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

| | |
|---|---|
| Earsell Hunt<br>P.O. Box 3471<br>Madison, WI 53704-0471<br><br>Complainant<br><br>vs.<br><br>Oscar Mayer Foods Corp.<br>910 Mayer Ave.<br>Madison, WI 53704<br><br>Respondent | CONSOLIDATED RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; INTERIM ORDER ON LIABILITY AND INTERIM PARTIAL ORDER ON DAMAGES<br><br>Case No. 21104<br><br>and<br><br>Case No. 21220 |
| Samuel Thomas<br>331 E. Bluff<br>Madison, WI 53704<br><br>Complainant<br><br>vs.<br><br>Oscar Mayer Foods Corp.<br>P.O. Box 7188<br>Madison, WI 53707<br><br>Respondent | |

## BACKGROUND

These cases were consolidated for purposes of a public hearing by the consent of the parties and by order of the Hearing Examiner. A public hearing was held in these cases before Hearing Examiner, Clifford E. Blackwell III, on October 14, 1993 in Room 312 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53710. Both Complainants, Earsell Hunt and Samuel Thomas, appeared in person and by the law firm of Fox and Fox S.C. by Mary Kennelly. The Respondent, Oscar Mayer Foods, appeared by its attorneys, Nancy Nims, labor counsel for Kraft Foods and Beth A. Clukey of the law firm of Pope Ballard Shepard and Fowle Ltd. Based upon the record of these proceedings, the Hearing Examiner makes the following Consolidated Recommended Findings of Fact, Conclusions of Law and Order:

## RECOMMENDED FINDINGS OF FACT

1. Complainant Earsell Hunt is a Black or African American male.
2. Complainant Samuel Thomas is a Black or African American male.

3. The Respondent is a corporation engaged in the production of food products at a facility located within the City of Madison. This facility employs workers, including the Complainants, in furtherance of its business or enterprise.
4. At its facility, the Respondent operates a cafeteria for the benefit of its employees. At all times relevant to these proceedings, the cafeteria was managed by Larry Winsand. Winsand's supervisor has been Tom Parker at all times relevant to these proceedings. Parker's supervisor was Mike Murphy.
5. Thomas first began work in the cafeteria in 1987 as a Vacation Replacement worker. At that time he had been employed by the Respondent for approximately twenty-three (23) years. The majority of Thomas' employment was in the Hamboning Department. When the Hamboning Department was closed, Thomas consciously decided to transfer to the cafeteria because it was the department where he could best take advantage of his plant seniority. After working as a Vacation Replacement worker, Thomas was posted to the position of Pots and Pans Washer.
6. At the time of hearing, Hunt had been employed by the Respondent for approximately twenty-two (22) years. Of this time, the last seven and one-half (7½) years were spent in the cafeteria.
7. Employees of the Respondent hold two types of seniority, plant and department. Plant seniority is based upon the employee's time at the plant regardless of the position(s) held by the employee. Department seniority is based upon an employee's time within a given department. One's plant seniority may be transferred from department to department as an employee holds a permanent position for more than one year. In addition to seniority, an employee may hold job rights to a specific position within a department. Job rights assure an employee of the position to which he or she holds job rights unless he or she is bumped by another employee with greater seniority or unless the employee remains on layoff status for more than thirty (30) days.
8. In January of 1989, the cafeteria had a roster of thirteen (13) employees though the department customarily ran with twelve (12) employees. Hunt was thirteenth on a list of seniority for the cafeteria. If Thomas were able to transfer his full plant seniority, Thomas would have been third on the cafeteria list of seniority.
9. In January of 1989, Hunt held the position of Night Cook in the cafeteria. Along with the position of Pots and Pans Washer, the Night Cook was the least favored position in the cafeteria. On January 15, 1989, Hunt was laid off from the position of Night Cook. When Hunt was laid off, Thomas exercised his right to demand that the Night Cook position be posted so that any employee of the cafeteria might bid for the position. On January 20, 1989, Thomas was posted to the position of Night Cook because no other cafeteria employee wished the position. With Hunt's layoff, the cafeteria was operating with one less than its usual complement of employees.
10. On February 5, 1989, Jeffrey Froh, another employee in the cafeteria, was scheduled to take a week's vacation. Under customary practice, Hunt would normally be recalled from layoff to fill the temporarily vacant position. On February 5, 1989, Hunt still held job rights to the position of Night Cook. If Hunt were recalled from layoff, he would be entitled to reduce Thomas from the position of Night Cook because of the job rights he held to that position. Once Thomas was reduced from the position of Night Cook, he would be entitled to transfer his full plant seniority to the cafeteria and be able to bump any other cafeteria employee with less seniority than he.
11. Winsand was aware of the possible consequences of Hunt's recall. He consulted with his supervisor, Parker and Parker's supervisor, Murphy, about what to do. The three supervisors decided not to recall Hunt from layoff and to operate the cafeteria with an additional employee less than usual. This prevented Thomas from exercising rights to which he was entitled under the Collective Bargaining Agreement and caused Hunt to lose job rights to the Night Cook position.

