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

Ricardo Harris 6342 Majestic Detroit, MI 48210 Complainant vs. Paragon Restaurant Group, Inc. 6610 Convoy Court P.O. Box 121513 San Diego, CA 92112 Vicorp of Wisconsin, Inc. c/o Gibbons Co. 4333 Transworld Road, #300 Schiller Park, IL 60176 Mountain Jack's - East 4520 East Towne Blvd. Madison, WI 53704 Greenleaf Ventures, Inc. 6610 Convoy Court San Diego, CA 92111 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 20947

This matter came on for a supplementary hearing before Commission Hearing Examiner, Clifford E. Blackwell, III, on April 28, 1993 in Room 312 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53710. The Complainant, Ricardo Harris, appeared in person and by his attorneys Kelly and Haus by Carol Rubin. The Respondents appeared by a corporate representative of Green Leaf Ventures, Inc., Christopher Miles, and by their attorneys, Jenswold, Studt, Hanson, Clark and Kaufmann by Lawrence Bechler. Based upon the record in this matter, the Hearing Examiner now makes his Recommended Findings of Fact, Conclusions of Law and Order as follows:

1. The Respondents in this matter are Paragon Restaurant Group, Inc., Vicorp of Wisconsin, Inc., and Mountain Jack's-East. In 1990, Paragon Restaurant Group, Inc. sold Vicorp of Wisconsin, Inc. and the two Mountain Jack's restaurants in Madison, Wisconsin to Kyotaru International, Inc. Paragon, Inc. retains no interest or control over Vicorp of Wisconsin, Inc. or either of the Madison Mountain Jack's restaurants.
2. In 1990, Paragon Restaurant Group, Inc. corporately reorganized and established a new wholly owned corporate entity known as Green Leaf Ventures, Inc. Green Leaf Ventures, Inc. is a successor in interest to the liabilities of Paragon Restaurant Group, Inc. in this matter. Green

Leaf Ventures, Inc. has recognized or ratified its responsibility for the liabilities established in this matter.

3. On June 28, 1989, the Commission Hearing Examiner, Harold Menendez, issued his Recommended Findings of Fact, Conclusions of Law and Order in this matter. He determined that the Respondents had discriminated against the Complainant on the basis of his race when they terminated his employment on March 8, 1988. He also found that the Complainant would have been paid at the annual rate of $22,000 from March 9, 1988 until September 21, 1988. He would have been paid at the annual rate of $23,500 from September 22, 1988 until March 21, 1989. He would have been paid at the annual rate of $25,000 from March 22, 1989 to the date of the order. These figures were to be used to calculate both back and front pay. Menendez also ordered that back pay include pre-judgment interest at the rate of five percent (5%0) per year. Menendez also ordered the Respondents to reinstate the Complainant to the first available working Chef position at either Madison Mountain Jack's restaurant.
4. The Respondents appealed Menendez's recommended decision and the Complainant cross-appealed it. On February 14, 1990, the Commission issued its decision in this matter. It adopted Menendez's Recommended Findings of Fact, Conclusions of Law and Order in whole but determined that the back and front pay awards must be enhanced by approximately 15 percent pursuant to a determination of the United States Department of Labor that the Complainant was entitled to overtime pay for the period of time that he was employed by the Respondents.
5. The Respondents appealed the Commission's finding of liability to the Dane County Circuit Court. In January, 1991, Judge Moria Krueger issued a decision upholding the Commission's decision.
6. The Respondents appealed Judge Krueger's decision to the Court of Appeals. On June 18, 1992, the Court of Appeals issued a decision upholding the earlier decisions and remanded this matter to the Commission for further proceedings.
7. After he was terminated by the Respondents, the Complainant attempted to find other employment. While he was seeking employment he received Unemployment Compensation benefits in the amount of $3,092. In June of 1988, the Complainant was employed as a baker for Cousins Submarines. His annualized wage; was to be $18,000. In 1988, the Complainant received $6,916.56 in gross wages and bonuses from Cousins Submarines. For some period of time while employed by Cousins Submarines, the Complainant wrongly received unemployment benefits from the State of Wisconsin. Ultimately the Complainant voluntarily terminated the Unemployment Compensation benefits and entered into a repayment agreement with the State of Wisconsin for the amount of wrongly paid benefits. This amount was $2.008.
8. In 1989, the Complainant continued to work for Cousins Submarines are the same annualized wage. In 1989, he received $16,925.25 in gross wages from Cousins Submarines. In October of 1989, the Complainant left his position wish Cousins Submarines to move to Chicago in order to take a job with Araserve, Inc. Araserve, Inc. is a commercial food provider for institutions in the Chicago area. The annualized wage for this position was to be $25,000. There was apparently no bonus potential with this position but the Complainant would receive a full benefit package. In 1989, the Complainant received $5,050.33 in gross wages from Araserve, Inc.
9. The Complainant's employment was subject to a probationary period of 90 days. The Complainant failed to pass his probation because he was unable to maintain the volume of production necessary to his position. His position was terminated at the end of 1989.
10. At the beginning of 1990, the Complainant was unemployed but diligently cooking for work. He received Unemployment Compensation until he obtained work. He reported having received $3,712 in Unemployment Compensation in 1990. It is not clear whether these benefits were paid by the State of Illinois, the State of Wisconsin or by both.

11. In March of 1990, the Complainant took a position as the baker at Eddie's Bakery. He was the only baker. His position did not include a benefit package. His hours were long and overnight. Because of the stress of this position on him and his family stemming from the low pay, the poor hours and personal factors surrounding transportation and scheduling, he continued to look for employment. He quit Eddie's Bakery in May of 1990. His gross wages in 1990 from Eddies Bakery were $4,700.
12. Before quitting his position at Eddies Bakery, the Complainant secured a position as a night baker at Frank's Finer Foods. This position paid $7.00 per hour. The hours were more predictable. The Complainant would receive benefits such as insurance but not until he had been employed for six months. The Complainant still had scheduling problems because of overlapping work schedules with his wife. As a result of these and other personal problems, the Complainant and his wife separated with her returning to the Detroit area. The Complainant worked at Frank's Finer roods until September of 1990. His gross wages from Frank's Finer Foods were $5,543.40 in 1990.
13. The Complainant left his position with Frank's Finer Foods because he had increased transportation troubles as a result of his wife taking the family car when she returned to Detroit. The Complainant secured employment closer to his home. He took the position of Assistant Pastry Chef at the Palmer House Hilton Hotel. This was within walking distance of his home. The position paid $7.28 per hour, a little more than the position at Frank's Finer Foods. The Complainant was not told at the time he was hired that his job was likely to be seasonal and subject to layoff. At the beginning of the holiday season, the Complainant was informed that layoffs would occur after the holidays and that he had little seniority. In 1990, the Complainant's gross wages from the Palmer House Hilton Hotel were $3,514.75.
14. After the holidays, the Complainant's hours were reduced by 40 percent from 5 days per week to 3 days per week. With the information that layoffs were likely, the lack of seniority and his reduced income, the Complainant quit his position with the Palmer House Hilton Hotel at the end of January, 1991. His gross wages from the Palmer House Hilton Hotel were $1,786.04 in 1991.
15. The Complainant returned to Detroit to look for employment and to be closer to his family. The Complainant had received his education, training and early employment in the food industry in and around Detroit. Upon returning to Detroit, the Complainant sought work at restaurants and hotels. He took the first position offered him. It was with Harbortown Market. It paid about $7.00 per hour. Benefits would be available only after 6 months. The Complainant had to work an erratic schedule that sometimes included two work shifts in the same day. The Complainant continued to look for better jobs. The Complainant worked at the Harbortown Market for one to two months before taking a position with Baking by the Auers. His gross wages from the Harbortown Market were $2,839.39 in 1991.
16. Baking by the Auers is a commercial bakery. The Complainant worked there from May until October when he was laid off because of a lack of business. His gross wages from Baking by the Auers were $6,042.15 in 1991.
17. The Complainant immediately regained employment this time with the Oakland Hills Country Club. The Complainant was hired as the Pastry Chef at the Country Club. The Complainant has remained in this position to the present. The position pays $23,000 per year. It provides a benefit package but does not provide for any significant bonus. In 1991, the Complainant received $4,064 in gross wages from the Oakland Hills Country Club.
18. In 1992, the Complainant received $23,668 in gross wages from the Oakland Hills Country Club.
19. The Complainant lost back pay in the amount of $43,442.50 from March 8, 1988 to the date of this decision. This is broken down as follows:

1988: $6,024.66
1989: $6,396.33
1990: $7,567.85
1991: $14,018.42
1992: $5,086.00
1993: $4,349.20

