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

Phillip Morgan 72 Sunfish Court Madison, WI 53713-3024 Complainant vs. Hazelton Labs 3301 Kinsman Boulevard Madison, WI 53704 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 21005

BACKGROUND

The above-captioned matter came on for a public hearing before City of Madison Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, on May 7, and 8, 1991 in Room C-10 of the Madison Municipal Building, 215 Martin Luther King, Jr Boulevard, Madison, Wisconsin. The Complainant, Phillip Morgan, appeared in person and by his Attorney, Jeff Scott Olson of the law firm of Julian, Olson and Lasker, S.C. The Respondent, Hazleton Laboratories America Inc., appeared by its Director of Human Resources, James Nie, and by its Attorney, James Ruhly of the law firm of Melli, Walker, Pease and Ruhly, S.C. Based upon the record of these proceedings and the argument of the parties, the Hearing Examiner makes his RECOMMENDED FINDINGS of FACT, CONCLUSIONS of LAW and ORDER:

RECOMMENDED FINDINGS of FACT

1. The Complainant is a Black or African American Male who was employed by the Respondent as a Laboratory Assistant from January 12, 1983 until February 9, 1989.
2. The Respondent is a corporation with its principal place of business located at 3301 Kinsman Boulevard within the City of Madison. It employs numerous persons in furtherance of its business or enterprise.
3. The Complainant was employed in the Compound Preparation Group along with five or six other people. During the time period in question, those co-workers included but were not necessarily limited to Frank Chizek, Wayne Hoernke, Mark Parnell, Tom Wetter, Carl or Curt Hutter and David Neuhauser. Not all of these people were employed by the Respondent at the same time.
4. The Complainant's immediate supervisor at the pertinent times was Steve Sorenson. Sorenson reported to Wayne Madison. Madison reported to Ronald Larson. Sorenson was the group leader. Madison was the section leader and Larson was the department or division leader. A section generally consists of three or four groups. Larson was responsible for five sections including Madison's. James Nie is the Human Resources Director and the Equal Opportunity Officer for the Respondent.

5. In the Fall of 1986, the Complainant, during his annual evaluation, first complained orally to Steve Sorenson about his feelings of being racially harassed by his coworkers particularly Wayne Hoernke. The Complainant asked Sorenson to speak with Hoernke about the jokes and racial remarks and to begin giving the Complainant assignments in writing directly and not passing them through Hoernke. Sorenson did both of these things though he did not report his conversation with Hoernke to the Complainant until September 14, 1987. Prior to this complaint, the Complainant had not complained about discrimination or racial harassment by the Respondent or by his coworkers.
6. The Complainant, in his written evaluation dated September 14, 1987, amongst other complaints stated that he wanted the prejudice in his work group to stop and stated that the prejudiced remarks were intolerable. Sorenson told the Complainant that he had spoken with Hoernke as a result of the Complainant's previous complaint. Sorenson asked if he (Sorenson) would speak with Hoernke about the situation again, would the Complainant remove his complaint from the evaluation. The Complainant said that he would not. The evaluation was reviewed by Madison and eventually Larson. An investigation of the Complainant's allegations was conducted. The investigation revealed that a number of the employees in the Compound Preparation Group, including the Complainant, had been engaged in bantering that included racially explicit language including use of the words "nigger" and "honky". For some period of time, the Complainant, Frank Chizek and Wayne Hoernke, outside of the presence of supervisors, used these terms in what was not intended by Chizek or Hoernke in a malicious way. The Complainant did become offended by this banter and eventually complained to Sorenson in 1986 and 1987.
7. Ronald Larson was upset and offended by the results of the investigation showing that racial epithets were being used at the work site. Larson personally spoke with the Complainant, Hoernke and Chizek in confirming the Complainant's allegations. He drafted a memorandum to be distributed to all of the employees of the Compound Preparation Group but apparently not to the other sections or groups under his supervision. James Nie reviewed the memorandum for consistency with the Respondent's general policies. On October 1, 1987, Larson addressed a meeting of the Compound Preparation Group. At this meeting, Larson distributed the memorandum and told the gathered employees that harassment would not be tolerated by him or the company. He urged anyone who felt that he or she was being harassed to report the harassment.
8. After the October 1, 1987 meeting, there were virtually no repetitions of the use of racial epithets in the work place.
9. Shortly after the October 1, 1987 meeting, Carl or Curt Hutter, upon seeing the Complainant bleeding from a cut stated, "Blacks bleed the same color as whites" or words to that effect. This statement was made in the presence of Sorenson and the Complainant. Hutter was not a member of the Compound Preparation Group on October 1, 1987 and did not attend the meeting conducted by Ronald Larson. Sorenson admonished Hutter that it was inappropriate to make color-sensitive comments. Hutter has not repeated such comments since being warned.
10. On an unknown date after the October 1, 1987 meeting, Ronald Larson noticed a newspaper picture or cartoon on the bulletin board of the office of the Compound Preparation Group. It is not clear what was specifically depicted in the clipping but Larson found it to be racially offensive. It may have depicted a Black man being lynched or an altered view of a Ku Klux Klan meeting or something similar. Larson took the clipping down and asked who had been responsible for its display and for how long it had been displayed. No one knew the answer to either question. Investigation demonstrated that it may have been posted by a former employee of the Compound Preparation Group named David Neuhauser. It appeared to have been posted for between six months and a year or more. Though the bulletin board was visible to anyone in

the office, no one, including supervisors of the Respondent, acted to remove the clipping until Larson removed it.

11. The Complainant did not take the clipping down himself nor did he complain to his supervisor or anyone else about the clipping. He was aware of it and chose to ignore it. His recollection of the contents of the picture and who removed it are in conflict with others.
12. At some point, the date of which no one remembers, the Complainant and Hoernke became involved in a physical altercation. This incident occurred sometime after the October 1,1987 meeting and before the Complainant filed his initial complaint on July 26, 1988. The Complainant was offering to help Hoernke with a procedure because the Complainant was not busy at the time. The procedure required the use of a syringe that the Complainant was attempting to pick up. Hoernke became angry and snatched the syringe from the Complainant's grasp. As the Complainant attempted to pick up another syringe, Hoernke shoved the Complainant in the chest with his forearm. The Complainant was knocked back a couple of steps. Frank Chizek witnessed the incident and warned the Complainant not to hit Hoernke but urged him to report the incident instead. The Complainant did not hit Hoernke and reported the incident to Sorenson.
13. Hoernke was known to have a quick and unpleasant temper. Hoernke was not selective in targeting his outbursts. White employees were the recipients of abuse from Hoernke as well as the Complainant. As a general matter, Hoernke's temper was known to supervisors of the Respondent and he had not received discipline as a result of his outbursts. Hoernke admitted that he was wrong in the confrontation with the Complainant.
14. The Complainant believed that he could no longer work with Hoernke. The Complainant wished to have Hoernke fired or at a minimum transferred to another group. Sorenson asked if Hoernke apologized to the Complainant if that would satisfy the Complainant. The Complainant indicated that it would not.
15. The Complainant was dissatisfied with Sorenson's handling of the matter and spoke with Wayne Madison about his complaint. Madison spoke with Chizek and Hoernke but did not take written statements. After his discussions, Madison indicated that he would not fire Hoernke over this incident because Hoernke was a good worker who had been with the Respondent for a long time. Madison stated that either the Complainant could transfer to another group or accept Hoernke's apology and go back to work together.
16. Madison orally reported the results of his investigation to Larson. Ron Larson reviewed the situation to see if there might be a racial element to the confrontation. He determined that, since there were no racial insults or epithets used during the incident, race was not a factor in the confrontation. Larson informed Nie of the situation. Larson and Nie agreed that an apology would be the proper way to resolve the situation.
17. The Complainant was not satisfied with the actions of the Respondent in treating this matter and he filed his initial complaint on or about July 26, 1988.
18. An Initial Determination concluding that there was probable cause to believe that discrimination had occurred was issued by the investigator on October 17, 1988.
19. On November 3, 1988, Sorenson held a group meeting during which he stressed that the office was not to be used as a lounge or for eating or sleeping. This was because clients of the Respondent might be shown the office on a tour or inspection.
20. On December 1, 1988, the Complainant was seated at his desk in the office with his head down on the desk and with his eyes closed. Tom Wetter was at his desk in the office and stated that the Complainant was asleep. Frank Chizek and Wayne Hoernke entered the office together and noticed the Complainant. They both believed that the Complainant was asleep. Hoernke took it upon himself to awake the Complainant. It is unclear whether Hoernke kicked the chair in which the Complainant was seated or if he shook the chair or the Complainant's shoulder and

reminded the Complainant that there was to be no sleeping in the office. The Complainant protested that he had not been "sleeping and confronted Hoernke. Hoernke suggested that if the Complainant did not like what had happened then, he should complain to Wayne Madison. The Complainant talked with Hoernke and said if it bothered Hoernke so much that Hoernke should talk to Wayne Madison instead of the Complainant. Hoernke reported the incident to Madison.