12. When Hunt was laid off and Thomas posted to the position of Night Cook, Hunt requested that he be allowed to remain employed in the cafeteria for a period of time in order to train Thomas in the position of Night Cook. Winsand denied Hunt's request stating that he (Winsand) would train Thomas. Thomas rarely saw Winsand.
13. When Thomas first posted to the position of Pots and Pans Washer, Terry King, the person who Thomas was replacing in the position, was retained in the cafeteria for a week to train Thomas. King is White.
14. On February 5, 1989, Paul Becker, a White employee of the Respondent, held the position of Head Cook. He had been employed by the Respondent for approximately twenty (20) years though it is not clear from this record how long Becker had been Head Cook. If Thomas had become third on the cafeteria seniority list, he could have bumped Becker from the position of Head Cook. The record does not clearly indicate that Thomas wished to move to the position of Head Cook. If Becker had been bumped from his position he could have bumped any employee of the cafeteria with less seniority than he. That employee could in turn bump any employee with less seniority and so on until the least senior employee was bumped from his or her position.
15. According to the Collective Bargaining Agreement, certain positions with the Respondent are exempt from bumping. This exemption is granted because of the sensitive nature of the position or because the position requires more extensive training than that provided for under the Agreement. The Head Cook is not a bump exempt position.
16. At all times relevant to these complaints, the Complainants were the only Black or African American employees in the cafeteria.
17. The Respondent's decision not to recall Hunt, and thus to prevent Thomas from exercising his full bumping rights, disadvantaged the Complainants and benefited one or more White employees.
18. Both of the Complainants experienced incidents of harassment and insensitivity because of their race while employed in the cafeteria. These incidents include, but are not limited, to being told that Blacks came to Madison in the trunk of someone's car, that Blacks lacked the intelligence to learn or perform jobs in the cafeteria, that the Complainant had fallen off the back of a watermelon truck and being exposed to a characterized drawing of a gorilla that was offensive to one of the Complainants.
19. It is not clear whether not recalling Hunt from layoff had a positive, negative or no effect on the cafeteria's operation resulting from not having to pay his permanent, full-time salary.
20. The Respondent refused to recall Hunt from layoff in order to keep Thomas from exercising his full seniority rights and bumping to the position of Head Cook. The Respondent did not wish a Black or African American to hold the visible and responsible position of Head Cook. The Respondent did not wish a Black or African American person to hold the position of Head Cook, at least in part, because of the likely negative reaction of other employees in the cafeteria to such a circumstance.
21. The Respondent does not have a written policy with regard to allowing an employee to remain assigned to the cafeteria for a short period of time to train his or her replacement. It is not clear from this record whether the Respondent has a customary practice regarding such training.
22. Hunt was denied the opportunity to remain assigned to the cafeteria for a short period of time in order to train Thomas in the position of Night Cook.
23. Terry King, a White employee of the cafeteria, was retained in the cafeteria for approximately one week to train Thomas in his position as Pots and Pans Washer.
24. Despite Winsand's statement to Hunt that Winsand would train Thomas in the position of Night Cook, Winsand was rarely available and took little part in Thomas' training.

25. Hunt was denied the opportunity to train Thomas in the position of Night Cook, at least in part, because of his race.
26. Hunt suffered an economic loss resulting from lost wages because he was not recalled from layoff status when there was a position available to him. Hunt has lost the opportunity to use the wages that he would normally have received had he been recalled from layoff status.
27. Thomas suffered an economic loss resulting from being paid a lower wage as Night Cook than he would have received had he been permitted to bump up to the position of Head Cook. Thomas has lost the use of the higher wages that he would have received had he been permitted to bump up to the position of Head Cook.
28. The precise amount of Hunt's and Thomas' economic loss is not clear on this record.

## RECOMMENDED CONCLUSIONS of LAW

29. Hunt is a member of the protected class "race" and is entitled to the protection of the Equal Opportunities Ordinance.
30. Thomas is a member of the protected class "race" and is entitled to the protection of the Equal Opportunities Ordinance.
31. The Respondent is an employer within the meaning of the Equal Opportunities Ordinance and is subject to the requirements of the ordinance.
32. The Respondent discriminated against Hunt on the basis of his race, in violation of Section 7(a), MGO 3.23, when it refused to recall him from layoff in February of 1989.
33. The Respondent discriminated against Hunt on the basis of his race in violation of Section 7(a), MGO 3.23, when it refused to retain him in the cafeteria to train Thomas in the position of Night Cook.
34. The Respondent discriminated against Thomas on the basis of his race, in violation of Section 7 (a), MGO 3.23, when it refused him the opportunity to transfer his full seniority rights to the cafeteria and prevented him from bumping to his highest level of seniority.
35. Hunt is entitled to an award of damages that will make him whole for the discrimination he suffered in violation of the MEOO. Such an award must consider Hunt's back pay, interest on Hunt's back pay and Hunt's costs in pursuing this complaint including reasonable attorney's fees.
36. Thomas is entitled to an award of damages that will make him whole for the discrimination he suffered in violation of the MEOO. Such an award must consider Thomas' back pay, interest on Thomas' back pay and Thomas' costs in pursuing this complaint including reasonable attorney's fees.