20. Green Leaf Ventures, Inc. operates two chains of restaurants that have locations in the midwest. They are Carlos Murphy's and the Rusty Pelican. Carlos Murphy's is a middle scale restaurant featuring Mexican food. The Rusty Pelican is a slightly higher scale restaurant featuring fresh seafood.
21. On or about April 27, 1993, Green Leaf Ventures, Inc. offered to the Complainant a position as Kitchen Supervisor at its Carlos Murphy's restaurant in Schaumburg, Illinois. This position is equivalent to that of Working Chef at the Mountain Jack's restaurant in responsibility, duty and pay. The position was available immediately and the Respondents placed no time restrictions upon its acceptance. The Carlos Murphy restaurant in Schaumburg is a higher volume restaurant than either of the: Mountain Jack's restaurants in Madison and accordingly has a higher bonus potential. The position offers a generally equivalent package of benefits to that which the Complainant would have received at Mountain Jack's.
22. The offer did not include moving or relocation costs to allow the Complainant to move from Detroit to Schaumburg. The insurance benefits that would be provided under the offer would not take effect until after 90 days of employment. Green Leaf Ventures, Inc. does not pay moving or relocation expenses for new employees but does pay them for existing employees.
23. None of the jobs held by the Complainant since his termination have provided him with the same level of pay and benefits as while he was employed by the Respondents. Since his termination, the Complainant has diligently attempted to regain the same level of employment that he enjoyed with the Respondents.
24. The Complainant has lost the opportunity to invest or to otherwise use money that he would have earned from the Respondents as a result of his termination.
25. The loss of the use of money is compensated for by an award of pre-judgment interest. The Commission calculates such interest at the rate of five percent (59o) per year simple interest. The amount of interest due as of this decision is $7,477.76. This amount is broken down as follows:
    1988: $1,720.29
    1989: $1,506.32
    1990: $1,403.49
    1991: $1,897.22
    1992: $434.90
    1993: $217.46
26. The Complainant has incurred costs including attorney's fees since bringing this complaint.

CONCLUSIONS OF LAW

27. The Hearing Examiner and parties are bound by the decisions issued by Hearing Examiner Harold Menendez on June 28, 1989 and by the Commission on February 14, 1990. This includes Green Leaf Ventures, Inc. because of its acknowledgement or ratification and adoption of Paragon Restaurant Group, Inc.'s liability.
28. The Complainant is entitled to the difference in the pay that he would have received if he had not been terminated by the Respondents and the wages that he actually received in mitigation of

his damages. The Complainant has acted diligently to reasonably mitigate his damages resulting from the termination of his employment by the Respondents.

29. The Respondents liability for back pay was not tolled by the Complainant's quitting jobs in 1990 or 1991 because he was still acting reasonably to mitigate his damages by seeking better jobs that would improve his employment position.
30. The Complainant's entitlement to back pay was not terminated by his move; to Detroit in 1991 because there were legitimate factors relating to his possible employment in Detroit that were not present in Chicago. His motivation for moving to Introit was not entirely personal and he was continuing to reasonably mitigate his damages.
31. The back pay award will not be increased by the amount of potential bonuses that the Complainant might have earned if he had remained employed by the Respondents because such bonuses were not awarded by either Menendez or the Commission.
32. The back and front pay awards will be increased by 15 percent per year in accordance with the determination of the U.S. Department of Labor pursuant to the order of the Commission dated February, 1990.
33. The Complainant's back pay award will include pre-judgment interest fror.1 March 8, 1988 until paid, at the rate of five percent (5%) per year calculated on the basis of simple interest.
34. The Commission is without authority to award or set an amount for post judgment interest.
35. The offer of employment made to the Complainant by Green Leaf Ventures, Inc. on or about April 27, 1993 is not an unconditional offer of employment that would put the Complainant in at least the same position as if he had not been terminated by the Respondents. It is insufficient to either terminate the Respondents' liability for front pay or to satisfy the Commission's order for reinstatement because by failing to pay relocation costs and not starting benefits at the beginning of employment, the Complainant is less well off than he would have been if he had been continuously employed by the Respondents.
36. The Complainant is entitled to receive his costs including a reasonable attorney's fee incurred in pursuing this complaint.

ORDER

37. The provisions of Hearing Examiner Menendez's June 28, 1989 and the Commission's February 14, 1990 decisions are incorporated by reference as if fully set forth herein and are amended or revised only to the extent that they are inconsistent with this decision.
38. The caption of this matter shall be amended to add Green Leaf Ventures, Inc. with an address of 6610 Convoy Court, San Diego, CA, 92111, as a Respondent.
39. The Respondents shall pay to the Complainant back pay in the amount of $43,442.50. This is broken down by year as follows:
    1988: $6,024.66
    1989: $6,396.33
    1990: $7,567.85
    1991: $14,018.42
    1992: $5,086.00
    1993: $4,349.20
40. The Respondents shall pay interest on the above back pay at the rate of five percent (5%) per year beginning with the date of discrimination and continuing until the back pay is paid in full. The amount of interest due as of this decision is $7,477.76. This will accrue at the rate of $6.07 per day after the date of this decision. The amount of interest due is broken down by year as follows:
    1988: $1,720.29

1989: $1,506.32
1990: $1,403.49
1991: $1,897.22
1992: $434.90
1993: $217.46

41. The Complainant shall be reinstated to the first available Working Chef position at either of the Mountain Jack's restaurants in Madison, Wisconsin or the Respondents shall offer to the Complainant the first available Kitchen Supervisor position at any of the Carlos Murphy's or Rusty Pelican restaurants in the Great Lakes region closest to Madison, Wisconsin. If a position is offered at either Carlos Murphy's or Rusty Pelican restaurants, it must be at a facility that has at least the equivalent sales volume and bonus potential of the Mountain Jack's restaurants in Madison, Wisconsin. The position shall place the Complainant in at least as good a position as he would have been if he had not been terminated from his employment at Mountain Jack's-East. This includes the Complainant's eligibility for benefits of employment such as but not necessarily limited to health insurance, life insurance, vacation pay, sick pay and profit sharing if any. If the offered position requires the Complainant to relocate from his current home, it shall include a reasonable transportation allowance and relocation costs.
42. The Respondents shall pay to the Complainant front pay at the rate of $28,7:10 per year less those wages actually received by the Complainant in reasonable mitigation of his damages until the Respondents make a bona fide, unconditional, offer of employment pursuant to the preceding paragraph to the Complainant. The Respondents' liability for front pay shall begin with the date of this decision and shall be calculated and paid quarterly.
43. The Respondents shall pay to the State of Wisconsin Unemployment Compensation Trust Fund on behalf of the Complainant, the amount of $3,092.
44. The Complainant shall submit a petition for his costs including a reasonable attorney's fee along with supporting documentation within thirty days of the entry of a final order in this matter. The Respondents may submit their objections, if any, to the petition within thirty days of its receipt. The Complainant may submit any argument in reply to the Respondents submission within fifteen days of its receipt. The Hearing Examiner may schedule further proceedings if necessary.

MEMORANDUM DECISION

This case began on March 8, 1988 when the Respondents discriminated against the Complainant on the basis of his race by terminating his employment. The Complainant filed a complaint of discrimination with the Commission on May 6, 1988. The complaint was investigated and an Initial Determination finding that there was probable cause to believe that the Complainant had been discriminated against on the basis of his race was issued. Efforts to conciliate the complaint proved unsuccessful. The complaint was transferred to Hearing Examiner Harold Menendez for the conduct of a public hearing. Subsequent to the public hearing, the Hearing Examiner issued Recommended Findings of Fact, Conclusions of Law and Order on June 28, 1989.

The Hearing Examiner found that the Respondents had discriminated against the Complainant. The Respondents were ordered to reinstate the Complainant to his position, to pay him back pay including interest, to pay front pay until he could be reinstated and to pay the Complainant's attorney's fees and costs. Both parties appealed the Hearing Examiner's proposed Decision. The Respondents sought to reverse the finding of discrimination. The Complainant sought to increase the damages awarded to him.

On February 14, 1990, the Commission issued its decision upholding the Hearing Examiner's decision except that it ordered that the back pay and front pay awards be increased commensurate with a decision of the United States Department of Labor awarding the Complainant overtime pay for the period of his employment with the Respondents.

The Respondents appealed the Commission's decision to Dane County Circuit Court. The court affirmed the Hearing Examiner's and Commission's decisions. The Respondents appealed the Circuit Court's decision to the Court of Appeals. The Court of Appeals found no error in the prior decisions. The case was then remanded to the Commission for further action.

During the pendency of this action, Paragon Restaurant Group, Inc. sold Vicorp of Wisconsin, Inc. and its holdings in Madison, Mountain Jack's-East and Mountain Jack's-West to Kyotaru International, Inc. Paragon Restaurant Group, Inc. established a new corporate entity called Green Leaf Ventures, Inc. This new entity "adopted" the liability imposed upon Paragon Restaurant Group, Inc. by the decisions in this matter. The status of Kyotaru International, Inc. with respect to responsibility for the decisions in this action has not been discussed or briefed by the parties. No one has sought the dismissal of either Vicorp of Wisconsin, Inc. or Mountain Jack's- East. It is clear from the record that neither Green Leaf Ventures, Inc. nor Paragon Restaurant Group, Inc, have any connection with the current operation of Vicorp of Wisconsin, Inc. or either of the Madison Mountain Jack's restaurants.