21. Madison ordered an investigation of the incident. As part of the investigation the Complainant stated that Hoernke had harassed him earlier in the day and used demeaning language and a demeaning manner. Madison took statements from all potential witnesses to both incidents. He concluded that Hoernke had not harassed the Complainant and that the Complainant had been sleeping. The Complainant was given a written reprimand and a warning that future violations could lead to his termination or further discipline. Hoernke was exonerated of any wrong doing for his part in these incidents.
22. Larson held another group meeting on January 6, 1989. At this meeting he restated the policy against harassment and reaffirmed the right of an employee to complain about harassment or discrimination. He went on further to state that the filing of a complaint did not constitute a license to violate company policy or procedures.
23. On February 8, 1989, Larson was returning to his office from a meeting when he passed the group office. The route used by Larson was one that took him out of the way that he would have normally gone. He saw the Complainant in a posture that suggested to Larson that the Complainant was sleeping at his desk. The Complainant was sitting in his chair with his feet propped up on another chair with his eyes closed and his chin on his chest. His breathing appeared to be slow. Mark Parnell was also in the office.
24. Larson asked the Complainant to come to his office. Larson described what he had seen to the Complainant. The Complainant asked if there would be another investigation. Larson indicated that there would be another investigation. The Complainant became very agitated and denied sleeping in the office. The Complainant wished to go home presumably to calm down. Larson gave the Complainant the rest of the day off because the Complainant was upset enough not to be able to work. Larson asked Parnell to write down his observations of the incident. Parnell asked to not be involved but was not excused by Larson. Parnell's written statement indicates that the Complainant had been sleeping for quite a while and had even awoken and returned to sleep.
25. Parnell recanted his written statement at hearing. He stated that he had felt pressured into giving the information in his written statement and that he could not tell whether the Complainant was sleeping or not. Parnell had been terminated by the Respondent approximately two months prior to the hearing under circumstances that could engender hostility.
26. After receiving Parnell's statement and discussing this matter with Nie, Larson decided to terminate the Complainant's employment with the Respondent and dictated a memorandum to that effect. The Complainant was terminated on February 9, 1989.
27. The only form of discipline that Hoernke received after striking the Complainant in early 1988 was that he was made to apologize to the Complainant and to attend meetings surrounding the incident. He received no reprimands either oral or written. His discipline was not reflected in his personnel record. Despite having a reputation for being a difficult employee, Hoernke's striking of the Complainant had no apparent effect on his standing as an employee.
28. Subsequent to the filing of his original complaint of discrimination, the Complainant was subjected to discipline on two or possibly three separate occasions within eight months for sleeping in the office. The final time resulted in his termination.
29. Hoernke admitted that he had been wrong to strike the Complainant. The Complainant denied all allegations of sleeping on the job.

30. During the investigation of Hoernke's confrontation with the Complainant, no statements were taken and there was little documentation of the incident. In the incidents involving the Complainant's alleged sleeping on the job, the incidents were fully documented and statements were taken from all possible witnesses.
31. After the December 1, 1988 incident, Larson held a group meeting to impress upon the group that violations of the company's policies would be disciplined whether or not the violator had filed a complaint of discrimination or not.
32. After the incident in which Hoernke struck the Complainant, no meetings were held to clarify any company policy.
33. On February 8, 1989, Larson, in returning to his office, took a circuitous route past the Compound Preparation Group office. He had to go out of his way. His route suggests an intent to check on the Compound Preparation Group.
34. As a result of his discharge, the Complainant suffered an economic loss in the amount of $3,332.72 (three thousand, three hundred, thirty two dollars and seventy two cents) resulting from lost wages that he would have otherwise earned.
35. After losing his job, the Complainant was upset about his ability to support his family because of his limited training. He was angered and hurt by losing a job with an employer for which he had worked for six years under conditions that were unfair and not his fault. The amount of $4,000.00 (four thousand dollars) will adequately compensate the Complainant for these injuries.

CONCLUSIONS OF LAW

36. The Complainant, a Black or African American Male, is a member of the protected class race.
37. By virtue of the Complainant's filing of his complaint with the Commission in July of 1988 and his complaints of racism made to the Respondent, the Complainant has engaged in activity protected by the Ordinance and he is entitled to the protections of the Ordinance against retaliation.
38. The Respondent is a person and an employer within the meaning of the Ordinance.
39. The physical confrontation between the Complainant and Wayne Hoernke in the early part of 1988 did not constitute racial harassment either separately or as part of a pattern of racial harassment.
40. The Respondent acted promptly and reasonably to end incidents of racial harassment once it knew, actually or constructively, of the harassment.
41. The Respondent did not discriminate against the Complainant on the basis of his race in affording him different terms and conditions of employment by allowing his racial harassment.
42. The Respondent treated the Complainant differently with respect to discipline and the terms and conditions of employment after he complained about racial harassment and filed a complaint of discrimination with the Commission.
43. The Respondent retaliated against the Complainant for his exercise of rights protected by the Ordinance in violation of MGO 3.23(8).
44. The Complainant lost wages as a result of the Respondent's act of retaliation.
45. The Complainant suffered embarrassment and other emotional injuries as a result of the Respondent's act of retaliation.
46. The Complainant failed to demonstrate that punitive damages should be awarded as a result of the Respondent's act of discrimination.

ORDER

46. The complaint of July 26, 1988 is dismissed.

47. The Respondent shall cease and desist from retaliating against the Complainant for his exercise of rights protected under the Ordinance. This does not require the Respondent to offer the Complainant employment. Pursuant to the terms of the Ordinance, the Respondent shall not retaliate against any person for the exercise of rights protected by the Ordinance for any participation that they may have had with this case.
48. The Respondent shall pay to the Complainant the amount of $3,332.72 (three thousand, three hundred, thirty two dollars and seventy two cents) as back pay. Such payment shall be made no later than thirty (30) days after this Order becomes final.
49. The Respondent shall pay interest at the rate of four (4) percent per annum on the award of back pay from February 9, 1989 until the amount is paid in full.
50. The Respondent shall pay to the Complainant the amount of $4,000.00 (four thousand dollars) as compensation for his emotional injuries. This amount shall be paid no later than thirty (30) days after this Order becomes final.
51. The Complainant shall submit to the Commission and serve upon the Respondent, a petition for his costs including a reasonable attorney's fee no later than thirty (30) days after this Order becomes final.
52. The Respondent shall file with the Commission and serve upon the Complainant, any objections to the Complainant's petition no later than twenty (20) days after receipt of the Complainant's petition.
53. The Complainant shall submit to the Commission and serve upon the Respondent, any reply to the Respondent's objections no later than ten (10) days after the receipt of such objections.
54. The Hearing Examiner may schedule further proceedings if necessary.