## RECOMMENDED ORDER

37. The Respondent shall cease and desist from any further discrimination in violation of the MEOO against Hunt.
38. The Respondent shall cease and desist from any further discrimination in violation of the MEOO against Thomas.
39. The Respondent shall not retaliate against Hunt for his exercise of rights protected by the MEOO or against any individual who may have aided or supported Hunt in his exercise of rights protected by the MEOO.
40. The Respondent shall not retaliate against Thomas for his exercise of rights protected by the MEOO or against any individual who may have aided or supported Thomas in his exercise of rights protected by the MEOO.
41. The Respondent shall pay to Hunt back pay in an amount as yet undetermined but calculated to place him in the same position he would be in today had the Respondent not discriminated

against him. The Respondent shall also adjust Hunt's benefits including seniority and contributions to any pension plan or deferred compensation plan to which Hunt may be entitled so as to place Hunt in the same position he would have been had the Respondent not discriminated against him. The Respondent shall pay pre-judgment interest on Hunt's back pay from the date of discrimination to the present.

42. The Respondent shall pay to Thomas back pay in an amount as yet undetermined but calculated to place him in the same position he would be in today had the Respondent not discriminated against him. The Respondent shall also adjust Thomas' benefits including seniority and contributions to any pension plan or deferred compensation plan to which Thomas may be entitled so as to place Thomas in the same position he would have been had the Respondent not discriminated against him. The Respondent shall pay pre-judgment interest on Thomas' back pay from the date of discrimination to the present.
43. In order to determine the amount of any payments to be made pursuant to the above, counsel for the parties are ordered to consult with each other as soon as possible to determine whether the parties can stipulate to the payments required above. If no stipulation is possible, the parties are directed to provide to the Hearing Examiner a proposed order setting forth the amounts to be paid along with written argument in support of the proposed order no later than thirty days from the undersigned date. Each party may reply to any party's proposed order within fifteen (15) days of its receipt.
44. The Respondent shall pay to the State of Wisconsin Unemployment Compensation Fund the amount of benefits paid to Hunt as a result of the Respondent's refusal to recall Hunt from the layoff which began on or about January 15, 1989.
45. The Hearing Examiner will issue further orders regarding costs and attorney's fees once there is a final order on liability and damages.
46. This is an interim order on liability and a partial interim order on damages. The period for appealing this decision will run from the Hearing Examiner's issuance of a final order on liability and damages.

## MEMORANDUM DECISION

These consolidated cases present a clear picture of the tension between an employer's right to manage its workforce and an employee's right not to be discriminated against. The Complainants are long-time employees of the Respondent, Oscar Mayer Foods. At the relevant times, they worked in the Respondent's cafeteria. The cafeteria, though not part of the Respondent's principle business, is an important service offered to its employees at its facility in Madison. Along with the Employee's Meat Market, the cafeteria affords the Respondent's employees a low cost food service. Operation of these services does not add directly to the profit of the company but their operation can affect the Respondent's overall profitability. To this end, the Respondent has a legitimate interest in the smooth and cost effective operation of the cafeteria.

On the other hand, the Complainants, as long-term employees of the Respondent, have an interest in improving the conditions and benefits of their employment. They are entitled to the protections of the ordinance and other agreements between their union and their employer. Their interests in improving their employment should not be thwarted by their race or any other protected characteristic.

At the time of hearing, Complainant Earsell Hunt had been employed with the Respondent for approximately twenty-two (22) years. He had worked in the cafeteria for the last seven and one-half (7½) years. In January of 1989, Hunt was thirteenth on the seniority list for the cafeteria. The cafeteria at that time normally operated with twelve (12) employees but maintained a roster of thirteen (13) employees in order to fill temporary vacancies such as those created by a vacation. Hunt held job

rights to the position of Night Cook by virtue of his being a permanent employee who had worked in that position for a period of time.

Complainant Samuel Thomas had been employed by the Respondent for approximately twenty-five (25) years in January of 1989. He had worked in the cafeteria since August of 1987 in either the Pots and Pans position or as a Vacation Replacement.

Employees of the Respondent have two types of seniority. The first is based upon the number of years employed by the Respondent at the plant. The second is determined by how long one was employed within a given department. Both types of rights may be exercised or lost under certain conditions. Additionally, an employee may have "job rights" to a given position within a department. For example, if an employee has "job rights" to a position no one may take that position from him or her unless an employee with greater plant-wide seniority is in a position to exercise those greater seniority rights. One can lose his or her "job rights" to a specific position by remaining on layoff status for more than 30 days. An employee may move his or her plant-wide seniority from one department to another only under limited circumstances. Most relevant here, an employee may move his plant seniority rights in their entirety after an employee has held a permanent position in a department for one year. If an employee exercises his or her plant-wide seniority rights, he or she may "bump" another employee from a position so long as the bumped employee is less senior. In this type of scenario, several bumps may take place within a department as a new alignment of seniority develops. Such a realignment does not necessarily take place each time an employee exercises seniority rights depending upon the position into which a high seniority employee moves and the seniority structure of a given department.