As a result of these corporate changes, the Complainant has moved to amend the caption of this proceeding to include Green Leaf Ventures, Inc. as a Respondent. The Respondents have not objected to this amendment. It is appropriate to amend the caption as requested given the corporate changes and Green Leaf Ventures, Inc.'s stated adoption of the liabilities in this matter. At the supplementary hearing in this matter, all of the various Respondents' interests were represented by Christopher Miles, a corporate representative of Green Leaf Ventures, Inc. Given tie obvious participation in and control over the Respondents' position by Green Leaf Ventures, Inc. it should be denominated as a Respondent in this matter.

A supplementary hearing upon the remand from the Court of Appeals was held on April 28, 1993. The issue for hearing was the determination of damages. The parties appeared before Hearing Examiner Clifford E. Blackwell, III. Subsequent to the supplementary hearing, the parties submitted briefs setting forth their respective positions.

In their briefs both parties attempt to litigate issues that were decided in Hearing Examiner Menendez's June 28, 1989 decision and the Commission's February 14, 1990 decision. The Complainant argues that the back pay and front pay awards should be augmented by bonuses to which the Complainant might have been entitled had his employment continued. The Respondents wishes to relitigate the Commission's decision to enhance Hearing Examiner Menendez's back and front pay awards by a percentage derived from a United States Department of Labor finding of entitlement to overtime pay. The current Hearing Examiner declines the opportunity to re-write history.

Subsequent to Menendez's June 28, 1989 decision, both parties appealed to the Commission. Initially the Respondents appealed and on July 18, 1989, the Complainant cross-appealed. In his appeal, the Complainant specifically stated that one of the issues or findings that he is appealing is whether the Hearing Examiner's decision on the amount of back and front pay should include amounts for bonuses that the Complainant either earned or was likely to earn in the future. This clearly placed the issue in question and the Complainant had an adequate opportunity to argue his position. Apparently he decided to forego this opportunity. The Complainant, in his initial brief in support of his cross-appeal,

fails to discuss or support the issue of bonuses at all. He argues that the back pay award should result in a single level of payment rather than the stepped arrangement settled upon by Menendez. He also argued successfully that the pay awards should be: increased pursuant to the Department of Labor finding of entitlement to overtime. The Respondents filed no responsive brief or argument and accordingly, the Complainant filed no further argument. The Complainant did not seek to reserve the issues raised in its appeal in any manner. The Complainant did not appeal the Commission's decision to Circuit Court, despite the Commission's failure: to include actual or prospective bonuses in its order.

The issue of whether actual or prospective bonuses should be included in the calculation of front and back pay awards in this matter has been or could have been litigated. The Complainant was aware of the issue at the time that he submitted his cross-appeal. After raising the issue, the Complainant failed to argue the issue on appeal. Given this background, it would be inappropriate to allow the Complainant yet another chance to argue an issue upon which he has already lost. A party that has a chance or opportunity to raise or argue an issue on appeal but does not, waives that issue in further proceedings. The Hearing Examiner will not enhance the front or back :gay awards by the amount of any bonus to which the Complainant claims to be entitled. To do so would ignore the preclusive effect that the Hearing Examiner must give to the Commission's decision adopting the Menendez's decision and the Complainant's failure to appeal those findings or determinations.

Similarly the Respondents would have the Hearing Examiner ignore the Commission's decision embodied in it's February 14, 1990 order regarding increasing the back and front pay awards to reflect a finding of the Department of Labor that the Complainant was entitled to overtime for the period of time for which the Complainant actually worked for the Respondents. When the Commission entered its order on February 14, 1990, it adopted the decision of Hearing; Examiner Menendez except that it ordered that the back and front pay awards be increased in accordance with the Department of Labor finding. The Respondents appealed the Commission's and Menendez's finding of liability but made no argument about the remedy or damages. It could and should have appealed the adjustment to the back and front pay awards but it did not. Having foregone the opportunity to challenge the overtime adjustment when it was first imposed, the Respondents should not be allowed to now attack what they should have challenged when they were appealing the Commission's determination. As with the Complainant's effort to claim what he was denied in the first go around of this litigation, the Hearing Examiner will not upset the essential findings of Menendez or the Commission unless it is required to implement the back and front pay awards made in the earlier decisions. To second guess this aspect of the initial decisions would not implement the decisions but would have the effect of vacating them. The Respondents spend significant effort in arguing the wrongness of the Commission's decision but these arguments come too late. The Respondents should have made these same arguments in response to the Complainant's cross-appeal or to the Circuit Court when they appealed the Commission's decision initially.

In both of these instances, the parties are asking the Hearing Examiner not to give effect to a prior decision of the Commission. As the Hearing Examiner is merely the designee of the Commission, he is without the authority to change or alter a decision of what to him is a higher authority. The parties waived their rights to object to these aspects of the earlier decisions by not appealing them at the time. The Complainant indicates that there may have been some agreement about holding discussion of damage issues until the resolution of the Respondents' appeals of liability. The current Hearing Examiner knows of no such agreement and finds no such agreement in the record of these proceedings.

There are several issues presented by the present stance of this matter that tile Hearing Examiner must decide. These issues are:

1. What is the proper point for the termination of the Respondents' back pay liability?
2. Have the Respondents made an offer of reinstatement that is sufficient to terminate the Respondents' front pay liability?
3. What is the measure of pre-judgment interest in this matter?
4. Can the Commission set an interest rate for post-judgment interest?

The Respondents argue that back pay liability should be tolled as of the Complainant's voluntary termination of his employment with Frank's Finer foods or at some other point where the Complainant "voluntarily quit" employment in 1990 or later. It is the Respondents' position that these were reasonably good positions that the Complainant quit for reasons personal to him and not for any reason related to his duty to mitigate his damages. The Complainant contends that these; voluntary "quits" do not act to toll the back pay liability because throughout the period the Complainant was attempting to better his employment and to regain a position that was at least as good as the one from which he was terminated.

Perhaps an initial question to be answered is whether back pay should be calculated to the date of Menendez's decision or the date of this decision or must be terminated at some date between these two. With respect to the question of whether Menendez's decision ends the liability for back pay or whether all such questions remain open until the issuance of this decision is to some extent moot. If June 29, 1989 were the closing date for back pay, then any damages accruing after that date would be front pay pursuant to Menendez's decision. The amount of base pay used in calculating either the back pay or front pay would be essentially the same using either the date of Menendez's decision or the date of this decision. The Respondents, based upon their briefs, clearly assume that the date of the current decision is the date for determining liabilities between the parties subject to their objections. The Complainant makes calculations that seem to assume: both that Menendez's decision fixes the date and amount but that the amount might be flexible in accordance with his arguments about bonuses and other enhancements including post judgment interest.

The Hearing Examiner will use the date of this decision for making a determination of back pay. Though use of this date does not strictly follow the language of Menendez's decision, it carries out the intent of the decision to make the Complainant whole while allowing the Respondents to make their arguments about tolling of the back pay liability. Also given the base pay amounts set forth in Menendez's decision, there is little if any effect on the Respondents' total liability for damages by use of the current date.

The Hearing Examiner finds that the voluntary termination of employment with either Eddie's Bakery or Frank's Finer Foods in 1990 or at any time presented in this record does not toll the Respondents' liability for back pay damages. While employed with the Respondents, the Complainant, in accordance with the earlier decisions, would have been receiving at least $28,750 on an annualized basis plus various benefits such as health, life and disability insurance, vacation pay and other similar payments. This amount includes the overtime award imposed by the Commission but does not include potential bonuses. It is this amount of income that the Complainant had been attempting to replace since his termination by the Respondents. When considering whether the Complainant has mitigated his damages, one must look at his efforts to regain this level of income and benefits.

At no time since his termination has the Complainant found employment that offers him an identical or substantially identical package of pay and benefits. The closest that the Complainant has come to

this position is his employment with Araserve, Inc. in the final quarter of 1989. In this position he would have made $25,000 per year with benefits, for fixed-schedule, day work. There is no indication on the record one way or another concerning the Complainant's eligibility for overtime or bonuses in this position. The only other job that approaches the total employment package is his current position with the Oakland Hills Country Club. This position is not so close as even the Araserve, Inc. position in that it pays only $23,000 per year. The Complainant testified that he received only minor bonuses and there was no testimony about his eligibility for overtime. He does receive a package of benefits that may be close to those that he would have received with the Respondents.

The Respondents have made no argument about any lack of effort on the part of the Complainant to seek "better" employment since obtaining the job with the Oakland Hills Country Club. The record does not reflect any additional efforts on the Complainant's part to seek more nearly comparable employment. Without an objection of the Respondent, however, the Hearing Examiner does not believe that it is necessary to make a finding about the Complainant's efforts to mitigate during this time period. Lambent v. All Lighting, Inc., (LIRC, 08/28/90), Sprogis v. United Airlines, Inc., 517 F.2d 387, 10 FEP Cases 1249 (7th Cir. 1975)

The Respondents argue that leaving a position for personal reasons or leaving a geographic region either toll or terminate the Respondents' back pay liability. The cases cited by the Respondents in support of these contentions are not necessarily determinative of these issues. With respect to the issue of leaving a geographic region, it is clear that if the move is motivated for purposes of finding employment that it does not terminate a Respondents' liability for damages even if there may also be some personal motivations. DiSalvo v. Chamber of Commerce, Inc., 568 F.2d 593 (8th Cir. 1978), Stone v. A.& S. Oil Well Servicing, Inc., 624 F.2d 142, 23 FEP Cases 157 (10th Cir. 1980). In NLRB v. Rice Lake Creamery Co., 365 F.2d 888 (D.C. Cir. 1966) cited by the Respondents, the employee left the area in order to assist a family member who was having some personal problems and that terminated back pay. However, a personal reason such as this ,vas not the sole motivating factor in the current case. The Complainant moved back to Detroit, at least in part, because he was having little luck in obtaining a satisfactory job in the Chicago area. For a number of reasons, the Detroit area offered some better hope for employment. These include his early training and work experience as well as family and other connections. An opportunity to reconcile with his wife may have been an additional benefit. It cannot be said on this record however that personal reasons and not employment reasons were the sole or even predominant reasons for the Complainant's move to Detroit.

The cases cited by the Respondents showing that liability may be tolled or terminated where a Complainant quits or leaves a job for personal reasons properly state the law. However, the circumstances in which this interrupts liability are not so broad as the Respondents would have the Hearing Examiner believe. The Respondents rely principally on the case of Brady v. Thurston Motor Lines, Inc., 753 F.2d 1269 (4th Cir. 1985). In Brady, the employee's entitlement to back pay was tolled because of his own wrongdoing on the job. The entitlement was not terminated but only tolled. In this case, there is no question of the Complainant's wrongdoing at any of his jobs. He generally left a job on his terms and for a better position.

It must be conceded that at several points in the past years the Complainant has left jobs when he was not required to do so. In some ways, these terminations were voluntary. At least in part, they were motivated by personal concerns such as schedules or lack of personal transportation. These reasons under the circumstances of this case do not, however, act to toll the accrual of back pay. The Complainant's responsibility is to take reasonable steps to mitigate his damages, not to work at any job regardless of pay and hours. State ex rel. Badger Produce v. MEOC, (Dane Co. Cir. Ct. 09/02/80), EEOC v. Guardian Pools, Inc., 828 F.2d 1507, 44 FEP Cases 1824 (11th Cir. 1987). The Complainant

was terminated by the Respondents from a position that would have paid him between $25,000 and $28,750 per year for a fixed schedule along with a significant package of benefits including health and disability insurance as well as other benefits.

The record demonstrates that the Complainant was diligent in attempting to find work that was the equivalent of that from which he was terminated. The only significant gaps in his employment occurred from his termination by the Respondents until he was hired by Cousins Submarines, a period after his failing to pass his probation with Araserve, Inc. until Mar,-,h of 1990 when he went to work for Eddie's Bakery and for a period of time in 1991 after he left the Palmer House Hilton Hotel and found work at the Harbortown Market after returning to Detroit. Other than these three periods, the Complainant has remained more or less continuously employed. The Respondents seem to admit that the Complainant took reasonable efforts to regain employment after his termination in 1988. The Respondents also apparently concede that the Complainants should not be faulted for the period of time in 1990 that the Complainant was unemployed after failing to pass his probation with Araserve, Inc. This had represented a good chance for the Complainant to more closely make up the lost income resulting from the Respondents' discrimination, however, there is no question that the Complainant's termination was not as a result of wrongdoing on his part. The Complainant received Unemployment Compensation until he went to work at Eddie's Bakery. This was an opportunity to be in at the start of a new business venture. The Complainant put in extremely long hours on an essentially overnight shift because he was the only baker. His shift would start at 7:00 p.m. and would continue for an indefinite period usually 12 to 14 hours. He was not eligible for any benefits. The only advantages to this position for the Complainant were that he was getting some pay and that presumably if the venture was successful, he might benefit more in the future. The Complainant had a family and limited personal resources. It is not unreasonable for h m to have foregone an indefinite future possibility for more secure employment with some prospects for benefits such as by leaving Eddie's Bakery for a more fixed schedule at Frank's Finer Foods. There was no significant gap of employment between Eddie's and Frank's.

Similarly, while Frank's provided stable employment it was in no way equivalent to the employment that the Complainant had lost with the Respondents. Partially as a result of the problems surrounding the work schedule at Frank's Finer Foods, an overnight shift, and the lack of a second car and child care, the Complainant and his wife separated. She returned to Detroit taking the family car with her. This left the Complainant with an almost impossible transportation problem trying to get from his home to his job at Frank's. He found new employment closer to K .s home. It is possible that he could have relocated where he lived but the Hearing Examiner believes that to require this would have placed an unrealistically high burden on the Complainant. Such a move would have likely necessitated the payment of additional money for housing including a new security deposit and time and transportation that the Complainant did not have simply to find a new place. Instead under the circumstances of this case it was reasonable for the Complainant to move to a job closer to where he lived.

In accomplishing this move, again the Complainant spent little or no time unemployed before starting a new job as a pastry assistant at the Palmer House. The pay was actually a little higher than that which the Complainant was receiving at Frank's Finer Foods ($7.28 instead of $7.00 per hour). He was not told at the beginning of his employment at the Palmer House that this was likely to be seasonal employment and that layoffs would be likely after the holiday season. The Complainant was told of impending layoffs at the beginning of the holiday season. When his hours were reduced by 40 percent, he believed that his layoff could not be far off. This does not seem to be an unreasonable view of his future. He had little or no seniority and his hours had already been substantially reduced.

He could not meet his financial needs under his current schedule. The Complainant's decision to quit before being laid off and seeking employment in Detroit were reasonable and will not toll the pay awards.

While leaving a job, even though one with reduced hours, might in some circumstances toll a pay award, where the Complainant was still acting reasonably to mitigate his damages, it will not have the effect of tolling the Respondents' liability because the Complainant was acting reasonably throughout to mitigate his wage loss. See, Badger Produce, supra. The Respondents argue that the Complainant's move to Detroit should automatically terminate liability for back pay, DiSalvo, supra. Moving to Detroit from Chicago was reasonable given the Complainant's background. The Complainant was from the Detroit area, he had received his schooling and training in the Detroit area and had been successfully employed in the Detroit area. These factors indicate that the Complainant should be more likely to find substantial employment in Detroit. These factors were not: present in Chicago and could not be helpful in securing employment. A move from one city or locale: to another must be judged on a case by case basis for the reasonableness of the move in light of the obligation to mitigate damages.

While the Complainant was unemployed for approximately two months, he was making reasonable efforts to regain employment. He looked for positions in hotels and restaurants. He took the first job offered to him. This was at the Harbortown Market. His schedule was erratic, sometimes requiring him to work a double shift or two split shifts in the same day. The pay was about what he had been making in Chicago and he was not entitled to benefits until after he would have been employed for six months. It is not unreasonable for the Complainant, given the work schedule, pay and lack of immediate benefits at the Harbortown Market to move to the position at Baking by the Auers. This move was accomplished without a loss of pay or time out of the employment market.

The Complainant's loss of the Baking by the Auers position was not due to any factor over which the Complainant had control. He was terminated as a result of a lack of business. The Complainant immediately found his current employment. The Complainant receives slightly more than $23,000 per year. This is still less than what the Complainant would have been making had the Respondents not wrongfully terminated him in 1988.

The real question about mitigation presented by this record is whether the Complainant's actions during the period from early 1990 until September of 1991, while the Complainant was substantially under-employed, represent a reasonable effort to mitigate his damages. The record indicates that the Complainant took substantial efforts to gain, maintain and improve his employment throughout the period. He often took the first job offered to him and then continued to attempt to look for positions that would improve his situation. Except where he was terminated or had a reasonable belief that he would imminently be terminated, he would not leave employment before securing new employment. All of these efforts were reasonably calculated to reduce or mitigate his overall damages. The Respondents have failed to demonstrate how the Complainant's efforts failed to mitigate his damages even if some of his actions were taken partially for personal reasons.

On or about April 27, 1993, Green Leaf Ventures, Inc. made an offer of employment to the Complainant. Since Green Leaf Ventures, Inc. has no control over or connection with the current operation of either of the Mountain Jack's restaurants in Madison, it made an offer of employment at one of its Chicago area Carlos Murphy's restaurants. The Chicago area is the closest area to Madison in which Green Leaf Ventures, Inc. has a restaurant. Green Leaf Ventures, Inc. asserts that the facility at which the position would be located is a better facility than either of the Madison Mountain Jack's because of the higher customer volume in the Chicago area. 'though the job titles differ, Working Chef at Mountain Jack's and Kitchen Supervisor at Carlos Murphy's, the positions appear to be

substantially similar. The base pay of the two positions is $25,000 per year. There is no opportunity for overtime at the Carlos Murphy's restaurant but outside of this case the opportunity for overtime at Mountain Jack's would appear limited. The bonus potential at Carlos Murphy's is greater than that at Mountain Jack's. Once an employee has qualified, the benefit packages at both restaurants seem to be roughly equal. The offer was held open for a reasonable period of time. What the offer did not contain was an agreement to pay the moving or relocation costs of the Complainant from Detroit to the Chicago area. Additionally, the Complainant would not be eligible for insurance until he had been employed for 90 days.

The Respondents contend that this represents an unconditional offer of employment sufficient to terminate their liability for front pay or other types of accruing damages. Anderson v. Labor & Industry Rev. Comm., 111 Wis. 2d 245, 330 N.W.2d 594 (1983) The Complainant argues that the order for reinstatement requires employment as if the Complainant had been continuously employed from the date of the Complainant's first employment with the Respondents and that not paying moving or relocation costs and not providing immediate insurance benefits does not put the Complainant in that position. Additionally the Complainant contends that he should be entitled to employment in the City of Madison.

The Hearing Examiner finds that the offer of employment dated April 27, 1993 does not terminate the Respondents' liability under this or previous orders. While the offer is close it falls short in two important ways. The Respondent requires the Complainant to absorb his moving or relocation costs and it leaves the Complainant with a 90 day gap in insurance coverage. It is necessary for these two elements to be included if the Complainant is to be placed in a position as if continuously employed with the Respondents. The Respondents argue that the Complainant would be a new employee to Green Leaf Ventures, Inc. and that new employees are not provided with these benefits or expenses. While it may be true that new employees of Green Leaf Ventures, Inc. do not receive these advantages, the Complainant cannot be viewed as the typical new employee. The Complainant has an entitlement to be placed in at least as good a position as if he had been continuously employed at Mountain Jack's. As such he would not have to absorb the moving and relocation costs and would have already passed through any insurance waiting period. Requiring the Complainant to absorb these costs clearly does not place him in the same position he would have been absent the Respondents' discrimination.

Green Leaf Ventures, Inc. is a successor in interest to the liability of the Paragon Restaurant Group, Inc. and has acknowledged or adopted responsibility for the liabilities established in the orders of the Commission. This includes the requirement to reinstate the Complainant. In this respect, Green Leaf Ventures, Inc. is in the identical position of Paragon Restaurant Group, Inc. and should consider the Complainant to be in the position of an existing Green Leaf employee. A somewhat more practical view of this problem is that the Complainant will continue to accrue front pay until he receives a job offer that will place him in the same position he would have been at Mountain Jack's. Since Green Leaf Ventures, Inc. is unable to exercise control over Mountain Jack's, the only way that it can relieve itself from continuing front pay liability is to place itself in the position of Mountain Jack's with respect to the Complainant. This requires the removal of the limitations presented in its offer of employment.

The Complainant appears to argue that only reinstatement at one of the Mountain Jack's in Madison should operate to toll the Respondents' liability. While it is true that the original decisions in this matter required the Complainant to be placed back at one of the Madison Mountain Jack's, the circumstances have changed over time. Specifically, some of the Respondents no longer have control over other of the Respondents. There is nothing in this record demonstrating or even hinting that

Paragon Restaurant Group, Inc. sold Vicorp of Wisconsin, Inc. and its Mountain Jack's holdings to avoid liability or damages in this matter. The assumption of liability by Green Leaf Ventures, Inc. supports this conclusion. It would be inequitable to continue to hold one of the Respondents liable while another Respondent holds the only method of terminating the other's liability. For that reason the Hearing Examiner finds that should Green Leaf Ventures, Inc. make the Complainant a truly unconditional offer of employment that meets the requirements of the earlier decisions at a comparable restaurant in the general Great Lakes area close to Madison, that such an offer would be sufficient to terminate the liability of all of the Respondents. Equally, if the Complainant is offered an equivalent position at either of the Madison Mountain Jack's, it will terminate the liability of all Respondents for front pay.

Pursuant to the earlier orders in this matter, the Respondents shall pay to the Complainant front pay in the amount of $28,750.00 per year. This amount represents the Complainant's base salary of $25,000.00 per year plus a 15 percent enhancement in accordance with the Commission's award of an increase derived from the determination of the United States Department of Labor relative to overtime. As indicated above, the appropriateness of this award has been previously determined. The front pay award is to be reduced by the amount of wages actually received by the Complainant during the applicable period. The Hearing Examiner has ordered that front pay is to be calculated and paid on a quarterly basis. The purpose of this method is to make it easier for the Complainant to replace wages to which he is entitled. If this calculation were to take place on an annual basis, it would likely require a further award of interest to reflect the lost time cost of the front pay. It seems more equitable and definite to make the calculation and payment quarterly. It is less burdensome to both parties than the alternative of requiring the calculation and payment to be made more frequently.

Front pay is intended only to be a stopgap measure pending the Respondents' reinstatement of the Complainant. It is not to be seen as a replacement for or an alternative to the reinstatement of the Complainant. It is well recognized that reinstatement is the preferred remedy and is most likely to make the Complainant whole again. Given this policy, any inconve6:nce to the parties, particularly the Respondents, can be overlooked.

The record in this matter presents two issues with respect to the Complainant's receipt of Unemployment Compensation. First, should the Respondents be made to pay or repay Unemployment Compensation wrongly accepted by the Complainant? The second is should the Commission order the Respondents to pay or repay Unemployment Compensation benefits received by the Complainant in another state. It is the usual practice in employment discrimination cases for the Respondent to be ordered to pay to the Unemployment Compensation Trust Fund an amount equal to the benefits paid to the Complainant while the complainant was unemployed as a result of discrimination.

In this case, the Complainant received Unemployment Compensation after the Respondents terminated his employment on March 8, 1988. Under normal circumstances, the Complainant would have stopped receiving benefits once he became employed by Cousins Submarines. The Complainant apparently did not report his employment and as a consequence continued to receive Unemployment Compensation for some period of time even though he was employed. He continued to accept these benefits in order to restore a measure of lost economic stability. His receipt of these benefits was illegal. After some period of time, the Complainant voluntarily reported his actions and entered into a repayment plan.

While it is appropriate for the Respondents to be ordered to repay to the Unemployment Compensation Trust Fund the benefits received by the Complainant, they should only be ordered to repay those benefits to which the Complainant was entitled. The Respondents should not be ordered

to "bail out" the Complainant by paying for benefits that he was not entitled to receive. If the Commission were to make such an order it would be condoning the Complainant's knowing violation of the law. The Commission will not reward the Complainant's conduct in this way.

After the Complainant failed to pass his probationary period with Araserve, Inc. at the end of 1989, he received Unemployment Compensation until he began working at Eddies Bakery. At this time, the Complainant was living in Illinois. During this period, the Complainant was still repaying the State of Wisconsin for the Unemployment Compensation benefits that he wrongly received in 1988. From this record, it is not possible for the Hearing Examiner to tell whether the figure proposed by the Complainant as the amount of Unemployment Compensation paid in 1990 includes amounts withheld from the Complainant to repay the State of Wisconsin or not. The Complainant was unable to testify about the amount that he had still owed to the State of Wisconsin during this period and the relationship of that amount to the benefits actually received or to be paid during 1990. Under the circumstances of the Complainant's earlier illegal conduct, this uncertainty must be resolved against the Complainant. If this were not the case, the Respondents could be made to unknowingly pay for the Complainant's misconduct.

Additionally, the record is devoid of information from which one can determine whether the Unemployment Compensation benefits were paid entirely by the State of Illinois, entirely by the State of Wisconsin or part by both of the states. If the benefits were paid, in part or in whole, by the State of Illinois, there is nothing in the record demonstrating that the Illinois system is identical to that of the State of Wisconsin. While the Commission can be presumed to know of the; provisions of Wisconsin law, it cannot be presumed that it has any knowledge of Illinois law even if it is part of a relatively uniform national system. The differences may be significant or not. The Hearing Examiner is in no position to judge.

The Hearing Examiner will not order the Respondents to pay to anyone or to repay either the State of Wisconsin or the State of Illinois for Unemployment Compensation benefits received by the Complainant in 1990. There is insufficient evidence in the record to conclude that the Respondents should make such a payment.

In employment discrimination cases, particularly those that continue for a long period of time, it is customary to make awards of pre-judgment interest. The purpose of such 3n award is to recognize the time cost of money to be received by the Complainant. In order to make a Complainant whole, he or she must be compensated for the lost opportunity to invest money that would have been paid as wages. The Commission has generally made such awards in appropriate cases. The Commission uses an interest rate of five percent (5%) per year running from the date of the act of discrimination. This figure comes from Wis. Stats. Sec. 138.04. This figure is used unless there is a demonstration that another amount is more appropriate in a given case. In this case neither party made any showing that another interest rate was required.

The act of discrimination that began this case was the Complainant's termination on March 8, 1988. This means that pre judgment interest must be calculated for a period in excess of five years. The Commission has not been faced with the proper method of calculating this interest over such a period of time. The interest could be calculated by taking the total amount of the back pay award and adding five percent (5%) to that amount. This does not recognize the annual nature of the interest. It also inappropriately charges the Respondent interest for a long period of time on wages that have only recently been lost. Some of these problems can be solved by calculating the interest figure and then multiplying it by the number of years since the Complainant's termination. This does not address the inequity of taxing interest on recently lost wages.

Another method for calculating the pre judgment interest would be to calculate the interest for the first year or portion of a year and then multiply that number by the number of years from the act of discrimination to the date of decision. To this number one adds the interest on the next year's back pay times the remaining number of years. This would be repeated until the back pay award is current. Should the award remain unpaid for some lengthy period of time it should be relatively straightforward to update the calculation until the award is paid.

The latter method is more consistent with the purposes of pre judgment interest. It attributes to specific blocks of time, interest to compensate for the loss of investment opportunity by the Complainant. This is intended to make the Complainant whole as opposed to the previously discussed methods that have the unintended effect of being somewhat punitive towards the Respondents. The latter method is more cumbersome but absent some demonstration by one of the parties that another less time consuming method is appropriate, the Commission will use the more cumbersome method.

The Complainant asserts that pre-judgment interest should be compounded. The Hearing Examiner finds no support for this contention. It is assumed that simple or straight interest is the norm and will be used unless compound interest is specifically authorized or called for. The statutes and regulations setting forth pre-judgment and post-judgment interest do not specifically call for the use of compound interest. The Commission will calculate pre judgment interest as simple interest.

The Complainant asks for the Hearing Examiner to order the payment of post judgment interest. The Complainant seeks to give the Respondents additional incentive to pay the award and to possibly forego future appeals. The Hearing Examiner is unaware of any authority permitting him to make such an award. Since pre judgment interest continues to accrue until paid, the Complainant's interest in being made whole is protected. Certainly both the Complainant and the Commission have an interest in seeing its orders followed. However, the Commission's interest is protected by the provisions of the Ordinance that permit the City Attorney to commence appropriate actions in the Circuit Court to enforce orders of the Commission. To chill either party's ability or decision to take a lawfully permitted appeal could be interpreted as an effort to deprive a party of due process. The ability of particularly respondents to have orders of the Commission reviewed by the courts is what preserves the authority of the Commission to act in awarding damages and enforcing the ordinance. The Hearing Examiner will not entertain a remedy that could threaten the Commission's jurisdiction.

As provided for in the earlier orders, the Complainant is entitled to an order for the payment of his costs including a reasonable attorney's fee incurred in pursuing this action. On September 27, 1989, Menendez issued an order assessing costs and attorney's fees for the period up to that date. Both sides in this dispute have expended many hours and dollars since that order. In order to be made whole the Complainant is entitled to a further award of costs and attorney's fees. The order in this matter provides a mechanism for determining the amount of costs and attorney's fees since the earlier order. It is highly suggested by the Hearing Examiner that the parties interests might be best served if they could reach a stipulated resolution of this issue.

Signed and dated this 8th day of November, 1993.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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

Ricardo Harris 6342 Marlowe Detroit, MI 48227 Complainant vs. Paragon Restaurant Group, Inc. 6610 Convoy Court P.O. Box 121513 San Diego, CA 92112 Vicorp of Wisconsin, Inc. c/o Gibbons Co. 4333 Transworld Road, #300 Schiller Park, IL 60176 Mountain Jack's - East 4520 East Towne Blvd. Madison, WI 53704 Greenleaf Ventures, Inc. 6610 Convoy Court San Diego, CA 92111 Respondent	HEARING EXAMINER'S RECOMMENDED DECISION AND ORDER ON COMPLAINANT'S PETITION FOR COSTS AND ATTORNEY'S FEES Case No. 20947

This decision represents, it is hoped, the last step in one of the most lengthy attempts to enforce rights protected by the Madison Equal Opportunity Ordinance MGO Sec. 3.23 et seq. The Complainant, Ricardo Harris, filed a complaint of discrimination against the then Respondent's, Paragon Restaurant Group, Inc., Vicorp of Wisconsin, Inc. and Mountain Jack's-East, on May 6, 1988. After investigation, an Initial Determination was issued concluding that there was probable cause to believe that discrimination had occurred on the basis of the Complainant's race. Attempts to conciliate the complaint failed and the complaint was transferred to then Hearing Examiner, Harold Menendez. After a Public Hearing, Menendez, on June 28,1989, issued his Recommended Findings of Fact, Conclusions of Law and Order finding that the Respondents had in fact discriminated against the Complainant on the basis of his race in terminating his employment. The Recommended Order entered in this matter on June 28, 1989 awarded the Complainant his costs and reasonable attorneys fees and established a schedule for the submission of a petition for costs and attorneys fees, and for briefs in support of and in opposition to such a petition. The parties availed themselves of the opportunity to argue their respective positions. On September 27, 1989, Menendez awarded the Complainant $15,661.25 in attorney's fees and $440.14 in costs. Menendez's decision on liability was appealed by the Respondents and cross-appealed by the Complainant to the Commission. On February 14,1990, the Commission issued its decision affirming the Hearing Examiner's decision for

the most part and amending it only to order that damages for back and front pay be; adjusted to reflect a United States Department of Labor order regarding payment of overtime to the Complainant.

The Respondents appealed the Commission's decision to Dane County Circuit Court. On March 26, 1991, Circuit Court Judge Moria Krueger issued an order upholding the Commission's decision and awarding the Complainant $15,661.25 in attorney's fees and $440.14 in costs. Krueger essentially adopted Menendez's September 27, 1989 decision.

The Respondents appealed Judge Krueger's decision to the Court of Appeals. On June 18, 1992, the Court of Appeals issued a Decision and Order upholding the proceedings below and remanding the complaint to the Commission for further proceedings on the issue of damages. The Court of Appeals awarded the Complainant $97.67 in additional costs for the appeal. The Respondents paid this amount to the Complainant. During the pendency of these proceedings, the Respondent, Paragon Restaurant Group, Inc., sold its interests in the other two Respondents, Vicorp of Wisconsin, Inc. and Mountain Jack's-East, to Kyotaru International, Inc. and formed a new corporate entity, Green Leaf Ventures, Inc. Green Leaf Ventures, Inc. represented to the Complainant and to the Commission that it was accepting financial responsibility for all awards made by the Commission in connection with this complaint. The Complainant moved to add Green Leaf Ventures, Inc. as a Respondent but did not similarly move to add Kyotaru International, Inc. Green Leaf Ventures, Inc. did not oppose the Complainant's motion. The: Hearing Examiner added Green Leaf Ventures, Inc. as a Respondent. No one has sought to have Vicorp of Wisconsin, Inc. or Mountain Jack's-East removed as Respondents.

In May of 1990, Clifford E. Blackwell, III became the Commission Hearing Examiner. On April 28, 1993, Blackwell held a hearing to consider the issue of additional damages as directed by the Court of Appeals. On November 8, 1993, Blackwell issued his Recommended Findings of Fact, Conclusions of Law and Order on the issue of damages. This Order included provisions directing the Complainant to file a Petition for his costs and attorney's fees in excess of those previously awarded. Such a petition was to be filed within thirty days of the Commission's order becoming final. The Respondents were provided with the opportunity to submit briefs in opposition to the Complainant's petition. The Complainant could file a reply brief to any material submitted by the Respondents.

The Respondents appealed Blackwell's decision on the issue of damages. On May 12, 1994, the Commission issued its decision upholding Blackwell's decision in its entirety. The Respondents were served with a copy of this decision by Certified Mail Return Receipt Requested. The Commission's Order indicated that its order would become final if not appealed to the Circuit Court for Dane County within thirty days of its receipt by the Respondents. Return Receipts indicate that the Respondents received the Commission's May 12, 1994 order on the following dates: Green Leaf Ventures, Inc.-May 17, 1994, Paragon Restaurant Group, Inc.-May 17, 1994, Vicorp of Wisconsin Inc.-on or about June 13, 1994, Mountain Jack's-East May 16, 1994.

On June 13, 1994 the Complainant filed a Petition for Costs and Attorney's Fees along with supporting affidavits and other material. As of the undersigned date of this Recommended Decision and Order, this matter has not been appealed to the Circuit Court for Dane County nor has any Respondent submitted any brief or material in opposition to the Complainant's Petition.

RECOMMENDED FINDINGS OF FACT

1. The provisions of Hearing Examiner Menendez's Recommended Findings of Fact, Conclusions of Law and Order dated June 28, 1989, Hearing Examiner Menendez's Recommended Decision and Order on Attorneys Fees dated September 27, 1989, the Commission's Decision and Order

dated February 14, 1990, Judge Moria Krueger's Decision and Order dated March 26, 1991, the Court of Appeals decision dated June 18, 1992, Hearing Examiner Blackwell's Recommended Findings of Fact, Conclusions of Law and Order on damages dated November 8, 1993 and the Commission's Decision and Order dated May 12,1994 are incorporated by reference as if fully set forth herein.

2. As of March 26, 1991, the Complainant had been awarded $15,661.25 in attorney's fees and $440.14 in costs in connection with his pursuit of this complaint. These amounts have; not been paid to this date.
3. On June 18, 1992, the Court of Appeals awarded the Complainant $97.67 in additional costs in connection with the appeal of this complaint. The Respondents have satisfied this amount.
4. At all times relevant to this complaint, the Complainant has been represented by the law firm of Kelly and Haus. Carol L. Rubin has been continuously employed by Kelly and Haus and has been the attorney assigned to represent the interests of the Complainant in connection with this complaint. Rubin is experienced in and to some extent specializes in the areas of employment relations and employment discrimination.
5. Since March of 1991, Rubin's usual and customary charge for fees in connection with the representation of a client is $130 per hour.
6. Rubin has expended and accounted for 196.75 hours of attorney time in connection with this complaint since March 12, 1991.
7. None of the hours spent in representation of the Complainant were unnecessary, duplicative or non-productive.
8. Since March of 1991, Rubin has charged $SO per hour for time billed for the services of a paralegal in connection with services related to this complaint.
9. Since October 17,1991, Rubin has used and accounted for 142.5 hours of work attributable to the paralegal in connection with this complaint.
10. None of the hours attributable to the paralegal for Rubin in connection with this complaint were unnecessary or duplicative.
11. Since March of 1991, the Complainant has incurred costs of $1,707.60 in connection with this complaint. This amount is comprised of $35.44 for telephone charges, $457.35 for copying charges, $30.35 for postal charges, $10.20 for witness fees and mileage charges, $20.00 for meals, $3.00 for parking charges, $508.33 for transcripts, $603 for an airplane ticket in connection with the deposition of the Complainant, $22.33 for Westlaw computerized research and 517.00 in miscellaneous expenses.
12. None of the charges incurred by the Complainant in connection with this matter were unnecessary or duplicative.

CONCLUSIONS OF LAW

13. The Complainant, in order to make him whole and pursuant to the previously rendered decisions in this matter, is entitled to an order compelling the Respondents to pay the costs and attorney's fees incurred by the Complainant in pursuit of his rights under the ordinance.
14. All of the costs and attorney's fees incurred by the Complainant in pursuit of his complaint are reasonable and necessary and are not unreasonably duplicative.

ORDER

15. The Respondents, individually or collectively, shall pay to the Complainant the following sums for
his costs and attorney's fees incurred to the undersigned date in the reasonable pursuit of his complaint before the Commission:

a. $15,661.25 as previously awarded, for attorney's fees through March 26, 1991.,
b. $440.14 as previously awarded, for costs through March 26, 1991,
c. $25,577.50 for attorney's fees since March 26, 1991,
d. $7,125.00 for the services of a paralegal since March 26, 1991 and,
e. $1,707.60 for costs reasonably expended since March 26, 1991.

MEMORANDUM DECISION

A complainant in proceedings before the Equal Opportunities Commission is entitled to recover costs and reasonable attorneys fees on any significant issue on which he prevails. MEOC Rule 17; see also, Vance v. Eastex Packaging, MEOC Case No. 20107, (Comm'n dec. Aug. 29, 1985) citing Hensley v. Eckerhart, 461 U.S. 424 (1983); cf. Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984). The fundamental purpose of a fee award is to compensate an attorney for her or his efforts. Accordingly, the fee award should be determined by allowing the attorney to recover a reasonable hourly rate for all time reasonably expended in representing her or his client. Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (en banc). It is appropriate to use an attorney's or law firm's customary billing rate in setting a reasonable hourly rate in awarding fees to that attorney or law firm. See, Laffe v. Northwest Airlines, Inc., 746 F.2d 4, 15 (D.C. Cir. 1984). The fees awarded to a prevailing complainant in a civil rights case ought not be limited by any monetary damages award because substantial non-monetary benefits are also realized by successful complainants, and because an adequate fee is necessary to attract competent counsel in such cases. City of Riverside v. Rivera, 477 US. 561, 573-78 (1986); Copeland v. Marshall, 641 F.2d at 987. In this case the Complainant has had to endure a lengthy process of litigation and appeal. It appears that most often the delays in the prompt adjudication of the parties' interests were at the instance of the Respondents. The length of this litigation has resulted in the expenditure of great amounts of attorney time and in costs connected with the reasonable processing of this complaint. Pursuant to the well established policy that in order for a prevailing civil rights complainant to be made whole he or she must receive payment for the reasonable costs and attorney's fees expended in pursuit of his or her rights, both Hearing Examiners, Menendez and Blackwell, ordered the Respondents to pay those costs and attorney's fees. These orders have been upheld on appeal to the Commission and with respect to Menendez's order and calculations upheld on appeal to the Dane County Circuit Court and the Court of Appeals.

It would represent a substantial miscarriage of justice if the Complainant were not fully compensated for all of his costs and expenses including attorney's fees connected with his pursuit of this complaint. To that end, the Hearing Examiner has incorporated into this order the amounts previously awarded to make it clear that this order does not relieve the Respondents from the obligation to pay those-amounts in addition to those expended since Menendez's September 27, 1989 order.

The Respondents have essentially defaulted in their rights to challenge the Complainant's petition for costs and fees. They did not respond in any manner to the Petition filed by the Complainant on June 13,1994. Despite this default, the Hearing Examiner reviewed the supporting documentation of the Complainant and found nothing to indicate that the Complainant attorneys were either charging an unusually high hourly rate or sought compensation for unnecessary, duplicative or non-productive hours. Similarly, the costs that the Complainant seeks to recoup represent ones reasonably expended in connection with his complaint or those required by the Respondents as a result of delay on their parts.

Specifically, the Hearing Examiner points to the charge for an airplane ticket to Detroit for the deposition of the Complainant. The Respondents sought the right to depose the Complainant but brought their demand very late in the process. The Respondents' attorneys were well aware of the

Complainant's out-of-state residence and caused the expenditure through their late scheduling of the deposition Had the Complainant been made aware of the Respondents' wish to depose him at an earlier date, a mutually convenient time could have been arranged for a deposition in Madison. The Respondents may contend that they informally made the Complainant aware of their wish to depose him early in the discovery period and that it was the Complainant's attorney's uncooperative attitude that caused the delay. While it seems true that the Complainant's attorney was unnecessarily combative about such matters, the Respondents' attorneys are presumably competent practitioners and understand how to compel discovery from an uncooperative opposing party.

The hourly rate of the Complainant's attorneys is well within the rates previously approved by the Commission. See Chung v. Paisans, MEOC Case No. 21192 (Examiner's Dec. on fees, September 23, 1993) and Batch v. Snapshots' Inc. of Madison, MEOC Case No. 21730 (Examiner's Dec. on fees, December 9, 1993). This is despite the increase in the fees charged by Kelly and Haus since Menendez's initial decision on costs and fees issued on September 27, 1989. As indicated above, since it is apparently the usual rate charged for services, it is presumptively a reasonable rate. It is the Respondents' burden to demonstrate that it is an unreasonable rate and the Respondents gave up their chance by not responding to the petition. The same is true for the services of a paralegal employed on behalf of the Complainant.

For the foregoing reasons, the Hearing Examiner has ordered the Respondents to pay the reasonable attorney's fees and costs of the Complainant in bringing this complaint and pursuing it to this point.

Signed and Dated this 8th day of August, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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

Ricardo Harris 6342 Marlowe Detroit, MI 48227 Complainant vs. Paragon Restaurant Group, Inc. 6610 Convoy Court P.O. Box 121513 San Diego, CA 92112 Vicorp of Wisconsin, Inc. c/o Gibbons Co.	NOTICE OF RIGHT TO APPEAL Case No. 20947

4333 Transworld Road, #300 Schiller Park, IL 60176 Mountain Jack's - East 4520 East Towne Blvd. Madison, WI 53704 Greenleaf Ventures, Inc. 6610 Convoy Court San Diego, CA 92111 Respondent	

Attached are the Recommended Findings of Fact, Conclusions of Law, and Order of the Equal Opportunities Commission's Hearing Examiner. The Rules of the EOC provide for appeal of this decision in the following terms:

10.1 Either party may appeal the recommended findings of fact, conclusions of law, and order of the Commission's designee by filing written exceptions to such findings, conclusions, or order in the EOC offices no later than ten (10) days after receipt of said findings, except that where the tenth day falls on a federal holiday or on a non-business day, the appeal will be accepted on the first business day thereafter.

10.2 If neither party appeals the recommended findings of fact, conclusions of law, or order within ten (10) days, they become final findings, conclusions and order of the Commission. If an appeal is made to the Commission, it shall consider only the record of the hearing, written exceptions to the recommended findings, conclusions and order, any brief properly submitted before it, and oral arguments presented by the parties at a review hearing scheduled by the Commission. To be properly submitted, briefs by any party must be served upon opposing parties or their counsel and received by the Commission at least ten (10) days prior to any scheduled oral arguments or by another date determined by the Commission. Cross appeals are allowed in accordance with Rule 15.521. Any party requesting a written transcript of the hearing that was held by the Hearing Examiner shall pay the actual cost of preparing the transcript, including copying costs. The Commission shall affirm, reverse or modify the recommended findings, conclusions and order. Any modification or reversal shall be accompanied by a statement of the facts and ultimate conclusions relied on in rejecting the recommendations of the Commission's designee. Such decision of the Commission shall be the final findings of fact, conclusions of law and order of the Commission.

This Notice and the attached Recommended Findings of Fact, Conclusions of Law, and Order have been sent to all parties by certified mail. Any appeal from these Recommended Findings of Fact, Conclusions of Law and Order must be delivered at the offices of the EOC within ten (10) days of the date of receipt. Cross appeals are allowed in accordance with EOC Rule 15.521. Unless timely appealed, the enclosed Recommended Findings, of Fact. Conclusions of Law and Order will become final without further notice to the parties.

Signed and dated this 8th day of August, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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

Ricardo Harris 6342 Marlowe Detroit, MI 48227 Complainant vs. Paragon Restaurant Group, Inc. 6610 Convoy Court P.O. Box 121513 San Diego, CA 92112 Vicorp of Wisconsin, Inc. c/o Gibbons Co. 4333 Transworld Road, #300 Schiller Park, IL 60176 Mountain Jack's - East 4520 East Towne Blvd. Madison, WI 53704 Greenleaf Ventures, Inc. 6610 Convoy Court San Diego, CA 92111 Respondent	COMMISSION DECISION AND ORDER ON ATTORNEY'S FEES Case No. 20947

Background

The Complainant, Ricardo Harris, filed a complaint of discrimination against the then Respondent's, Paragon Restaurant Group, Inc., Vicorp of Wisconsin, Inc. and Mountain Jack's-East, on May 6, 1988. After investigation, an Initial Determination was issued concluding that there was probable cause to believe that discrimination had occurred on the basis of the Complainant's race. Attempts to conciliate the complaint failed and the complaint was transferred to then Hearing Examiner, Harold Menendez. After a Public Hearing, Menendez, on June 28, 1989, issued his Recommended Findings of Fact, Conclusions of Law and Order finding that the Respondents had in fact discriminated against the Complainant on the basis of his race in terminating his employment. The Recommended Order entered in this matter on June 28, 1989 awarded the Complainant his costs and reasonable attorneys fees and established a schedule for the submission of a petition for costs and attorneys fees, and for briefs in support of and in opposition to such a petition. The parties availed themselves of the opportunity to argue their respective positions. On September 27, 1989, Menendez awarded the

Complainant $15,661.25 in attorney's fees and $440.14 in costs. Menendez's decision on liability was appealed by the Respondents and cross-appealed by the Complainant to the Commission. On February 14, 1990, the Commission issued its decision affirming the Hearing Examiner's decision for the most part and amending it only to order that damages for back and front pay be adjusted to reflect a United States Department of Labor order regarding payment of overtime to the Complainant.

The Respondents appealed the Commission's decision to Dane County Circuit Court. On March 26, 1991, Circuit Court Judge Moria Krueger issued an order upholding the Commission's decision and awarding the Complainant $15,661.25 in attorney's fees and $440.14 in costs. The Court essentially adopted Menendez's September 27, 1989 decision.

The Respondents appealed Judge Krueger's decision to the Court of Appeals. On June 13, 1992, the Court of Appeals issued a Decision and Order upholding the proceedings below and remanding the complaint to the Commission for .further proceedings on the issue of damages. The Court of Appeals awarded the Complainant $97.67 in additional costs for the appeal. The Respondents paid this amount to the Complainant. During the pendency of these proceedings, the Respondent, Paragon Restaurant Group, Inc., sold its interests in the other two Respondents, Vicorp of Wisconsin, Inc. and Mountain Jack's-East, to Kyotaru International, Inc. and formed a new corporate entity, Green Leaf Ventures, Inc. Green Leaf Ventures, Inc. represented to the Complainant and to the Commission that it was accepting financial responsibility for all awards made by the Commission in connection with this complaint. The Complainant moved to add Green Leaf Ventures, Inc. as a Respondent but did not similarly move to add Kyotaru International, Inc. Green Leaf Ventures, Inc. did not oppose the Complainant's motion. The Hearing Examiner added Green Leaf Ventures, Inc. as a Respondent. No one has sought to have Vicorp of Wisconsin, Inc. or Mountain Jack's-East removed as Respondents.

In May of 1990, Clifford E. Blackwell, III became the Commission Hearing Examiner. On April 28, 1993, Blackwell held a hearing to consider the issue of additional damages as directed by the Court of Appeals. On November 8, 1993, Blackwell issued his Recommended Findings of Fact, Conclusions of Law and Order on the issue of damages. This Order included provisions directing the Complainant to file a Petition for his costs and attorney's fees in excess of those previously awarded. Such a petition was to be filed within thirty days of the Commission's order becoming final. The Respondents were provided with the opportunity to submit briefs in opposition to the Complainant's petition. The Complainant could file a reply brief to any material submitted by the Respondents.

The Respondents appealed Blackwell's decision on the issue of damages. On May 12, 1994, the Commission issued its decision upholding Blackwell's decision in its entirety. The Respondents were served with a copy of this decision by Certified Mail Return Receipt Requested. The Commission's Order indicated that its order would become final if not appealed to the Circuit Court for Dane County within thirty days of its receipt by the Respondents. Return Receipts indicate that the Respondents received the Commission's May 12, 1994 order on the following dates: Green Leaf Ventures, Inc.-May 17, 1994, Paragon Restaurant Group, Inc.-May 17, 1994, Vicorp of Wisconsin Inc.-on or about June 13, 1994, Mountain Jack's-East-May 16, 1994.

On June 13, 1994 the Complainant filed a Petition for Costs and Attorney's Fees along with supporting affidavits and other material.

Neither party appealed to circuit court the Commission's decision with respect to damages. None of the Respondents filed any material in opposition to the Complainant's petition for attorney's fees and costs.

On August 8, 1994 Examiner Blackwell issued the Hearing Examiner's Recommended Decision and Order on Complainant's Petition for Costs and Attorney's Fees. This recommended decision and order awarded the Complainant $48,363.75 in attorney's and paralegal fees and $2,147.74 in costs. On August 10, 1994 the Complainant filed a motion for the hearing examiner to reconsider his decision on attorney's fees and costs. The Complainant asserted in this motion that the hearing examiner had failed to include certain fees and costs which were requested in the body of his June 13, 1994 petition lout were inadvertently omitted from the requested total set forth in Complainant's petition. The Hearing Examiner took no action on the Complainant's motion to reconsider.

On August 19, 1994 the Complainant appealed the Hearing Examiner's Recommended Decision and Order on Complainant's Petition for Costs and Attorney's Fees to the Commission. The Commission established a briefing schedule. No briefs were submitted by any party on appeal.

On February 9, 1995 the Commission met to address the Complainant's appeal. Participating in the Commission's deliberations were: Anderson, Bruskewitz, Fieber, Gardner, Miller, Rosas, Verridan and Washington.

Decision

In reviewing the record of this latest appeal, the Commission determined that the costs and fees requested by the Complainant in his appeal were the subject of a petition filed with the Commission on March 13, 1990. Due to a change of Hearing Examiners, this petition was not addressed at the time of its filing and remained undecided through the pendency of this matter. It is the exclusion by the Hearing Examiner of the amount set forth in that petition that formed the basis of the Complainant's current appeal.

The prevailing complainant is entitled to make-whole relief which includes reasonable costs, including attorney's fees, of pursuing his/her complaint. The Hearing Examiner, in his decision of August 8, 1994, found that the hourly rate and work performed by the attorney for the Complainant in this matter met the requirements of being necessary to the pursuit of the complaint and reasonable for the type of work. The Hearing Examiner also found that the costs expended by the Complainant in pursuit of the complaint were necessary and not duplicative. However, in detailing the specific amounts to be included in his order, the Hearing Examiner failed to include the amounts set forth in the March 13, 1990 petition. If the Complainant is to be made whole in this matter, the Hearing Examiner's Order of August 8, 1994 must be amended to include the amounts set forth in the March 13, 1990 petition. Those amounts are attorney's fees in the amount of $7,225 and costs of $227.52. When added to the Hearing Examiner's August 8, 1994 figures, the total award of costs and attorney's fees is $57,964.01.

The Commission notes that all parties were served with the briefing schedule in this matter as evidenced by return receipts for certified mail but that no party filed any argument in this appeal.

The Respondent shall pay to the Complainant, within 30 days of the order becoming final, those amounts previously awarded for damages, plus attorney's fees and costs in the amount of $57,964.01.

Commissioners participating in this decision were: Bruskewitz, Fieber, Gardner, Miller, Verridan and Washington.

Signed and dated this 27th day of February, 1995.

EQUAL OPPORTUNITIES COMMISSION

Booker Gardner
President