MEMORANDUM DECISION

This case presents two separate allegations of discrimination. The Complainant's original complaint filed on July 26, 1988 states a claim for racial harassment by co-workers and that the Respondent did not act reasonably to remedy the harassment. There was also an allegation of unequal pay but that issue was not a subject of testimony at the hearing. The second claim of the Complainant was filed on March 17, 1989 and states that the Respondent retaliated against him for his filing of his original complaint by subjecting him to more stringent discipline and by terminating his employment. The majority of the incidents surrounding these complaints occurred in the last year and a half of the Complainant's approximately six years of employment with the Respondent. More specifically, the greatest concentration of activity regarding the harassment allegations occurred in September and October of 1987.

The Complainant was first hired on January 12, 1983 as an entry-level Laboratory Assistant in the Compound Preparation Group. He mixed products and solutions as well as prepared food for :laboratory animals. The Complainant had no specific training except that which he received at the job).

Though the Complainant testified that he had been subjected to harassment by his coworkers from the beginning of his employment, the first time that he raised the issue of his treatment to a supervisor was in the Fall of 1986. During his annual evaluation and appraisal, the Complainant told his supervisor, Steve Sorenson, that he had been harassed and called racial names by co-workers especially Wayne Hoernke. He asked Sorenson to speak with Hoernke to stop the harassment and to give the Complainant his work assignments directly in writing. It had been the practice to pass work assignments through Hoernke, presumably because Hoernke was the most senior of the workers in the group and sometimes functioned as a lead worker. Sorenson adopted the Complainant's requested method of giving work assignments and apparently spoke with Hoernke. Sorenson did not report to

the Complainant about his conversation with Hoernke until the Complainant's next annual appraisal in September of 1987. The Complainant did not complain to Sorenson about continued harassment until September, 1987.

The harassment of which the Complainant complained was the telling of racial jokes and use of words such as "nigger" and "honky". The conduct seems to have begun as banter between co-workers and was carefully limited to times and locations outside of the presence of supervisors. The care taken not to be observed by supervisors strongly indicates that the participants knew of the wrongfulness of the conduct. The Complainant participated in the banter though there was no testimony concerning the willingness of his participation. It is the experience of the Hearing Examiner that given the pressures of the work site to get along and to conform, a worker may engage in conduct that is distasteful or objectionable to that worker under other circumstances. There is nothing in the record to suggest that the Complainant did not at first participate as an equal. He did eventually become offended by the harassment and sought to have it end. He did not speak with those workers with whom he had been engaged in this banter, rather he spoke with his supervisor, Sorenson. The record is clear that the participants did not intend to be malicious or hurtful towards the Complainant. Because of the Complainant's participation, it is understandable that the other participants would be confused about how their banter was received by the Complainant.

The harassment did not stop after the Complainant complained to Sorenson in 1986. What specifically occurred during that year with respect to the harassment of the Complainant is not demonstrated by the record. In September of 1987, the Complainant put his complaint and concerns in writing. After reviewing the Complainant's comments, Sorenson told the Complainant that he had spoken with Hoernke the previous year. Sorenson asked the Complainant if he were to speak with Hoernke again if the Complainant would remove his written comments. The Complainant stated that he would not. The comments were reviewed in turn by Wayne Madison and Ronald Larson.

An investigation was conducted to find out about the allegations made by the Complainant. The investigation disclosed that employees in the Complainant's work unit had been using racially explicit language at the work site. Larson was appalled to find out that the workers were using words like "nigger" and "honky". With the concurrence of James Nie, the Respondent's Human Resources Manager and Equal Employment Officer, Larson prepared a memorandum to be given to all of the employees in the Compound Preparation Group setting forth the Respondent's policy against the use of such language at the work site and its support for a harassment-free work environment. On October 1,1987, Larson addressed a meeting of the Compound Preparation Group. All members were expected to attend. Larson distributed the memorandum and emphasized that he would not tolerate the use of racial epithets at the work site even if they were used in jest.

Subsequent to the October 1, 1987 meeting no one who attended the meeting used any racially explicit language at the work site.

The only incident of racially charged language being used at the work site after the October 1, 1987 meeting involved a person who was not in attendance at the meeting because he was not yet a member of the Compound Preparation Group. The exact date of the incident was not clear on the record. The best estimate is that it occurred in the late Fall of 1987 and definitely after October 1, 1987, A co-worker variously identified as Carl Hutter or Curt Hutter commented, in racial terms, upon observing that the Complainant had cut himself. The Complainant, at the time of hearing, contended that Hutter stated along the lines that, "Niggers bleed red just like whites." The Respondent contends that the comment was somewhat more racially inoffensive because Hutter said, "Blacks bleed the same color as whites." The Hearing Examiner credits the Respondent's version of the language used instead of

that proposed by the Complainant. The notes of the Investigator, Mary Pierce, reflect that the word "black" was used, not "nigger". The Investigator would not change the report of the language for any purpose. Her notes were taken at a Fact Finding Conference that occurred much more contemporaneously with the event than the hearing. Her notes also indicate that the Complainant was not sure that the word "nigger" had been used. While the Complainant now states that the word "nigger" was used, there is greater support in the record for the word "black" to have actually been used.

It is somewhat immaterial which specific word was used. Under the circumstances neither was inappropriate. The words were spoken in front of the Complainant and Sorenson. Sorenson immediately rebuked Hutter for his comment and let him know that further occurrences would not be tolerated. Hutter had not attended the October 1, 1987 meeting because he was not employed in the Compound Preparation Group on that date. This incident appears from the record to be the only incident involving Hutter and there were no repetitions.

The next incident revolves around the Group's office bulletin board. In late October, 1987, Larson became aware of a cartoon or drawing that he found offensive. It had been affixed to the bulletin board in the group office for probably a minimum of six months and it may have been there for. more than a year. It was located so that any person interested in seeing it would have had no trouble. Larson first saw it as he was showing some customers through the area.

It is not clear from the record what was exactly depicted in the drawing. The Complainant described it as a picture of a black man or woman being hanged. Other testimony indicated that it was more of a satirical drawing showing black men in the robes of the Ku Klux Klan. Again, it is not particularly material which description is closer to the truth. A drawing of either is inappropriate in a work setting or on a company bulletin board. Larson's action in immediately removing the drawing and starting an investigation to find out who had been responsible for the posting was correct.

There is a conflict in the record concerning this matter beyond the content of the picture. The Complainant testified that Sorenson removed the picture. Larson clearly stated that he was the one to remove it. It is possible that there were two drawings or pictures and they were removed by different people. It seems more likely that there was one picture and the Complainant's memory of the incident was faulty. His testimony was that he was aware of the picture but that he had generally ignored it. He never complained about the picture specifically.

The investigation did not result in any final conclusion. As indicated above, no one could state with any certainty how long the picture had been posted. It seems likely that the drawing had been posted by David Neuhauser. Neuhauser was an employee in the Compound Preparation Group who had left the Group about one year prior to Larson's finding the drawing. It is clear that the Complainant, though he did not like the drawing, did not complain to anybody about the drawing or its presence.

The final specific incident of which the Complainant complains with regard to harassment involves a physical altercation between the Complainant and Wayne Hoernke. The precise date of the incident is not known but it occurred some time between the October 1, 1987 meeting and the filing; of the Complainant's initial complaint in July of 1988.

Early in the morning, the Complainant had completed his initial work and came to the group office. He found Hoernke and Frank Chizek beginning a large project. The Complainant offered to assist. Hoernke declined the offer of help. The Complainant persisted and picked up a syringe to work with

Hoernke and Chizek. Hoernke grabbed the syringe from the Complainant's hand. The Complainant reached for another syringe.

Hoernke indicated that the Complainant's help was not wanted and emphasized his point by striking the Complainant in the chest with his forearm. The Complainant was hit with sufficient force to knock him back a couple of steps.

Chizek, who had witnessed the incident, took steps to regain control of the situation. He told the Complainant not to hit Hoernke back because that would only make matters worse. He urged the Complainant to report the incident instead. The Complainant followed Chizek's advice and did not contribute to an escalation of the trouble.