According to the Collective Bargaining Agreement between the Respondent and the union representing the Complainants, certain positions within the Respondent's facility are exempt from bumping on the basis of seniority. This reflects a determination that the bump exempt position needs stability and may require more or different training than that provided for under the Collective Bargaining Agreement. None of the positions in question in these cases were bump exempt. In January of 1989, Complainant Hunt had "job rights" to the Night Cook position in the cafeteria. He held this position despite being thirteenth out of thirteen (13) employees with regard to seniority in the cafeteria. In part, Hunt held this position because it is one of the least desirable positions within the cafeteria. The Night Cook stays late and is always on call to prepare food in the event that the cafeteria runs out of food listed on the menu. On or about January 15, 1989, Hunt was laid off. On January 20, 1989, Complainant Thomas requested that the vacant Night Cook position be posted so that it could be filled from within the cafeteria. The position was posted and Thomas was awarded the position because he was the only cafeteria employee to sign for the position. At the time that Thomas signed for the position, he was third on the cafeteria seniority list. He had not been able to transfer and apply his considerable seniority because he did not hold a position within the cafeteria for the requisite period of time that would allow such rights to be exercised. Despite Thomas' signing to the Night Cook position on January 20, 1989, Hunt retained "job rights" to that position until February 14, 1989, even though he was on layoff status. This means that if Hunt were recalled to work in the cafeteria on or before February 14, 1989, he could exercise his "job rights" to the Night Cook position and bump Thomas from the position even though Thomas had much more overall seniority than Hunt.

Once Thomas had signed into the Night Cook position, he was able to use his full plant seniority. With this seniority, Thomas could have bumped any person in the cafeteria with less seniority than him. This would have included the position of Head Cook as well as most other positions in the cafeteria. During the week of January 30, 1989 to February 5, 1989, Larry Winsand, Cafeteria Manager, was faced with the scheduled vacation of Jeffrey Froh. This would mean that unless Hunt

were recalled from layoff status, the cafeteria would operate with eleven (11) employees instead of the usual twelve (12). However, if Hunt were recalled, he would force Thomas from the Night Cook position because of Hunt's rights to the job of Night Cook and Thomas would be free to exercise his bumping rights throughout the cafeteria including to the position of Head Cook. Nothing in the record indicates that Thomas intended to use his seniority rights to bump into the position of Head Cook.

Winsand discussed the possible scenarios inherent in this situation with others at the plant including his supervisor, Tom Parker and Parker's supervisor, Mike Murphy. It was decided that Hunt should not be recalled from layoff. The decision not to recall Hunt is not without precedent but did represent a somewhat unusual operating procedure.

The Respondent has offered two separate reasons for reaching this decision. First, throughout most of the complaint process the Respondent has stated that Hunt was not recalled for economic reasons. The Respondent in describing the economic benefits accruing to it by not recalling Hunt relies on its experience that running some level of overtime can be less expensive than bringing back an additional employee. This explanation can be referred to as the salary savings explanation. Second, shortly before hearing, the Respondent indicated to the Complainants that it had been concerned about the possible disruption to the cafeteria's operation if Thomas had been allowed to exercise his complete seniority bumping rights. This disruption would include the possibility of having to train several experienced employees for positions in which they may have had little or no experience. The Respondent also asserts that it was concerned that Thomas would not be able to learn the position of Head Cook in the period of time allowed by the contract and that smooth operation of the cafeteria would be jeopardized during the training period. This second explanation is referred to as the disruption explanation.

The Respondent now admits that Hunt was not recalled in order to prevent the possibility of Thomas bumping into a senior position in the cafeteria. Though the record is silent as to Thomas' intentions, it appears that the Respondent was most concerned about the possibility that Thomas would seek to bump Paul Becker, a White male, from his position as Head Cook. In this way, the Respondent was favoring the rights or position of a White employee over Black or African American employees.

Referencing the burden shifting process described in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) and St. Marys Honor Center v. Hicks, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), the Complainants have made out prima facie cases of discrimination. Both of the Complainants are Black or African American males and are hence members of the protected class "race." Both Complainants suffered an adverse employment action. In the case of Hunt, he was not recalled from a layoff and ultimately lost his job rights to a position that he had held for some period of time. This prejudiced him economically and with respect to his position within the cafeteria. In the case of Thomas, he was delayed in his ability to fully transfer his plant seniority and to bump into a more desirable position from that which he had been working since late January of 1989.

The adverse job actions occurred under circumstances that give rise to an inference that the Complainants' membership in the protected class "race" was a factor in the adverse action. At the time, the Complainants were the only Black or African American employees in the cafeteria. A White employee benefited as a result of the adverse job action affecting the Complainants' employment. Both of the Complainants reported that they had suffered racial harassment while employees in the cafeteria. While this harassment may not be sufficient of itself to support a claim of racial harassment, it can be viewed as evidence of an animosity towards Blacks that may have influenced the Respondent in its decision not to place Thomas in a senior and highly visible position.

Under the McDonnell Douglas/Burdine paradigm, once the Complainants establish a prima facie case of discrimination, the burden shifts to the Respondent to put forth a legitimate, nondiscriminatory explanation for its conduct. This is a burden of articulation and not one of proof.

As noted above, the Respondent sets forth two reasons for its actions. First, it asserts that it wished to reduce costs in the operation of the cafeteria and determined that it would be more economical to pay some amount of overtime instead of paying another employee, Hunt, his regular wage. The Respondent also asserts that it wished to avoid the disruption to the operation of the cafeteria that might have occurred had Thomas been allowed to exercise his bumping rights and cause a string of bumps within the cafeteria among all of those employees less senior to Thomas. Both of these reasons represent legitimate, nondiscriminatory reasons for not recalling Hunt.

If the economic reasons for not recalling Hunt are legitimate and nondiscriminatory, then Thomas cannot prevail on his complaint because the consequences to Thomas of the decision regarding Hunt follow naturally and would be without the necessary discriminatory motive. It is conceivable that one might make out a claim for Thomas based upon a disparate impact theory, but the Complainants did not put forth such a claim.

Concern for the economical operation of a department within the larger company represents a legitimate, nondiscriminatory reason for not recalling Hunt from his layoff status. Despite the fact that the cafeteria is not a part of the Respondent's overall efforts to manufacture and sell packaged or ready for sale meat products, its operation can have an impact upon the overall profitability of the Respondent. If the cafeteria requires subsidization because it cannot meet its own costs, the Respondent must be more profitable in its other operations to overcome the operating loss in the cafeteria. If Hunt's continued layoff meant less of an expenditure for wages even in the light of additional overtime for other employees, as asserted by the Respondent, it is an appropriate exercise of management's control over its workforce.

The Respondent's second reason, fear of disruption to the operation of the cafeteria, is also a legitimate, nondiscriminatory reason for refusing to recall Hunt in order to prevent Thomas from exercising his seniority rights to bump a less senior employee from his or her position including the position of Head Cook. If the Respondent is correct in assuming that Thomas would have chosen to move to the position of Head Cook, it is not inconceivable to believe that a series of nine (9) or ten (10) additional bumps might have occurred as Becker moved to another position within the cafeteria and the person who he bumped moved to another position within the cafeteria and so on. It is arguable that as each bump occurred, the new person in a job would need to be trained to perform the requirements of the new job. This type of large scale disruption can cause job dissatisfaction and discontent within a work unit. A potential retraining of the majority of the workers in the cafeteria could also affect the smoothness of the cafeteria's operation and cause dissatisfaction with the cafeteria in the customers who usually use the service.

The Respondent also asserts that it was concerned that Thomas would not be able to learn the duties of the Head Cook job within the time period allowed for training by the Collective Bargaining Agreement. If Thomas was unable to learn the duties of the Head Cook position, then the work assignments within the cafeteria would have to be realigned shortly after the first series of bumps. Though the Respondent need only articulate a legitimate nondiscriminatory reason for its action, the Respondent points to the difficulties Thomas had in learning the Pots and Pan Washer position.

To the extent that the Respondent was motivated by its concern for the smooth operation of the cafeteria and its concern that Thomas' move to the position of Head Cook might have on that

operation, the Respondent's concerns are legitimate and nondiscriminatory. As noted above, any large employer organized into different departments must be aware of the effect on the overall productivity of each of its departments. Operation of each department in a way intended to maximize overall profitability is a legitimate interest of business. Concern over decisions affecting how a particular department will function does not necessarily indicate that a discriminatory animus is at work.

Since the Respondent's burden is one of articulation and not one of proof, the Hearing Examiner must accept the Respondent's statements that it was motivated by concern for the profitability and smooth operation of the cafeteria. The balancing of the Respondent's explanation with the Complainant's position comes in the final stage of analysis. The Respondent, having met its burden under Burdine, the Hearing Examiner must review the record to determine whether the Complainants have presented evidence demonstrating that the reasons proffered by the Respondent are either not credible or are a pretext for discrimination. In this regard, a finding of pretext does not necessarily require the Complainants to present additional evidence. The Hearing Examiner may find that the pretext, if found, is sufficient to support a finding of discrimination. St. Marys Honor Center, supra. In the current case, the majority of the dispute revolves around whether the reasons proffered by the Respondent are either a pretext for discrimination or are otherwise not credible.

The Hearing Examiner finds the Respondent's explanations to be a combination of pretextual and not credible. Both parties spend much of their time analyzing the Complainants' rebuttal burden and evidence. The Hearing Examiner, rather than trying to address each element in the parties discussion, will address the points that lead him to the conclusion that the Complainants were the victims of discrimination. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 31 FEP 609 (1983).

The Complainants, at all times relevant to the complaint in this matter, were the only Black or African American employees of the cafeteria. While employed in the cafeteria, both of the Complainants experienced some degree of what at best might be called racial insensitivity and at worst racially based harassment. Though the conduct of the Complainant's co-workers may not have risen to a level sufficient to establish a claim for a hostile work place even under the Commission's less stringent standards, the evidence clearly indicates an atmosphere of insensitivity and a lack of trust. Vance v. Eastex Packaging, Co., MEOC Case No. 20107 (Comm'n Dec. 08/29/85, Ex. Dec. 05/21/85), Guyton v. Rolfsmeyer, MEOC Case No. 20424 (Comm'n Dec. 07/18/86, Ex. Dec. 04/28/85). It is this atmosphere that was inhospitable to Blacks or African Americans into which Thomas wished to transfer and to possibly rise to a visible position of responsibility and authority. The Respondent openly admits keeping Thomas from transferring his seniority at the time that he wished by the mechanism of not recalling Hunt from layoff. The Respondent took this action despite its Affirmative Action Plan which professes to encourage the promotion of minority employees to such positions and the Respondent's Collective Bargaining Agreement that contemplates giving employees the opportunity to advance even though such advancement might cause some disruption in work units.

The Respondent is caught trying to argue essentially two different points while attempting to shoehorn one into the other. The Respondent wishes the Hearing Examiner to believe that it acted only with concern for the economic betterment of the cafeteria and hence its overall business. Throughout most of the process of this complaint, the Respondent's economic argument was based on a need to have salary savings derived by not recalling Hunt to work. Until shortly before the hearing, the Respondent did not concede that it had intentionally acted to keep Thomas from transferring his seniority under circumstances that could lead to his becoming the Head Cook. At the last minute, however, the Respondent makes this admission and shifts the entire thrust of its argument to justify its decision not to permit Thomas from advancing.

Though the Respondent makes a valiant attempt to demonstrate that there were in fact salary savings accruing from the decision not to recall Hunt, the record is anything but clear. The lack of clarity is not limited to the position of the Respondent. The Complainant's own analysis is couched in terms of "probably" and lacks the type of economic analysis that would prove the Complainants' point. However, the Respondent's analysis is also limited in effect. Neither party conclusively demonstrates that Hunt's continued layoff had either a beneficial or detrimental effect on the economic condition of the cafeteria.

More specifically, the record does demonstrate that the Respondent did from time to time operate with less than its customary staffing level. However, the record is devoid of information sufficient to demonstrate that the Respondent actually accrued any salary savings as a result of operating in this manner. Part of the evidentiary problem is there is no explanation or analysis of the wage levels, the wages actually paid or saved as well as other work related factors.

Both parties suffer as a result of this lack of evidentiary base. While the Respondent cannot prove that there were salary savings, the Complainants cannot prove that there were not salary savings. The real problem arises because of the Respondent's shift from the salary savings argument to the disruption explanation. The timing of this shift strongly hints that the Respondent recognized that its factual basis for the salary savings argument was lacking. The Hearing Examiner concludes that the salary savings argument put forth by the Respondent lacks credibility as a result of the shift in emphasis by the Respondent.

The chain of events set forth as part of the disruption explanation by the Respondent, while on the face of things appears dire, is something that is contemplated by the Respondent's own agreements. The Affirmative Action language adopted by the Respondent encourages the advancement of minority employees to positions of supervision and authority. It does not indicate that such advancement should occur only when it is convenient for the Respondent. Similarly, the Collective Bargaining Agreement reached between the Respondent and its unionized employees contemplates that an employee may rise within the work force. As an employee enters a new position, a period of time for training is permitted. If an employee cannot meet the minimum job requirements at the end of the training period, he or she can be disqualified from the position. This is called "white carding." Thomas was "white carded" from his first position in the cafeteria as Pots and Pans Washer. The "white card" was withdrawn after Thomas grieved the action. Thomas was given an additional training period which he passed. When Thomas posted to the Night Cook position, one much more similar to that of Head Cook, he passed his training period without a problem.

The Collective Bargaining Agreement provides that certain positions are exempt from bumping and thus exempt from the scenario set forth by the Respondent. These positions are ones that are particularly sensitive or require an unusually long training period. The Respondent could have sought to make the position of Head Cook bump exempt. It did not. That is a clear indication to the Hearing Examiner that there is nothing particularly sensitive or unusual about the position of Head Cook. The concerns expressed at the hearing by Winsand and others for the consequences if Thomas had been allowed to bump up to the position of Head Cook are exaggerated given the fact that such a possibility is well within the range of events contemplated by the Collective Bargaining Agreement.

The Respondent expressed doubt that Thomas could learn the position of Head Cook in the time allotted for training. It points to the difficulties experienced by Thomas in passing the training period for the Pots and Pans position. The Complainants' attempt to use this incident to demonstrate that the Respondent wished to keep Thomas from the cafeteria in the first place. While the interpretation

given these facts by the Complainants is possible, the record lacks sufficient facts for the Hearing Examiner to adopt the Complainants' position.

The Respondent ignores Thomas' learning the Night Cook position without a problem or a reoccurrence of the earlier noted "White carding." While there are differences between the position of Head Cook and Night Cook, it appears that they are ones of quantity rather than substance. It appears that the Night Cook primarily serves the food prepared earlier and when necessary prepares additional meals. This may be as easy as cooking hamburgers or defrosting stored food but nothing in the position description limits the work to that. The position of Head Cook requires menu planning and cooking for a large number of people. The Respondent does not explain why these additional duties are so difficult to learn that a qualified Night Cook could not be expected to learn them in a timely manner. While it is true that the employee in the position of Head Cook had significantly more experience as a result of time in the position, the record lacks any basis for asserting that Thomas would not have been able to learn the requirements of the position in a timely manner or certainly after the time afforded Becker. Becker and the Respondent could have no reasonable expectation that the Head Cook position was his for the keeping. It must be an expectation of any employee covered by the Collective Bargaining Agreement and a seniority system that they may well lose their position to someone with greater seniority.

Given the fact that Thomas' advancement to the position of Head Cook was one contemplated by the various agreements or plans noted above, one is left with the question of why was the Respondent so determined to keep Thomas from the position of Head Cook. The Hearing Examiner is convinced from this record that Thomas was kept from the Head Cook position because of his race. Though the record lacks direct evidence of this motivation, there are sufficient facts to raise the inference of discrimination. As noted above, Thomas and Hunt were the only Black or African American employees of the cafeteria during the relevant time period. The effect of the decision not to recall Hunt and to prevent Thomas from bumping up to a higher position was to benefit White employees to the detriment of Black or African American employees. Both Complainants report having experienced examples of racist conduct or language while working in the cafeteria. These comments included references to bringing Blacks to Madison in the back of a pick-up truck or the trunk of a car, someone not having just fallen off the watermelon wagon and the posting of a picture of a gorilla. The record contains further examples of disturbing language or events experienced by Hunt and Thomas in the cafeteria and this short list is intended only to give a small example. This conduct indicates that the Respondent may have been concerned about the reaction of the cafeteria's other employees to the reality of a Black or African American in the visible and responsible position of Head Cook. Keeping Thomas from the position of Head Cook would prevent problems caused by his bumping, which were not just related to the need to possibly retrain a number of employees but included problems in the workforce related to having a visible Black supervisor in a position that had apparently been customarily held by a White for the recent past.

The Respondent points to two other supervisors who testified that they had not allowed certain employees to post to positions within their departments in order to show that this was a company-wide practice and disadvantaged employees not of the Complainants' race. These incidents are too remote in time and too sporadic in nature to demonstrate what the Respondent wishes to establish. More convincing would have been a written policy or an entry in a management manual noting the existence and acceptability of the practice. Such evidence was not produced. Winsand also testified that on another occasion, he had refused to allow a White employee named John Radinius to post to a position in the cafeteria because of his concerns over Radinius' physical appearance. Far from showing that Winsand treated Whites in the same manner as Blacks or African Americans, it tends to

show that Winsand lacked an understanding of the requirements of the MEOO. One of the MEOO's protected classes enumerated by the MEOO is "physical appearance." Winsand's treatment of Radinius arguably violates the provisions of the MEOO protecting a person from discrimination in employment on the basis of physical appearance. The Hearing Examiner does not decide here whether Radinius might have brought a claim for discrimination and does not presume that because Radinius was treated in an arguably discriminatory manner that it necessarily follows that the Complainants were the victims of discrimination. This incident does point out the unlikelihood that the Respondent would permit a practice or procedure that could be used in such a discriminatory manner. It also points up the desirability of a uniform, written policy.

The Respondent asserts that neither the Affirmative Action Plan nor the Collective Bargaining Agreement deprive the Respondent of the right to exercise its managerial authority over its workforce. The Hearing Examiner does not disagree that the Respondent as the employer retains all authority to make decisions about staffing and workforce utilization. There are two notable exceptions to this general premise, however. The Respondent may limit its own authority through the policies it adopts and the agreements it makes. In this regard, the Affirmative Action Plan and the Collective Bargaining Agreement may have reduced some of the Respondent's options. The Hearing Examiner finds the Collective Bargaining Agreement seniority provisions as explained by the witnesses for both parties, and the "bumping" procedures that follow one's seniority rights, to be particularly likely to have limited the Respondent's options. The second limitation on the Respondent's authority to manage its employees is the law. The law in question here is the MEOO. The Respondent may not exercise its authority or discretion in a manner that violates the MEOO.

The Respondent also contends that the Affirmative Action Plan and the Collective Bargaining agreement must not be read to require the Respondent to place an employee into a position for which he or she is not qualified. The Hearing Examiner again does not object to this general premise. However, the Collective Bargaining Agreement seems to contemplate giving an employee the opportunity to move to any position that their seniority will allow and attempt to learn the duties and responsibilities of the position during a training period and to be "white carded" if the employee cannot perform the job at the end of the training period. It would appear to the Hearing Examiner that the question of absolute qualification for a position is to be determined at the end of the training period, not before. If the Respondent is going to alter this process, it must understand that its decisions will be scrutinized for the motivation behind the change. In this case the Hearing Examiner is convinced that the motivation was the Complainants' race.

The Respondent points out that its motivations must be judged as of the time of the decision, not in retrospect. The Hearing Examiner agrees. The fact that Thomas has proven to be a very good worker in Winsand's opinion, and based upon subsequent work experience is apparently capable of the work required by the Head Cook, are not factors in the Hearing Examiner's decision. The Hearing Examiner has looked at the situation in the cafeteria as it was presented as being at the time of the decisions.

The Respondent states that it could not have been motivated to keep Thomas from exercising his seniority rights because Thomas was able to exercise his rights and to transfer his full seniority some time after the incidents that form the basis of this complaint. This ignores the clear testimony of Winsand and Parker whose testimony was that they wished to prevent Thomas from exercising his bumping rights. It is not clear from this record what happened when Thomas was eventually able to transfer his full seniority rights. It would seem to the Hearing Examiner that this is more relevant to the issue of damages rather than to liability.

Hunt asserts that he was treated differently in the terms and conditions of his employment than others not of his race when he was denied the opportunity to remain in the cafeteria in order to train Thomas when Thomas posted to the Night Cook position. Hunt had been the Night Cook until his layoff in mid-January of 1989. The Respondent asserts that it was not the practice to retain an employee to train his or her replacement and that the only time this procedure was used was when Thomas posted to the Pots and Pans position when he first entered the cafeteria. Winsand testified that he took this extraordinary step because he had been warned by other managers that Thomas was lazy and would make trouble for Winsand.

The Respondent put on no testimony other than that of Winsand to indicate the actual practice of the cafeteria with respect to training. Winsand did not testify about other specific instances where new employees were trained by other employees or by himself. The Respondent presented no written training policy to verify Winsand's testimony.

The record supports a finding of discrimination with respect to Hunt's allegation. While the Respondent's explanation makes practical sense, the record does not indicate that the practice was necessarily followed. The only incident testified to by the parties was that of Thomas', where a White employee, Terry King, was retained for a week to train Thomas. Given the general lack of proof of the practice and having one incident demonstrating that a White employee was treated more favorably, the Hearing Examiner is compelled to find that Hunt was deprived of the opportunity to train Thomas because of his race.

The MEOO requires, where there has been a finding of discrimination, the Hearing Examiner to issue a proposed order making the Complainants whole and otherwise effectuating the purposes of the ordinance, MGO Sec. 3.23(9)(b) 3.c. The Commission has interpreted this language in the context of employment cases to include orders to cease and desist from discrimination and for reinstatement to employment and for awards of back pay, front pay where reinstatement is not possible, equalization of benefits including contributions to pension plans or to deferred payment plans, compensatory damages for emotional distress and in limited circumstances punitive damages. Nelson v. Weight Loss Clinic of America, Inc. et al., Case No. 20684 (Ex. Dec. 09/29/89), Leatherberry v. GTE Directories Sales Corp., Case No. 21124 (MEOC 04/14/93, Ex. Dec. 01/05/93), Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. 2/6/93, Ex. Dec. on fees 7/29/93, Ex. Dec. on fees 9/23/93), Balch v. Snapshots, Inc. of Madison, MEOC Case No. 21730 (Ex. Dec. on Lia. 10/14/93, Ex. Dec. on Dam. 12/09/93). While the Commission has made awards for emotional distress damages, the Court of Appeals in State of Wisconsin ex rel. Caryl Sprague v. City of Madison and City of Madison Equal Opportunities Commission, Ann Hacklander-Ready and Moreen Rowe, 94-2983 (Ct. App. 09/26/96) has precluded the Commission from making awards of compensatory damages for emotional distress and by extension from making awards of punitive damages. The court was interpreting the ordinance as it was constituted in 1989 in the context of a claim of housing discrimination. The court found that because the Common Council, in 1992, amended the ordinance to specifically permit the awarding of compensatory damages for emotional distress, in housing cases, it could not have intended the Commission to have had the authority prior to the amendments. Because the language of the MEOO that was interpreted by the court is general language applying to all forms of discrimination, the Commission finds that it is without authority to make awards of compensatory damages for emotional distress in employment or public accommodation cases. The Commission may award such damages in housing claims because of the effect of the 1992 amendments. A similar amendment has not been adopted either in general or with respect to employment or public accommodation claims.

Though the language of the court's opinion in Sprague does not specifically address the Commission's authority to award punitive damages, the logic of the court would also preclude such awards.

Essentially, since the MEOO is silent with respect to such awards, the Commission is likely without authority to make such awards. Even if the decision in Sprague does not preclude an award of punitive damages, the Hearing Examiner finds that the Complainants have not met the higher burden of proof necessary to establish entitlement to an award. While the Complainants' proof on liability is sufficient to meet the preponderance standard, it falls short of the clear and convincing burden for proof of punitive damages. The Respondent's explanation that it reasonably believed that Thomas' bumping to the position of Head Cook, while insufficient to persuade the Hearing Examiner that no discrimination occurred, is sufficiently credible to defeat a claim for punitive damages.

Under the circumstances of this complaint, an award of back pay is required. Also to make the Complainants whole, the Respondent will be ordered to pay the Complainants reasonable attorney's fees and costs of bringing this complaint. In order to make the Complainants whole, the Respondent is also ordered to pay pre-judgment interest on the back pay from the date of discrimination and to place the Complainants in the same position they would have been in had they not been discriminated against by making any necessary additional adjustments or contributions to the Complainants' benefits including, if applicable, pension plans, deferred compensation plans, sick leave or any other form of fixed compensation. Harris v. Paragon Restaurant Group, Inc. et al., MEOC Case No. 20947 (on liability/damages: Comm'n Dec. 02/14/90, 05/12/94, Ex. Dec. 06/28/89, 11/08/93; on atty. fees: Comm'n Dec. 02/27/95, Ex. Dec. 08/08/94), Hilgers v. Laboratory Consulting, Inc., MEOC Case No. 20277 (Comm'n Dec. 03/29/89).

The record with respect to the Complainants' back pay and other forms of fixed compensation and the proper level of interest is insufficient for the Hearing Examiner to properly fix the award. The Hearing Examiner is also concerned about two lengthy delays in the processing of this complaint. The delays causing concern for the Hearing Examiner are those requested by the attorneys for the parties for personal family reasons and the Hearing Examiner's delay in issuing this Recommended Findings of Fact, Conclusion of Law and Order. These delays may or may not act to partially toll the running of back pay and pre-judgment interest. In order to complete the record, the Hearing Examiner orders the parties to consult with each other to determine whether these matters can be stipulated. If no stipulation is possible, the parties shall submit to the Hearing Examiner no later than 30 days from the undersigned date, their positions with respect to : 1) the amount of back pay, and benefit adjustments for each complainant, 2) the proper interest rate to be used in calculating pre-judgment interest, and 3) the method for calculating pre-judgment interest and any supporting argument or documentation for each position. Each party may submit rebuttal argument no later than 15 days from receipt of the initial proposed order. If the record remains unclear, the Hearing Examiner may order further proceedings. The Hearing Examiner will make further orders with respect to the Complainants costs and fees once the damage issues are resolved.

Signed and dated this 23rd day of May, 1997.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner