1984 alleging discrimination on the basis of age in regard to compensation, promotion and various other terms and/or conditions of employment. A copy of said complaint was received by the Respondent on or about April 9, 1985.

16. Sometime on or before April 26, 1984, the Respondent posted Hilgers' complaint (dated April 4, 1984) on a bulletin board that could be viewed by all employees as well as visitors to the Respondent's business location. The complaint was posted by Swenson at the direction of Hicks.

17. The bulletin board where Hilgers' complaint (dated April 4, 1984) was posted contained such items as cartoons, articles of interest from other companies, an unemployment compensation sign required to be posted, notices of items for sale, and so on. A second, smaller bulletin board was located next to the bulletin board that contained Hilgers' complaint. The smaller bulletin board contained the Respondent's company memos, meeting minutes and other company business-related documents.

18. During the time which Hilgers' complaint was posted, the Respondent had visitors to its place of business. Certain documents on the two aforementioned bulletin boards (See Finding of Fact 17) were covered by the Respondent so those documents could not be viewed. Hilgers' complaint was not one of the documents covered.

19. The Complainant filed an amended complaint of discrimination with the MEOC on April 27, 1984 adding an allegation of discrimination related to the

Respondent's action of having posted a copy of the original complaint (dated April 4, 1984) on a bulletin board where all employees could see it.

20. After the Respondent received a copy of the amended complaint, Swenson posted the amended complaint (dated April 27, 1984) near the copy of the original complaint on the larger bulletin board (see Finding of Fact 17).

21. On May 17, 1984, a fact-finding conference was held at the Madison Equal Opportunities Commission offices as part of the investigation into Hilgers' complaint, as amended. At or just prior to the beginning of said fact-finding conference, the Respondent's attorney - Donald D. Johnson - announced that the Complainant would be terminated effective May 18, 1985.

22. Copies of the Complainant's original and amended complaints remained posted on the Respondent's larger bulletin board until on or shortly after May 17, 1984, Hilgers' last day of employment.

23. The Complainant was harassed and intimidated by LCI's posting of her original and amended complaints.

24. Wiemann's starting salary was set based in part on her previous earning power and the quality of her previous work experience and schooling. Hilgers also was started at a salary higher than she had earned from her previous employer.

25. Outside of three written evaluations, the Complainant received no other written warnings regarding any deficiencies in her performance.

26. In addition to the evaluation that Swenson had performed in March of 1983, two other evaluations were performed prior to Hilgers' termination. Thew did an evaluation on behalf of the Focus group which was discussed and approved by the group. Said evaluation covered the period from June 1, 1983 to March 1, 1984. Thew's overall evaluation of Hilgers was that:

> Employee's work is good, when her attitude doesn't get in the way. Employee's present attitude and demeanor make the working atmosphere barely tolerable. Employee must learn to accept change and certain setbacks as part of life. (See Exhibit 6)

Annette Wiemann also did an evaluation (Exhibit 10) dated May 7, 1984 at the request of Swenson. Sometime after her promotion to Administrative Assistant, Wiemann was made responsible for distributing work to Hilgers. Wiemann's evaluation of Hilgers reads in part:

> The quality of the work she accomplishes is fine. The problem arises in getting her to perform her job responsibilities.

27. Among the problems with the Complainant's performance and attitude that occurred after the first six to nine months of her employment and until her termination were:

a. Inaccurate typing of letters; specifically, failure to proofread or include all the information she was requested to include;

b. Failure to transmit telephone messages on various occasions;

c. Rudeness on the telephone to customers, employees and relatives of employees; and

d. Excessively slow turnaround time for the work of some employees for whom the Complainant was to perform duties.

28. Age was not a factor affecting the Complainant's compensation at any time throughout her employment with the Respondent.

29. Age was not a factor affecting the Respondent's failure to promote the Complainant to a supervisory position.

30. Age was not a factor affecting the terms and/or conditions of the Complainant's employment with the Respondent.

31. Age was not a factor in the Complainant's discharge from employment by the Respondent.

32. The fact that the Complainant had filed a complaint or amended complaints with the Madison Equal Opportunities Commission was not a factor in the Complainant's discharge, nor was the Complainant retaliated against in regard to discharge for otherwise opposing practices which she believed to be discriminatory.

33. The Complainant was discriminated against (i.e., retaliated against) by the Respondent on the basis having filed a discrimination complaint(s) under Sec. 3.23, Madison General Ordinances, in regard to terms and/or conditions of employment; specifically, the Complainant was discriminatorily intimidated and harassed on the basis of her having filed a complaint under Sec. 3.23, Madison General Ordinances, by the Respondent's posting of her original (April 4, 1984) and amended (April 27, 1984) complaints on a bulletin board in the manner described previously in these findings.

INTERIM RECOMMENDED CONCUSIONS OF LAW

1. The Complainant is a member of the protected class of age under Section 3.23, Madison General Ordinances.

2. The Respondent is an employer within the meaning of Section 3.23, Madison General Ordinances.

3. The Respondent did not discriminate against the Complainant on the basis of age in regard to terms and/or conditions of employment in violation of Section 3.23, Madison General Ordinances.

4. The Respondent did not discriminate against the Complainant on the basis of age in regard to discharge from employment in violation of Section 3.23, Madison General Ordinances.

5. The Respondent did not discriminate against the Complainant on the basis of her opposition to discriminatory practices and/or because she made (filed) a complaint in regard to discharge from employment in violation of Section 3.23, Madison General Ordinances.

6. The Respondent discriminated against the Complainant on the basis that she made (filed) a complaint by posting her complaint in a manner that harassed and intimidated her in violation of Section 3.23(8), Madison General Ordinances.

INTERIM RECOMMENDED ORDER

1. That all issues as described in Conclusions of Law 3, 4 and 5 are hereby dismissed.

2. That the Respondent cease and desist its discrimination against the Complainant as described in Conclusion of Law 6.

3. That the Respondent, for a period of one year, post a copy of the entirety of Section 3.23 of the Madison General Ordinances in a conspicuous location on the bulletin board it presently uses for important internal business communications to all employees.

4. That the Respondent permit MEOC staff persons to verify, on site and/or as otherwise requested by the MEOC through its Executive Director, continuing compliance with Order 3 above.

5. That the Respondent shall pay to the Complainant all costs and reasonable attorneys fees attributable to the prosecution of the issue upon which she was successful in proving discrimination.

6. That the Respondent shall submit, within ten days of the date this order becomes final, evidence of compliance.

INTERIM MEMORANDUM OPINION

In light of the Aikens[1] decision, an analysis of the Complainant's interim burden of proof may be dispensed with and the focus is directed to whether the Complainant met her ultimate burden of proof. The liability issue, for each allegation of discrimination, is whether or not the Complainant proved by a preponderance of the evidence that she was discriminated against on the basis alleged.

To address each liability issue, an examination must be made of those reasons articulated by the Respondent for its actions and that evidence submitted by the Complainant in rebuttal of the Respondent's articulated reasons.

I. Age Discrimination Allegations

A. Compensation, Promotion, Other Terms and/or Conditions

The Complainant alleges that she was discriminated against on the basis of age because she was started at a lower salary than the younger Wiemann for the secretary-receptionist job and because the Complainant received her first evaluation and raise after a year while Wiemann received her first raise after six months.

The Complainant started in March of 1982 at an annual salary of $11,000. She received a 5.5% raise to $11,605 in March of 1983. Wiemann was hired in May of 1983 at $12,600 annual salary and received a 5% raise to $13,230 after approximately six months of employment.

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1. U.S. Postal Service Board of Governors v. Aikens, 103 S.Ct. 1478, 31 E.P.D. par. 33,477 (1983). Aikens makes clear that once all the evidence has been let into the record (i.e., the case has proceeded to completion without being dismissed via an interim motion), the analysis should focus on the Complainant's ultimate burden of proof, not the interim burden.

The Respondent articulated a variety of reasons for the difference in starting salary.[2] Three reasons were effectively offered by the Respondent: that Wiemann's initial salary was based in part on what she had earned previously, that Wiemann had a greater quality of work experience than the Complainant and that Wiemann had a greater quality of schooling than the Complainant.

Swenson testified that the Complainant was started at $11,000 which was a rate higher than her previous employer had paid her. Wiemann had been receiving $1,050 per month ($12,600 per year) from her previous employer and was started at the same rate. Additionally, Wiemann had worked for approximately fifteen months as a clerk/typist (5/80 to 8/81), approximately four months as a bookkeeper (8/81 to 12/81), approximately eight months[3] as an office manager/secretary at Century 21 Key Realty (1/82 to 9/82) and approximately eight additional months as an office manager at Life Style Services (9/82 to 5/83) prior to her hire by the Respondent. The Complainant

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2. Swenson testified that Wiemann also was paid more because over a year of time had elapsed since Hilgers was hired. This was at best a nominal factor. Even assuming that the Respondent might raise the starting salary some amount, it would not alone justify the Respondent having raised the salary to even as much as the $11,605 which the Complainant was being paid due to a 5.5% raise after a year in the job. In this case, other factors were present and it is these other factors, discussed in the body of the opinion above, which primarily accounted for the higher salary.

Also, Swenson testified that Wiemann was paid more than the Complainant essentially because of the attitude that Wiemann manifested at the interview, which Swenson felt was more professional than the Complainant. This Examiner is unconvinced that the manner in which the Complainant interviewed had any bearing on the amount of her starting salary.

3. Wiemann's application lists her as having worked as an office manager at Century 21 Key Realty from January, 1981 to September, 1982 at $1,000/month. However, the application shows that she worked at Dierk's Florist from August, 1981 to December, 1981 as a bookkeeper at $4.00/hour and lists her reason for leaving as "Part-time work while completing college."

I find, therefore, that the job at Century 21 Key Realty was meant to be listed as from January, 1982 to September, 1982 since it was unlikely that Wiemann was working at a $1,000/month job in addition to a part-time job while completing college.

While it is puzzling that Wiemann's graduation date at MATC is listed as May, 1981, there was no specific testimony given as to these parts of Wiemann's application, and I am ruling on the record before me.

had worked for four years as a clerk at the First Wisconsin Bank (1963-67) and approximately two years as a receptionist/clerk typist (1978-80) at Anchor Savings and Loan prior to her hire.

Wiemann had about sixteen months experience, therefore, as an office manager. The Complainant had no such office manager experience.

In terms of education, both Hilgers (1959) and Wiemann (1981) had graduated from MATC. Wiemann studied office mid-management while Hilgers studied more basic office skills. Additionally, Wiemann had studied business administration for one year at Evangel College.

In summary, the Complainant failed to present any persuasive evidence to show that the higher initial salary was based in substantial part on age in addition to or in lieu of the reasons articulated by the Respondent (salary at past employment, quality of previous work experience, quality of education).

As for the initial raise, there was evidence presented that an annual evaluation and pay adjustment (raise) was customary for LCI employees. At the same time, there was also evidence that no established rules were in force and supervisors had some discretion about when to grant raises.

The Complainant again failed to meet her burden to show that the granting to Wiemann of a raise after six months had anything to do with age discrimination. What little evidence was presented indicated that Wiemann was a better performer that the Complainant and that Wiemann's job performance likely accounted for the earlier than customary raise.

In regard to promotion, the Complainant showed no evidence of how age was a factor in Wiemann's having been promoted to Administrative Assistant. At the time of hire, the Complainant was told by Swenson that she would supervise other clerical staff, if there was a need to hire additional staff. This Examiner finds, however, that implicit in that promise was an assumption that the Complainant's performance would

warrant such an advancement. As described in the "Discharge" section below, it was the Complainant's attitude and performance that prevented her promotion, not her age.

Finally, the Complainant failed to show that she was subject to age discrimination in regard to any other terms and/or conditions of her employment, including her unsupported claim that Wiemann was entitled to a longer lunch hour.

B. Discharge

The evidence shows that the Complainant's attitude toward her work became negative after approximately nine months and then became worse for a number of reasons, including (but not limited to) the following:

(a) her disappointment that Swenson's overall rating of her performance in March of 1983 was only "satisfactory" and her belief that she should have received a salary increase of more than 5.5%; and

(b) her resentment that the more recently-hired Wiemann, and not herself, was promoted to Administrative Assistant.

The evidence supports a finding that the Complainant's failure to recognize and correct her own attitude deficiencies led to her discharge. She failed to show that her discharge had anything to do with her age.

II. Retaliation Claims

A. Discharge

LCI gave the Complainant generous opportunity to improve her attitude and job performance. Her supervision and job duties were transferred after her first evaluation. She could not, however, resolve her resentment toward her first evaluation by Swenson. And she further resented the promotion of Wiemann. Her resentment of Wiemann's promotion, while alleged by the Complainant to be resentment caused by the Respondent's age discrimination, was primarily a symptom of the Complainant's inability to deal with her own shortcomings.

While the Complinant had been promised by Swenson, at the time of her hire, that she (Hilgers) would supervise any new clerical staff that needed to be hired, it was unreasonable for the Complainant to believe that the promise would be effective regardless of attitude and performance. The Complainant's attitude and performance began to deteriorate approximately five months prior to Wiemann's hire. While Wiemann's promotion intensified the Complainant's feelings of resentment toward her job and employer, those intensified feelings were not the result of a discriminatory act by the employer.

The Complainant also alleges that Wiemann was discriminatorily given a longer lunch hour, but the Complainant presents no persuasive evidence to show that this occurred or, if it did occur, was because of age discrimination.

Essentially, the Complainant failed to prove that she was discharged because the Respondent, via discriminatory acts, created conditions that affected her attitude. Rather, the Complainant's attitude problem was unrelated to any age discrimination on the Respondent's part.

The Complainant also failed to prove that her having filed a discrimination charge did anything to cause or accelerate her discharge. The Complainant argues that Wiemann's evaluation of Hilgers was based on observation notes which commence on April 14, 1984, shortly after Hilgers filed her initial complaint, and that the timing constitutes evidence of retaliatory intent. The Examiner finds that in this case, however, the Respondent was simply being very cautious in dealing with an individual who had been a problem employee for over fifteen months and who had then filed a discrimination claim.

This is <u>not</u> a case where the Complainant had been performing adequately and later, subsequent to filing a discrimination claim, was more closely scrutinized and suddenly evaluated in a more negative light. While it is clear that the Complainant became more closely scrutinized by the Respondent through Wiemann, after the filing

of the original complaint, the Respondent had adequate substantiation for its decision to discharge the Complainant even without considering Wiemann's observation notes and evaluation.

It does not escape this Examiner, however, that the Respondent reacted harshly to Hilgers' filing of a discrimination complaint. The complaint was posted on a bulletin board for all employees to see (discussed in next section) and the Complainant was discharged on one day's notice at an MEOC fact finding conference. But it also does not escape this Examiner that the Complainant was on a sinking ship by her own design. The Respondent had, by reassigning her to the Focus group, made a significant effort to salvage the Complainant's employment short of discharge. Rather than responding to LCI's efforts, the Complainant simply became more embittered. She has not shown that the filing of the discrimination complaint was a substantial or determining factor in her discharge.

B. Posting the Complaint

The Respondent claims that Hilgers' complaint was posted on a bulletin board where all employees could see because the outcome of her lawsuit could affect the company profit-sharing plan.

I am not drawing an absolute line as to what is or what is not appropriate for a corporate employer's officers to communicate to other employees regarding a discrimination suit filed against the corporation. I do, however, find that wherever that line is, the employer's conduct in this case was unlawfully out of bounds.

The Respondent's articulated reason for posting the complaints are dubious because most of LCI's employees were not involved in the corporate profit-sharing plan and the complaints were not posted on the smaller bulletin board devoted to company business. It should also be noted that the complaints were removed on or around the day the Complainant left LCI's employment, even though the alleged potential impact on the profit-sharing plan still remained and presumably remains to the present day.

However, even if most of LCI's employees were in the company profit-sharing plan and even if the complaint had been posted on the smaller bulletin board, it would still be a per se unlawfully retaliatory act for the employer to post the complaint (and amendment) on a widely accessible company bulletin board for the duration of the Complainant's employment.

To post the complaints in the manner they were had the inevitable impact of harassing and intimidating the Complainant during her remaining tenure. Such posting also could have had a chilling effect on other employees in filing valid complaints and could have had an unnecessarily detrimental effect on the Complainant's ability to obtain future employment.

The policy of fair employment laws, whether federal or state or local, is to encourage resolution of the complaint, compliance with the law, and to minimize harm to both parties. I find the employer's display of a complaint on a daily basis to all of the Complainant's co-workers also interferes with the conciliatory focus of the local fair employment law.

Signed and dated this 11th day of April, 1985.

EQUAL OPPORTUNITIES COMMISSION

/s/

Allen T. Lawent
EOC Hearing Examiner

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