The Complainant was convinced that he could no longer work with Hoernke. When he reported the incident, the Complainant asked that Hoernke be fired or transferred from the unit. Sorenson sought to resolve the situation by having Hoernke apologize. The Complainant found this unacceptable and took his complaint to Wayne Madison. Madison stated that Hoernke had worked for the Respondent for a long time and that Madison would not fire him over the incident. Madison told the Complainant that the Complainant could accept Hoernke's apology and go back to work in the unit or transfer to another unit. The Complainant did not wish to transfer because he was only skilled or trained in the work of the Compound Preparation Group.

Larson reviewed Madison's oral report of the incident and along with Nie's input decided that the apology of Hoernke was a suitable resolution to the incident. Larson was particularly concerned about whether the incident was racially motivated or not. Larson concluded that the lack of any racial language and the circumstances as a whole made a racial motivation unlikely.

A meeting between Hoernke and the Complainant was arranged. Hoernke accepted responsibility for the incident and apologized to the Complainant. It is not clear whether the Complainant accepted the apology or merely stood as a mute participant.

The Complainant alleges that these incidents, individually or in some combination, require a finding of racial harassment on the part of the Respondent. The Hearing Examiner reluctantly disagrees.

All of the allegations regarding harassment relate to so called co-worker harassment not supervisory harassment. This is true despite the fact that Hoernke occasionally acted in the role of a lead worker or in Sorenson's stead when Sorenson was not present in the unit. Hoernke had none of the usual indicia of supervisory responsibility such as the right to hire, fire, discipline or evaluate employees. He was an admittedly skilled and experienced worker upon whom others in the Group occasionally relied for training or explanations but this is insufficient to change him from a co-worker to a manager. The distinction is an important one. In the case of co-worker harassment, the charging party must, in addition to demonstrating the facts of the harassment, also demonstrate the knowledge, either actual or constructive, of the harassment by the management and the lack of a sufficient response of management to the harassment. In the case of supervisory harassment, the charging party need only demonstrate the fact of the harassment. Management is presumed to know of the activities of all of its supervisors and management's response is also presumed insufficient. This case presents issues of whether the incidents of which the Complainant complained constitute harassment, whether the Respondent knew or reasonably should have known about the harassment and whether the Respondent's response to the harassment it knew or should have known about was appropriate.

The Commission has dealt with issues similar to those in this case on at least two occasions. The case of Guyton v. Rolfsmeyer, MEOC Case No. 20424 July 18, 1986 (Comm'n Dec.) addresses the standards for analyzing a case of co-worker harassment. Vance v. Eastex Packaging, MEOC Case No. 20107 May 21, 1985 (Comm'n Dec.) sets the standards for addressing a case of supervisory harassment. The Commission uses Federal and State court decisions for guidance in interpreting the Ordinance but is not bound by those decisions. The Commission is not bound by these decisions because it is interpreting the provisions of the Ordinance recognizing, where appropriate, different policy considerations of the City Council. This is apparent from the decision in the Vance case that holds that the Commission may find isolated incidents of supervisory harassment actionable under the Ordinance, while cases brought under Title VII or under the Wisconsin Fair Employment Act require a much more significant pattern or practice of conduct in order to establish actionable harassment.

Had the harassment demonstrated in the record of this matter come at the hands of a supervisor, there is little doubt that the Complainant would have established liability. However, following the lead of the Guyton case, we must look at whether the management of the Respondent knew or reasonably should have known of the harassment and having such knowledge, whether they acted reasonably to stop and prevent harassment of the Complainant. First we will examine the individual incidents before looking at the situation as a whole.

First, in the incident involving Curt or Carl Hutter, as indicated above, there is no doubt that Hutter's comment was inappropriate and, under certain circumstances, by itself could be part of a claim of harassment. Hutter's offensive comment was made in front of a supervisor, Sorenson, so there is no question about management's knowledge of the situation. Sorenson immediately spoke with Hutter and told him that such color-sensitive comments would not be tolerated by the Respondent. There were no further incidents involving Hutter. This is evidence that the response of the Respondent was appropriate and effective to address and prevent future incidents. Hutter was not a member of the Compound Preparation Group at the time that Larson addressed the group. There is nothing in the record indicating that Hutter had any actual knowledge that his statement was contrary to the Respondent's policy prior to his making the statement. Under the facts available to the Hearing Examiner, the Hutter incident appears to have been an unexpected, isolated event that was properly addressee by the management without any reoccurrence of the offensive comment.

Similar to the Hutter incident is the problem of racially explicit jokes and language at the work site. The earliest knowledge on the part of management of the problem came in the Fall of 1986, when the Complainant complained to Sorenson of his treatment by his coworkers. These complaints were made orally during the Complainant's annual performance review. Sorenson's knowledge is imputed to the Respondent because he is a manager even though he is at the lowest rung of the managerial ladder. The Complainant requested that Sorenson take specific action to address his concern. He asked Sorenson to speak with Hoernke about stopping his harassment and for Sorenson to give him his work assignments in writing directly instead of passing them verbally through Hoernke. Apparently Sorenson took both of these steps. Since Sorenson did not testify, we must rely on the Complainant's testimony on this point. Sorenson did not inform the Complainant that he had spoken with Hoernke until the Complainant repeated his complaint during the next year's annual performance appraisal. The Complainant did not complain to Sorenson about continuing problems during the year. Given the luxury of hindsight, Sorenson's and hence the Respondent's, actions to prevent the continuing harassment of the Complainant appear inadequate. However, Sorenson took the steps requested by the Complainant and heard no more complaint from the Complainant until a year later. While it now seems that Sorenson should have done more to follow up on the Complainant's complaint, it is

difficult to find Sorenson's actions culpably lacking given the circumstances at the time particularly in light of the Complainant's silence.

When the Complainant repeated his complaints during the 1987 annual appraisal, Sorenson's offer to speak with Hoernke again if the Complainant would withdraw his written complaint would have been inadequate had it not been for the steps taken by Larson to address the issue of harassment. Sorenson's proposed resolution suggests to the Hearing Examiner that he may have felt some responsibility for not performing an adequate follow up to the 1986 complaints by the Complainant. Sorenson was let off the hook by Larson's actions.

Larson reviewed, as a matter of course, the annual performance reviews for the employees under his supervision. Upon his reading of the Complainant's complaints of harassment, Larson ordered an investigation. When the Complainant's complaint was confirmed, Larson took prompt steps to assure that there would not be any further occurrences of the harassment. He spoke personally with the principle offenders. He also prepared a memorandum to be given to each of the employees in the Complainant's group. The memorandum was reviewed for consistency with company policy by James Nie, the Respondent's Human Resources Manager and Equal Employment Officer. Larson called a meeting of the Compound Preparation Group to distribute the memorandum and to emphasize the Respondent's position that there would be no tolerance of harassment at the work site and that the use of words like "nigger" would not be tolerated even if used jokingly.

Larson's talk and memorandum had their intended effect. Subsequent to the October 1, 1987 meeting, there were no repetitions of racially explicit language by any member of the Compound Preparation Group who attended the meeting. As noted above, there was one incident involving a person who did not attend the meeting. The Complainant did testify that there were no further incidents using the word "nigger". However, he also testified that Hoernke would assign him less favorable tasks saying that they were "nigger's work". The Complainant's latter testimony was not supported in the record by any other witness. Several other witnesses testified to the fact that there were no instances of racially explicit language after the October 1, 1987 meeting.

The Complainant's 1987 annual performance appraisal was dated September 14, 1987. Once he became aware of the Complainant's allegation, Larson took prompt, reasonable and effective action to remedy the Complainant's complaint of harassment by use of language such as "nigger" or "honky", The Complainant had not raised any other complaint of harassment. The incident involving Hutter cannot be seen as a failure of Larson's action because Hutter had not been a member of the group on October 1, 1983 and therefore did not attend the meeting. The only questions about Larson's response that concern the Hearing Examiner is why Larson did not cast his net wider and circulate the October 1, 1987 memorandum to his other employees or hold meetings with other sections under his supervision. If prevention of harassment of employees was that serious a matter, it would seem logical and prudent to have brought the message to all of those under his control. This omission does not diminish the fact that Larson did what the law required him to do once he found out about the Complainant's complaint. To have taken the additional steps suggested simply would have demonstrated a clearer commitment to workplace equality.

The third incident occurred sometime shortly after the October 1, 1987 meeting. No one is sure of the precise date. Larson discovered a cartoon or drawing on the bulletin board of the Compound Preparation Group office that he found to be offensive. The record reflects that the exact nature of the drawing is not recalled. It may have depicted a black man being hanged or blacks dressed in white robes like members of the Ku Klux Klan. Given the record, this latter description seems more likely. The Complainant did not mention the cartoon in any of his complaints. Upon finding the drawing

Larson took it down and threw it away. He began an investigation to discover who had been responsible for the drawing and how long it had been posted. The investigation was generally unsuccessful. No one could remember for precisely how long the drawing had been displayed. At the hearing, there was testimony indicating that it had been posted for at least six months and possibly somewhat more than a year. The investigation determined that the drawing had probably been put up by David Neuhauser. Neuhauser was a person who had left employment with the Compound Preparation Group at least one year prior to the discovery of the drawing.

Testimony at the hearing indicated that the drawing had been posted on the bulletin board where anyone looking at the board would have been able to see it. Larson discovered the drawing as he was escorting customers on a tour through the area. Despite the testimony concerning the prominence of the drawing, it appears that no one from management knew of the existence of the drawing prior to Larson's discovery. It is arguable that members of management should have reasonably known of the drawing. This might be particularly true of Sorenson who had the closest dealings with the office. Neither party chose to call Sorenson. There is no indication that Sorenson was unavailable to testify. In this instance Sorenson's knowledge of the drawing would be most damning to the Respondent. Had Sorenson known of the drawing or was otherwise likely to have known of the drawing, one would have expected the Complainant to call Sorenson. The failure to call Sorenson under these circumstances leads to an inference that his testimony would not have been particularly helpful to the Complainant.

There is insufficient evidence to lead to the conclusion that the Respondent knew or reasonably should have known of the existence of the drawing prior to its discovery by Larson. Larson acted promptly to remove the drawing upon finding it and took reasonable steps to investigate the posting of the drawing and to prevent the reoccurrence of such an incident. Though Larson found the drawing objectionable, the lack of complaint by the Complainant at any time other than at hearing and the Complainant's contradictory testimony leads the Hearing Examiner to the conclusion that the drawing was not particularly objectionable to the Complainant. The Complainant demonstrated by his complaints in 1986 and 1987 that he was willing to speak up when he believed himself to be the subject of discrimination. For him not to have raised an issue about the drawing, in light of his recent objections to other treatment, suggests that he was not particularly bothered by the drawing. The Hearing Examiner does not in any way condone the display of drawings such as that described at hearing, however, the Complainant has failed to demonstrate to the requisite degree, the knowledge of the Respondent prior to Larson's discovery or that it failed to take appropriate action.

The fourth and final incident chronicled by the Complainant in his claim of harassment stems from a physical altercation between the Complainant and Wayne Hoernke. Again, the exact date of the altercation could not be reconstructed on the record. It occurred sometime between the October 1, 1987 :meeting and the filing of the initial complaint in this matter. The facts of the altercation are not particularly in dispute.

The Complainant, Chizek and Hoernke were all in before their usual starting time. The Complainant had begun his tasks and was waiting for the next step of the procedure upon which he was working to begin. He saw Chizek and Hoernke beginning to work on a different procedure involving injecting a substance by use of a syringe. He picked up a syringe and offered to assist. Hoernke became irritated and grabbed the syringe from the Complainant's hand. The Complainant again offered his assistance and reached to pick up another syringe. Hoernke again told the Complainant that his help was not wanted and struck the Complainant forcefully across the chest with his forearm. The Complainant was knocked back a couple of steps by the blow. Chizek stepped into the altercation to restore order. He urged the Complainant not to hit Hoernke back but to complain to the Respondent instead. The

Complainant took Chizek's advice and did not hit Hoernke. There were no words spoken throughout this incident that could be interpreted as being racial in nature.

Subsequent to the fight, Hoernke was relatively quick to admit that the altercation was his fault. The Complainant had reported the incident to Sorenson. Because of Hoernke's contrition, Sorenson sought to restore the working relationship in the office. To this end, he asked the Complainant to accept the apology of Hoernke and go back to work. The Complainant was convinced that he could no longer work with Hoernke and asked that Hoernke be fired or transferred to another work unit. Sorenson would not or could not meet the Complainant's demands. The matter was taken to Wayne Madison.

Madison spoke with those involved in the incident but did not take written statements or perform any additional investigation. In response to the Complainant's requests, Madison stated that Hoernke had worked for the Respondent for a long time and he would not fire Hoernke over the incident. He offered the Complainant the opportunity to transfer to another unit if the Complainant could not accept Hoernke's apology and go back to work together. The Complainant did not want to transfer to another unit because of his concern that he only knew the work in his unit and had no other specific skills.

Madison's report of the incident was orally given to Larson. Larson was particularly concerned to see if there were racial overtones to the confrontation. He was satisfied that because there were no racial words or epithets used that race had not been a motivating or other factor. After consultation with James Nie, Larson concurred with the recommendation that the incident be resolved by an apology from Hoernke. The Complainant was not satisfied with this resolution and when a meeting was arranged for Hoernke to apologize, the Complainant stood mute. From that point on, the Complainant had as little to do with Hoernke as possible.

The Complainant argues that given the incidents in the Fall of 1987 that the absence of racial invective in the confrontation is not a true indicator of whether the incident was racially motivated. The Hearing Examiner agrees with this general contention. However, this does not carry the day. It is equally true that not every time a Black and White are involved in a struggle it is racially motivated or a result of prejudice. One must seek other evidence from the totality of the circumstances.

The Complainant contends that the confrontation when taken in the light of the incident:, of 1987, particularly the Fall of 1987, and Hoernke's conduct towards the Complainant leads to the inescapable conclusion that the Complainant was a victim of a pattern of racial harassment. The Complainant relies upon Hoernke's stand-offish attitude after the October 1, 1987 meeting and the Complainant's allegations that Hoernke assigned him less desirable work and called it "nigger's work" to support his contention. There is nothing in the record to corroborate the Complainant's claims of less desirable work or assignments being called "nigger's work". No witness tested that they ever heard the word "nigger" at the work site after the October 1, 1987 meeting. Additionally, no one's testimony can be read to show that the Complainant was given less desirable work assignments.

Somewhat more troubling is the notion that the Complainant was isolated and shunned by other employees including Hoernke as a result of the common knowledge or perception that the October 1,1987 meeting came as a result of the Complainant's complaint. Hoernke's relationship with all other employees was apparently anything but smooth or predictable. Even friends were subject to Hoernke's temper tantrums and irascible personality. Chizek, a White male, testified that he had born the brunt of Hoernke's temper on more than one occasion. Larson testified that Hoernke had difficulties dealing with a number of other employees over the period of employment and that fact was well known. Given Hoernke's mercurial personality and temper, it cannot be said that this record demonstrates any

change in Hoernke's conduct and if any change can be found that it is due to Hoernke's prejudice, if any.

The reaction of other employees to the Complainant is similarly undocumented. There was no testimony from any other employee who was employed at the same time as the Complainant about any change in treatment after October 1, 1987. Even if there was a documented change, it could be as much a result of fear or concern on the part of the other employees as prejudice on their part. In October of 1987, all of the Group employees were told that harassment would not be tolerated and that offenders could be disciplined if they were found to have harassed another employee. Under the facts of this case, it must have been obvious to anyone who attended that meeting that the Complainant was the source of complaints. Since it is natural to look out for oneself, a certain degree of caution or reticence in dealings with the Complainant might be expected. It is one of the unfortunate results of whistleblowing that the person who calls attention to wrongdoing may become somewhat of a social outcast until a "community" gets used to the new relationships engendered by change. In this case, one explanation is as likely as the other. As a result, the Complainant fails to convince the Hearing Examiner that the physical confrontation was a result of racial prejudice and not the result of a bully who has not been appropriately disciplined.

The Complainant also argues that his overall treatment as an employee must result in a finding of illegal racial harassment. Once again, the Hearing Examiner disagrees. Having concluded that the altercation between Hoernke and the Complainant was not as a result of racial prejudice, we are left to consider whether the other incidents discussed above when taken as a whole represent a pattern or practice of actionable harassment. It cannot be denied that the Complainant was subjected to several incidents of racially harassing conduct. The real question is whether the Respondent knew or reasonably should have known of the conduct and once having knowledge, either actual or constructive, did it act reasonably to stop it and to prevent further occurrences.

The record demonstrates that racially insensitive attitudes if not outright racism was prevalent in the Compound Preparation Group. These attitudes were made manifest by racial jokes and language and the posting of racially ugly pictures. It appears, however, that the Respondent did not know of these problems until the Complainant called them to the attention of management in September of 1987. As discussed above, Sorenson apparently knew of the Complainant's concerns a year earlier but thought that they had been resolved. The incidents of joke telling and the use of racial expletives stopped as of October 1 1987 when Larson laid down the law with regard to harassment. The drawing incident seems to have been a lingering part of the earlier conduct and not a separate incident. As such it was resolved by its removal and the subsequent investigation. The Hutter incident does not seem to be part of a pattern but is rather an isolated incident that was immediately and successfully addressed by Sorenson.

The clustering of these events and the lack of subsequent incidents suggests not an outbreak: of racism but rather a heightened awareness of racism and an attempt to remove or control it. It seems that once Larson was put on notice he took prompt and effective steps to end the harassment of the Complainant. The Guyton case places a certain degree of responsibility on the Complainant to raise issues of harassment to the Respondent. Once he did, the Respondent acted to end the harassment. It is unfortunate that the Complainant had to endure the harassment at all but the law gives a respondent some flexibility in managing employees. If the harassment had come at the hand of a supervisor the result would have been different. Guyton (supra) and Vance (supra) The Complainant's claim of harassment is not proven.

The Complainant's amended complaint alleges that his termination in February of 1989 was as a result of either retaliation for his filing of his original complaint or as a result of racial discrimination. The Respondent alleges that the Complainant was terminated for good cause resulting from three incidents of sleeping on the job.

The Complainant filed his initial complaint on July 26, 1988 after he became dissatisfied with the handling of his complaints of harassment by the Respondent. The complaint was investigated and on October 17,1988, the Investigator issued an Initial Determination concluding that probable cause existed to believe that discrimination had occurred. Shortly thereafter, the Complainant missed several days of work as a result of his incarceration. He was warned that taking any more unexcused absences would not be tolerated.

The Respondent asserts that the Complainant was found sleeping on the job by Sorenson on November 3, 1988 and that the Complainant was orally warned about such inappropriate conduct. The Complainant denies that Sorenson spoke to or warned him about sleeping on the job. Sorenson did hold a Group meeting to tell all employees that they should not use the office as a lounge, i.e. for eating lunch or for sleeping.

On December 1,1988, two things happened that related to the Complainant. Sorenson was not in the office that day and Hoernke had been left nominally in charge. In the afternoon, Hoernke and Chizek were entering the office when Hoernke saw the Complainant with his head down on a desk. Hoernke moved to behind the chair in which the Complainant was sitting. He then gently shook either the Complainant's shoulder or chair and told him to wake up. The Complainant stated that he had not been sleeping. Hoernke asked the Complainant if he wished to speak to Wayne Madison about the matter. The Complainant said that Hoernke should talk to Madison if it concerned him. Hoernke did report the incident to Madison.

Madison spoke to the Complainant about the incident. The Complainant again denied sleeping and asserted that Hoernke had harassed him earlier in the day in connection with a work project.

The Complainant asserted that Hoernke had treated him rudely when Hoernke ordered him to complete a project. This incident had allegedly occurred in the vicinity of the laundry and in front of witnesses.

Madison conducted an investigation of both incidents He interviewed several witnesses and obtained written statements or comments from each of them.

The investigation could not be concluded until early January of 1989 because of various legitimate reasons. On January 4, 1989, the Respondent issued its conclusions regarding the events of December 1, 1988. The Respondent determined that there was no evidence to suggest that Hoernke had harassed the Complainant on December 1, 1988. The Respondent further determined that the Complainant had in fact been sleeping or appeared to have been sleeping in violation of the earlier warning from Sorenson. The Respondent could not conclude whether the Complainant had been asleep while on his lunch break or on his work hours. The Complainant was additionally warned that further incidents of sleeping in violation of company policy could lead to his termination.

On January 6, 1989, Larson held another meeting of the Compound Preparation Group. He reaffirmed the Respondent's policy against harassment and supported the right of any employee to file and pursue a complaint of harassment. He also indicated that a person who files such a complaint is not relieved from the responsibility of meeting other policies or requirements of his or her job.

On February 8, 1989, Larson was returning to his office from a meeting in one of the training rooms. He took a route that passed by the Compound Preparation Group office. This was not the most direct route that Larson could have followed. As he passed the Group office, he observed the Complainant under circumstances that suggested that the Complainant was asleep. The Complainant was leaning back in a chair with his feet on another chair, and his head on his chest with his eyes closed. The Complainant was breathing slowly and deeply. Larson entered the office and asked the Complainant if he had been asleep. The Complainant denied it saying that he was resting while waiting for a process to finish. Larson noticed that Mark Parnell was also in the office. Larson returned to his office stating that he would have to decide how to handle this situation.

Larson spoke with the Complainant in his office later that morning. He told the Complainant that he believed that the Complainant had been sleeping. The Complainant denied that he had been asleep and indicated that he felt harassed or picked upon. The Complainant became more and more: agitated and upset and indicated that he wished to leave for the day. Larson wanted the Complainant to provide a written explanation of the Complainant's position. The Complainant never provided such a statement on the advice of his then Attorney. The Complainant was eventually given permission to leave early based upon Larson's observation that the Complainant was too upset to work effectively.

Larson called Parnell to his office and asked for a written statement from Parnell about Parnell's observations of the incident that morning. Parnell did not wish to become involved in the dispute and asked not to have to provide a statement. Larson insisted that a statement be provided. Parnell then provided a statement confirming that the Complainant had been sleeping in the office.

At the time of hearing, Parnell partially retracted his earlier statement. He indicated that he really did not know if the Complainant had been sleeping or not. He stated that he had provided the earlier statement because he had felt pressured by Larson for a statement that corroborated Larson's impressions. Parnell's change in testimony may have been due to the fact that he was involuntarily terminated by the Respondent several months before the time of hearing. It was clear to the Hearing Examiner that Parnell did not hold warm feelings for the Respondent. The change in his testimony was not particularly startling given his feelings of animosity for the Respondent. However, Parnell only changed his testimony to not being sure that the Complainant had been sleeping. He did not corroborate the Complainant's position that he had not been sleeping.

After meeting with Parnell, Larson spoke with James Nie and concluded that the Complainant should be involuntarily terminated because of the repetition of the sleeping incident. Larson prepared a memorandum including his recommendation for termination. The Complainant's employment was terminated on February 9, 1989.

The Complainant contends that his termination was the result of either discrimination or retaliation for the filing of his initial complaint with the Commission. The Respondent asserts that it terminated the Complainant's employment for a legitimate business purpose, i.e. that the Complainant had violated the policy against sleeping on the job three times within four months. The Respondent denies that discrimination or retaliation played any part in the Complainant's termination.

The record indicates that the Respondent had virtually no disciplinary problems with the Complainant until shortly after the Commission's Investigator issued her Initial Determination in October of 1988. In short order the Complainant allegedly received an oral warning, a written warning and termination. He also received discipline for a period of several days of unexcused absences due to an incarceration. The record is clear, though, that the Respondent claims to have terminated the Complainant's employment solely over the issue of repeated sleeping incidents.

The Complainant contends that the first incident upon which the Respondent relies did not occur. It is the Respondent's position that the Complainant was orally warned on or about November 3, 1988 after Sorenson found him sleeping in the Group office. The Complainant states that Sorenson held a meeting on November 3, 1988 with the whole Group to emphasize that the office was not to be used as a lounge because clients passing through the area might see the office. Neither party called Sorenson to testify in this matter and there was no showing of his unavailability. In this instance, Sorenson's testimony that he had warned the Complainant or that he had found him sleeping would support the Respondent's position. The Respondent did not present Sorenson or any written corroboration of its contention beyond a passing reference in a memorandum dated January 4, 1989. The Complainant's contention is credible particularly in light of the earlier testimony around the removal of the drawing from the office bulletin board. In that instance, the attention of the Respondent was also motivated by concern about what a strolling client might see.

Given the discrepancies between the parties accounts of November 3,1988 and the lack of direct testimony by Sorenson, the Hearing Examiner finds the Complainant's explanation more credible and discounts the Respondent's allegation that Sorenson had found the Complainant sleeping and issued him an oral warning.

The incidents of December 1, 1988 and February 8, 1989 are somewhat more problematic from the Complainant's perspective. There is ample evidence from which the Respondent or any reasonable person could conclude that the Complainant had been asleep on those occasions. Given the November 3, 1988 meeting, the Complainant should have known that this was a matter that the Respondent was prepared to take seriously.

The Complainant's contention that he had been harassed by Hoernke earlier in the day on December 1, 1988 over the Complainant's failure to completely store pan papers, is without support in the record. The investigation conducted by Wayne Madison appears to have been thorough and appropriate: There is no reason for the Hearing Examiner to doubt its conclusions.

Similarly with the February 8, 1989 incident. The steps taken by Larson were appropriate and the conclusion seems reasonable given the information available to Larson at the time. The subsequent recantation of his written statement by Mark Parnell does not really affect the validity of Larson's conclusion that the Complainant had been sleeping at his desk. There is nothing in the record to demonstrate that Larson did anything improper in insisting that Parnell provide him with a statement. Equally, there is nothing in the record to suggest that Larson improperly steered Parnell's statement in a direction of his preference.

Given these conclusions of the Hearing Examiner, the question becomes whether the Complainant's filing of his complaint in July of 1988 caused the Respondent to treat the Complainant differently than he would have been treated if he had not filed his complaint. The answer, based upon this record, is yes.

The first point of comparison is the physical altercation between Hoernke and the Complainant and the Complainant's violation of the sleeping policy. Despite Wayne Madison's testimony that there was nothing in the Employee Handbook that would apply to this incident, a physical fight between employees during work hours and on company property is clearly prohibited by the Handbook and is or at least should represent a very serious breech of an employee's right to a safe work environment. In this case Hoernke's ill temper seems to have been one of long standing and was well known to other employees including managers. Chizek testified that he had felt the lash of Hoernke's temper in the past. In investigating this incident, Madison only took oral statements from those involved and

failed to document his investigation or any steps that he took to identify any other witnesses or persons who could shed light on the incident. Madison reported to Larson and Nie. Nie, who testified that he had attended courses on investigatory techniques, offered no guidance and merely concurred with Madison's actions. It is not credible to the Hearing Examiner that a professional Human Resources Manager in this day would not require better documentation and would allow a problem employee to strike another employee without requiring more in the way of discipline than an apology.

The two incidents in which the Complainant was accused occurred within four months of the Complainant's receipt of an Initial Determination concluding that there was probable cause to believe that he had been discriminated against. With respect to the December 1, 1988 incident, Madison took written statements from Chizek, the Complainant, Hoernke, and Wetter. He took additional statements from witnesses to the Complainant's counter allegation of harassment also. The investigation resulted in a mixed finding that the Complainant had probably been sleeping but that it was not clear that the Complainant had not been on his lunch break. The Complainant received a written warning that further violations might result in his termination. This was the first documented violation by the Complainant. While the Hearing Examiner does not condone an employee sleeping on the job, it is not a violation of policy that can compare to striking an another employee. Hoernke, a White employee who had not filed a complaint, did not receive a warning that further violations could lead to his termination and his action had no adverse effect on his relationship with the Respondent. No written statements were taken in the case of the altercation. It may have been appropriate for Madison to document the December 1, 1988 incidents as he did but when compared to the negligible investigation when Hoernke struck the Complainant, one cannot fail to conclude that the Complainant was treated less favorably.

With respect to the February 8, 1989 incident, the Respondent again took pains to document in writing the statements of all possible witnesses including a very reluctant Mark Parnell. This is again compared to the more serious incident with Hoernke where no statements were taken. Again, it may have been appropriate for Larson to do the documenting that he did but that does not explain why Hoernke was let off so easily in comparison.

Another point of comparison involves Larson's January 6, 1989 meeting. While the stated purpose seems to have been to reaffirm the anti-harassment policy, clearly an additional strong reason for the meeting was to warn the Complainant to watch his step. No such meeting was held after the Hoernke physical altercation. Hoernke was not made to attend a meeting where he would have been warned that future incidents of fighting might result in his termination.

The Respondent argues that the filing of the Complainant's complaint with the Commission alerted the Respondent to the need to better document employee problems. This is not a credible; assertion. Nie was a trained professional and the difference in documentation between the "fight" and the "sleeping" incidents simply is not explained by the filing of the complaint. In fact, such an argument tends to support the Complainant's argument that the complaint triggered a higher level of scrutiny and action in violation of the Ordinance. The Ordinance MGO 3.23(8) is intended to protect against such higher scrutiny once one has exercised a protected right. The filing of a complaint with the Commission is specifically enumerated as a protected right. If the Respondent had truly felt the need to improve its disciplinary procedures, it would have been better to announce the change and make it clear that a new stricter standard was going into effect.

Another problem with this argument of the Respondent is that in response to the earlier allegations of harassment, it took a strong stand including threatening dismissal. When another serious violation of

policy occurred, the Respondent showed a much lower level of concern. This difference heightens the later difference in treatment of the sleeping allegations.

The Respondent contends that the fact that Hoernke admitted his wrongdoing and demonstrated some degree of contrition, while the Complainant denied the allegations against him justified the difference in documentation of the facts and the difference in discipline. This is again not an adequate explanation of the failure to document Hoernke's aggressive conduct. Given Chizek's testimony that Hoernke was a consistently abrasive co-worker, it could have only been in the best interests of the Respondent to have a record of Hoernke's actions in the event that there were any repetitions of such conduct. This is particularly true in light of Larson's knowledge of Hoernke's troubled past. Hoernke's contrition could reasonably have a positive effect on the degree of discipline to be meted out. However, the Complainant's objections to the allegations could equally require documentation and might be a factor to be considered in the level of discipline. It would seem, however, unreasonable for his defense of himself to cost him his job particularly since the February 8, 1989 incident was only the second documented offense.

The view of the Hearing Examiner might be different if the Complainant had a record of disciplinary problems over the period of his employment. The Complainant's record is quite clear until almost immediately after the issuance of the Initial Determination. This close temporal connection is highly suggestive of a retaliative motive. The Respondent states that the Complainant's breeches of policy were unprecedented in the company or the Complainant's background. The Respondent does not demonstrate or suggest any explanation for why the Complainant's conduct should change so dramatically after October of 1988. For instance, the Respondent does not show that the Complainant's conduct deteriorated because he felt that he was shielded by the Initial Determination. This is hinted at in Larson's January 6, 1989 statement but it does not stand as proven on this record.

In general, the Commission has used an "in part" standard for addressing claims of discrimination and retaliation. This is a somewhat more lenient standard than the "but for" standard or the "mixed motive" standard or method of analysis. Under this approach, the Complainant has established that the Complainant's exercise of his rights under the Ordinance resulted, at least in part, in the application of more stringent discipline and his ultimate termination. Given this finding, we must now look at what the Respondent needs to demonstrate to defend itself.

If the Complainant's termination should be analyzed as a "mixed motive" case pursuant to Price Waterhouse v. Hopkins, 490 U.S.228 (1989) retaliation has been demonstrated to be a significant motivating factor by the Complainant. Under Price Waterhouse, the Respondent could still prevail if it demonstrates that it would have terminated the Complainant even if retaliation had not been involved.

The Respondent seems to contend that because of the seriousness of the Complainant's alleged violations and their repetition after a written warning that the Respondent would have most certainly terminated the Complainant's employment. This seems unlikely. The issue around sleeping is two-fold, time and location. The Respondent, it would appear inferentially from the January 4, 1989 memorandum, would not object to the Complainant's sleeping if it occurred during a break period and in a location such as the locker room. Presumably this is why the Respondent issued a written warning for the December 1, 1988 incident. Since sleeping may be permissible under certain conditions, it would not seem that termination would automatically result when it occurred outside of the permitted parameters. The Complainant had a reasonably good work record and had been with the Respondent for six years. Wayne Madison indicated in not terminating Hoernke for attacking the Complainant that these were factors in his decision. It seems likely that these factors would have or should have been taken into account in the Complainant's case.

The Complainant's apparent repetition of the sleeping violation could be reasonably considered an exacerbating factor. However, in a system of progressive discipline, there would almost certainly be some intermediate step between a written warning and termination.

The analysis would be similar under the McDonnell-Douglas/Burdine burden shifting paradigm. McDonnell-Douglas Corp. v. Green, 411 U.S. 793 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under this approach, the complainant must first make out a prima facie case of discrimination or retaliation. The Complainant has done that in this case. The Complainant engaged in protected conduct by filing his case with the Commission. He then suffered an adverse employment action, termination, under circumstances that could lead to the conclusion that retaliation was the motive for the action. Once the Complainant has made his prima facie case, the Respondent has the opportunity to rebut that case by offering a legitimate nondiscriminatory reason for its action. In this case, the Respondent states that its reason for terminating the Complainant's employment was his violation of the Respondent's policy against sleeping at work and on company time. This would be a legitimate non-discriminatory explanation that could serve to rebut the prima facie case. The Complainant may still prevail if he can demonstrate that the reason put forth by the Respondent is either not credible or is a pretext for other discriminatory reasons. By showing the difference in the treatment afforded Wayne Hoernke and the Complainant, the temporal proximity between the issuance of the Initial Determination and the increase in discipline and the increased attention to the Complainant's actions demonstrated by the January 6, 1989 meeting, the Complainant has demonstrated that the reason proffered by the Respondent is, at least in part, a pretext for the retaliatory motive of the Respondent.

The next issue to be addressed is that of damages. The Complainant is not seeking reinstatement and he has been employed in a position of at least equal pay for most of the time subsequent to his termination. The Complainant calculated his back pay to be $3,332.72 (three thousand, three hundred, thirty two dollars and seventy two cents). In its Reply Brief, the Respondent seems to stipulate that to be the amount of the Complainant's wage loss stemming from his termination. In order to make this part of a "make whole" remedy, the award must include prejudgment interest. The amount of prejudgment interest will be calculated on the basis of an annual interest rate of four percent since February 9, 1989. The Commission has used an interest rate of five percent per year in the past but the general lowering of interest rates in the past few years warrants a reduction in this rate.

The Complainant asks for an award of compensatory damages for the emotional injuries that he suffered as a result of his termination. The authority of the Commission to make such awards was established in the cases of Nelson v. Weight Loss Clinics of America Inc. et al, MEOC Case No. 20684 September 29, 1989 and Ossia v. Rush, MEOC Case No. 1377 June 7, 1988. Since the decisions in those cases the Commission has continued to make awards of this kind. Following the guidance of these cases and those upon which they rely, an award of compensatory damages may be made without expert testimony and the existence of such an injury may be inferred from the circumstances of a given Case. Chomicki v. Wittekind, 128 Wis. 2d 188, 381 N.W.2d 561 (Wis. App. 1985); Brantley v. Rosenblatt, No 601-474 (Milwaukee Cir. Ct.1984); Seaton v. Sky Realty Co. Inc., 491 F. 2d 634 (7th Cir. 1974); Crawford v. Gamier, 719 F. 2d 1317, 1324 (7th Cir. 1983)

Under the circumstances set forth in this record, the Hearing Examiner concludes that an award of compensatory damages is appropriate. The Complainant's employment was wrongfully terminated after six years of productive employment. During this time the Complainant learned his only marketable skill. To be deprived of that which you have built up over a period of time leads to emotional upset and injury. This injury is reinforced by the fact that the Complainant was a family

man with three children at the time of his termination. The concern that loss of his job would cause him for the welfare of his children cannot be questioned.

It has long been recognized that discrimination represents an assault on the dignity of the victim. It is appropriate to compensate the damage to the Complainant's dignity and self-esteem.

The Hearing Examiner sets the amount of the award for compensatory damages at $4,000 (four thousand dollars). While the Complainant tested to his injury at the time of hearing, he was unable to state with clarity how he had precisely been harmed. He did not present any supportive testimony by friends, family or employers that can be used to support a higher award. The Complainant's testimony was not particularly forceful about the impact of the injury to his self-esteem. While the Complainant should receive an award, the award is somewhat limited by the lack of a strong demonstration of the significance of the injury.

In the case of Perez v. Affiliated Carriage Systems Inc. dba Madison Taxi, MEOC Case No. 20938, the Hearing Examiner made a similar award though of a slightly lower amount. The difference is explained by the longer period of time for which the Complainant worked for the Respondent in the present case. Also, the Complainant's only job skills were ones that had been learned with this employer and it was not clear how transferable they would be to a new employer. In the case of Leatherberry v. GTE Directory Sales Corporation, MEOC Case No. 21124 January 5, 1993, the. Hearing Examiner awarded the Complainant twenty-five thousand dollars ($25,000.00) for compensatory damages. In that case, there was a demonstration of conduct that was personally focused and of an extreme nature. There was also a finding that the Complainant's future job prospects may have been more substantially limited than in the current case. This is partially a result in the difference in expectations between a managerial prospect and a person with limited job skills.

The Respondent argues that the Complainant is not entitled to any award of compensatory damages because only the Complainant testified about his loss. The cases cited above make it clear that it is sufficient to make an award based upon the Complainant's testimony alone. The lack of supportive testimony only goes to limit the amount of the award.

The Complainant asks the Commission for an award of punitive damages on his retaliation claim. The Complainant's theory is that retaliation is per se intentional and malicious and punitive damages are appropriate any time there is a finding of retaliation. The Hearing Examiner does not agree. The Complainant's argument ignores the different burdens of proof required to show liability and to show entitlement to punitive damages. The burden for liability is by the greater weight of the evidence, while that for punitive damages is the higher, by clear and convincing evidence standard, In this case the Complainant fails to meet the higher standard. The Complainant's conduct in either sleeping on the job or at least appearing to sleep on the job clouds the issue of malice or disregard for the rights and feelings of the Complainant. Accordingly, the Hearing Examiner does not need to consider an award of punitive damages in this case.

The Commission has long recognized that a prevailing party, in order to be made whole, must be awarded the costs of bringing and maintaining a complaint including a reasonable attorney's fee, if represented. In this case there is no reason that the Complainant should not be awarded these costs. By bringing complaints under the Ordinance, people in the Complainant's position act as private Attorneys General and as such benefit the City as a whole.

For the foregoing reasons, the Hearing Examiner finds that the Respondent did not discriminate against the Complainant by affording him different terms and conditions of employment but that the

Respondent did retaliate against the Complainant for his exercise of those rights protected by the ordinance.

Signed and dated this 2nd day of April, 1993.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner