

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

<p>Deborah Leatherberry 320 N. Lexington Parkway DeForest, WI 53532</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>GTE Directories Sales Corp. 8017 Excelsior Drive, Suite 110 Madison, WI 53717</p> <p style="text-align: center;">Respondent</p>	<p>RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p>Case No. 21124</p>
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BACKGROUND

This matter came up for a hearing before Madison Equal Opportunities Commission Hearing Examiner Clifford E. Blackwell, III on March 19, 20 and 21, 1991 at 8:30 a.m. The Complainant, Deborah K. Leatherberry nka Lopez, appeared in person and by her counsel, Julian, Olson and Lasker S.C. by Jeff Scott Olson. The Respondent, GTE Directories appeared by its representative, Blake Hamilton and by its counsel, Jenswold, Studt, Hanson, Clark and Kaufmann by Bruce K. Kaufmann and by its senior counsel Dana West Borland. On the basis of the evidence presented, the Hearing Examiner now makes his Recommended Findings of Fact, Conclusions of Law and Order, as follows:

RECOMMENDED FINDINGS OF FACT

1. As of the date of hearing, the Complainant, a White woman, was 29 years old. During the pendency of this matter, the Complainant married Michael Lopez, a Hispanic male. She began her employment with the Respondent in February, 1981 as a receptionist for the Sales Division of the Respondent. The offices of the Respondent were located on Applegate Road in the City of Madison.
2. In the middle of 1985, the Complainant was transferred to the position of Service Representative. This was a new entry-level sales position created by James Bluecher, the Division Manager at that time, to give the Complainant the opportunity to work into a sales position. In this position the Complainant was given the less desirable and more difficult accounts to work. The Complainant reported directly to Bluecher.
3. In January of 1986, the Complainant was transferred or promoted to fill a recently vacated position as a Telephone Sales Representative. Her position was in the Sales Unit supervised by Jill Nichols.
4. The Respondent employs salespersons as either Telephone Sales Representatives or as Premises Sales Representatives. Telephone Sales Representatives work in a central office and contact sales prospects by telephone. Premises Sales Representatives work outside the central office and contact sales prospects at the prospect's business location.
5. In January 1986, there were two telephone sales units located in the Madison office. These units were supervised by a District Sales Manager (DSM). The DSMs were James Billmeyer and Jill

Nichols. The DSMs reported to the Division Sales Manager. In 1986, the Division Manager was James Bluecher.

6. Billmeyer had been a DSM-Telephone since September or October of 1986. Jill Nichols had been at DSM-Telephone since some time in either 1984 or 1985. Billmeyer moved from the position of DSM-Telephone to that of DSM-Premises in late July or early August of 1988. Bluecher left his position as Division Manager in Madison at the end of 1987 or at the very beginning of 1988. He remained with the Respondent as a manager in a joint venture of the Respondent on the east coast known as CDSC.
7. Bluecher was replaced as Division Manager in Madison by Blake Hamilton at the end of January, 1988 or during February of 1988. Prior to assuming the position of Division Manager in Madison, Hamilton was a DSM with the Respondent in Illinois.
8. Dan Gable was initially employed by the Respondent as a Telephone Sales Representative in the Madison office in either September or October of 1986. On August 8, 1988, Gable was promoted to the position of DSM-Telephone by Blake Hamilton. While Gable was a Telephone Sales Representative his immediate supervisor or DSM was James Billmeyer. It was Billmeyer that Gable replaced as DSM in August of 1988.
9. The Complainant was uncontrovertedly an excellent salesperson. In 1986, her sales efforts were recognized nationally on at least four separate occasions. In 1987, her sales figures were down somewhat but she still ranked near the top of the Madison office and above Gable. In 1988, James Bluecher, Complainant's Division Manager through 1987, offered her a sales job with CDSC. Bluecher was attempting to hire the Respondent's best salespeople for the Respondent's new joint venture. The Complainant was offered a position but declined it for personal family reasons. The Complainant received generally favorable reports from her clients and some of her reviews were suggested as possible advertising copy.
10. In 1988, the Complainant's sales performance was down somewhat from prior years. She was given additional supervisory responsibilities while her DSM, Jill-Nichols, was on maternity leave for six weeks. This responsibility was shared with James Billmeyer. The Complainant was also going through the final steps of a difficult divorce.
11. The Complainant had sought to rise in the ranks of the Respondent throughout her employment. In 1987, she approached Nichols to discuss the possibilities of promotion to the position of DSM. Nichols encouraged the Complainant. Over time, the Complainant's co-workers came to rely on the Complainant for guidance or assistance in the absence of Nichols. In January and early February of 1988, Nichols took six weeks maternity leave. Though Billmeyer was technically put in charge of Nichols' unit, it was understood and recognized by the Respondent that the Complainant was acting as a co-manager of Nichols' unit in her absence.
12. Dan Gable did not have as much supervisory experience as the Complainant.
13. The Complainant's job performance and appraisals suffered after Blake Hamilton became the Division Manager in Madison in 1988.
14. Shortly after Hamilton assumed his duties as Division Manager in Madison, he met the Complainant and two of her co-workers on a walk through their work area. During this meeting Hamilton negatively identified the Complainant as the person who took a Black man on a company trip to Brazil. The Complainant had in fact taken a Black male companion with her on a company-sponsored trip to Brazil some time prior to 1988.
15. In late April or early May of 1988, the Complainant interviewed for a sales position with the Respondent in the headquarters of the CDSC. This interview was established at the recommendation of James Bluecher. After returning to the Madison office, the Complainant showed Brenda Tincher, a friend and co-worker, and several other coworkers pictures that she had taken during her interview trip. One photograph included a picture of a Black male manager of the Respondent that the Complainant had met and flirted with during the trip. While

showing this photograph to the group, Hamilton walked past and indicated that the Complainant could not date the man depicted in the photograph because he was married. He also expressed his opinion that the Complainant seemed to have an affinity for Black men. Those who heard this remark did not feel that it was meant in a positive manner.

16. Shortly after this incident, Hamilton had a conversation with Mark Stoveken at the copy machine that was in the area. During this conversation Hamilton again identified the Complainant as the person who took a Black man on the trip to Rio and further indicated that if the Complainant continued to date Blacks that she would not advance with the Respondent. During this conversation, Hamilton used the word "nigger".
17. Immediately after his conversation with Hamilton, Stoveken asked Tincher if she had heard what Hamilton had said. When she indicated that she had not, Stoveken told her of Hamilton's feelings about the Complainant.
18. Early in the summer of 1988, the Respondent's Madison office held a group outing at Wisconsin Dells. During this outing Blake Hamilton was overheard by the Complainant and Mike Lopez telling ethnic jokes in a more or less public setting. This outing was in a private area of the Dells but was open to employees of the Respondent and their families. The precise nature or ethnicity of the jokes is not known.
19. On July 29, 1988, a group of Respondent's employees were to gather at the Bombay Bicycle Club, a bar located close to the Respondent's office, to celebrate the birthday of Brenda Tincher. The Complainant was invited to attend because of her long friendship with Tincher. The Complainant expressed reservations about attending the gathering because of her concern that she might run into Blake Hamilton. She was concerned about such a meeting because of her unpleasant interactions with Hamilton in the past and because she had applied for a promotion to fill James Billmeyer's DSM-Telephone position for which Hamilton would be conducting the interviews. Ms Tincher persuaded the Complainant to attend the gathering.
20. Both the Complainant and Hamilton were at the Bombay Bicycle Club, though apparently Hamilton was not there as part of the Tincher birthday gathering. Hamilton indicated that he wished to speak to the Complainant. Hamilton and the Complainant stepped away slightly from their respective parties. They stood more or less in front of the bar area which was within listening distance of Mike Lopez, the Complainant's companion. Though Hamilton and the Complainant were standing in the vicinity of their respective parties neither of them overheard the conversation except for Lopez.
21. Hamilton asked the Complainant who she was planning to take on a company outing to Cancun. She indicated that she was going to take Mike Lopez, her fiancé. Hamilton indicated that her decision to take a Black man on the Brazil outing had not been wise and that it would similarly not be wise to take Lopez on the Cancun trip. He indicated that even though Lopez or his ancestors might have been from there, the company would not be pleased. Lopez is Hispanic. Hamilton also stated that he knew that the Complainant was going to be interviewing for a promotion and that her progress in the company would not be great unless she paid more attention to her choice of companions.
22. The Complainant was shocked and upset by Hamilton's statement. Lopez, who had overheard the conversation, was similarly upset. The Complainant asked Tincher if she had heard any of the conversation. Tincher said no. The Complainant then told her of Hamilton's statement about her advancement possibilities. The Complainant and Lopez left the gathering shortly after speaking with Tincher because of their being upset.
23. Early the following week the Complainant, told Nichols of the Bombay Bicycle Club incident. In response to the Complainant's concern, Nichols indicated that Hamilton was new and that the Complainant should wait until after the interviews to do anything.

24. The Complainant interviewed with Hamilton for the DSM-Telephone position on or about August 3, 1988. Dan Gable interviewed for the same position at approximately the same time. On August 8, 1988, Hamilton called both the Complainant and Gable to his office and announced that he had selected Gable for the position.
25. Within a few days of Hamilton's decision, the Complainant confronted Hamilton about the basis of his decision and asked if this was evidence of the statements, that he had made at the Bombay Bicycle Club. Hamilton initially denied the statements but later indicated that no one had heard the statements. After discussions became more heated, Hamilton stated that even James Bluecher had not recommended her for the position.
26. The Complainant called Bluecher to confirm what Hamilton had said. Bluecher denied to the Complainant that he had spoken with Hamilton. This was knowingly false. Bluecher did not tell the Complainant of his earlier conversation with Hamilton because he believed that inter-managerial conversations are or should be privileged and that managers need to stick together in the face of difficulty. Soon after his conversation with the Complainant, Bluecher called Hamilton to let him know of the Complainant's call and that she was talking to an attorney. He also expressed his displeasure that his comments about the Complainant had been shared with the Complainant.
27. After her conversation with Bluecher, the Complainant spoke with Marilyn Carlson. Carlson was Hamilton's direct supervisor. Carlson attempted to convince the Complainant that further complaints about her failure to be promoted were not in her best interests. Carlson related her own experiences with sexism while working for the Respondent. She wished to avoid further action on the part of the Complainant. The Complainant indicated that Hamilton had lied about contacting Bluecher. Carlson stated that she would check that out. She urged the Complainant to contact the Respondent's Employee Assistance Program before she made up her mind about any further action. Shortly after this conversation, the Complainant received a note from Carlson confirming that Bluecher had talked to Hamilton.
28. In October of 1988, Hamilton and Nichols decided to transfer the Complainant to Dan Gable's Telephone Sales Unit. The Complainant and Gable were happy for the proposed change and looked forward to a new start. In early November, the Complainant's employment with the Respondent was terminated after she missed two days of work, at least one with the approval of Nichols.
29. The failure of the Complainant to receive the promotion to District Sales Manager-Telephone in August meant that she received less pay from August 8, 1988 until her termination in November than she would have if she had received the promotion.
30. The Complainant suffered depression and a lack of confidence as a result of her failure to receive the promotion in August of 1988. These feelings caused her to have a poor view of the Respondent and her ability to advance in the Respondent's management structure. The Complainant's attitude changed and it negatively affected her relationships with her family. However, her attitude did not so affect her relationship with Mike Lopez to prevent their marriage.

RECOMMENDED CONCLUSIONS of LAW

31. The Complainant is a member of the protected class "race" by virtue of her association with persons not of her race.
32. The Respondent is an employer within the meaning of and subject to the Madison Equal Opportunities Ordinance.

33. The Respondent discriminated against the Complainant on the basis of her race (by association) when it failed to promote her on August 8, 1988 in violation of the Madison Equal Opportunities ordinance MGO 3.23(7)(a).
34. The Complainant suffered both a compensable economic and a non-economic loss as a result of the Respondent's discrimination.

RECOMMENDED ORDER

35. The Respondent shall offer to the Complainant the next available position in its Madison office for which the Complainant is qualified and has the same rank and status as that of District Sales Manager-Telephone.
36. The Respondent shall pay to the Complainant the difference in pay that she actually received from August 8, 1988 until the date of her termination and that which she would have received for the same period had she been promoted to the position of District Sales Manager-Telephone including interest on that amount calculated at an annual interest rate of 5%. The Respondent shall calculate this amount and shall file a notice of this amount with the Commission and shall serve the notice on the Complainant no later than thirty (30) days from undersigned date. The Complainant shall have twenty (20) days from the date of receipt of said notice to file with the Commission and to serve on the Respondent any objections to the calculation made by the Respondent.
37. The Respondent shall pay to the Complainant the sum of twenty five thousand (\$25,000) dollars in compensation for her humiliation, embarrassment and emotional distress resulting from the Respondent's act of discrimination.
38. The Respondent is ordered to cease and desist from any further discrimination against the Complainant and shall not discriminate against any similarly situated employee.
39. The Respondent is ordered not to retaliate against the Complainant in any manner prohibited by MGO 3.23(8) for her exercise of rights protected by the Ordinance.
40. The Respondent shall pay reasonable attorney's fees and costs of the Complainant stemming from the maintenance of this action. The Complainant shall, within thirty (30) days, file with the Commission its requests for costs and fees along with supporting documentation. The Respondent shall file any objections to the request for costs and fees no later than twenty (20) days after its receipt by the Respondent. If either party wishes oral argument with respect to the award of costs and fees, such request shall be made in writing prior to the time for the Respondent's submittal.

MEMORANDUM DECISION

The question before the Hearing Examiner is whether the Complainant was denied a promotion from the position of Telephone Sales Representative to the position of District Sales Manager-Telephone because of her association with or dating of Black and Hispanic men or because she was not as well qualified as the person who received the promotion.

The parties agree that if the decision was made on the basis of the Complainant's association with Blacks or Hispanics that a violation of the ordinance on the basis of "race" would be established even though the Complainant is White. Equally there seems to be no question that the Respondent is an employer who is subject to the provisions of the Madison Equal Opportunities Ordinance MGO 3.23 et seq. The real point of contention is the motivation for the Respondent's decision not to promote the Complainant in August of 1988.

In order to answer this question, we must apply the facts to one of the paradigms for proof of discrimination cases. The two that could have applicability in this case are the McDonnell-Douglas/Burdine (McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)) burden shifting method and the "mixed motive" analysis found in Price Waterhouse v. Hopkins (109 S. Ct. 1775 (1989)). In the McDonnell-Douglas scheme, the Complainant must first establish a prima facie case of discrimination by a preponderance of the evidence. If the Complainant succeeds in this effort, the burden then shifts to the Respondent to demonstrate that there was a legitimate, nondiscriminatory reason for its action. Once the Respondent meets that burden, the Complainant may still prevail if he or she can demonstrate by a preponderance of the evidence that the Respondent's proffered reason is either a pretext for other discriminatory reasons or is simply not credible. The ultimate burden remains with the Complainant throughout this system. On the other hand, under the Price-Waterhouse approach, the Complainant carries the initial burden to establish that an illegally discriminatory motive was a substantial or significant factor in the Respondent's decision. If the Complainant meets this burden, the Respondent may escape liability if it can demonstrate by a preponderance of the evidence that despite the illegally discriminatory motive, it would have taken the same action anyway.

The first step under either approach is to assess whether the Complainant has demonstrated that her association with members of protected classes was at least a significant factor in the Respondent's decision. not to promote her in August of 1988. The Complainant relies on four or perhaps five incidents to demonstrate that Blake Hamilton was prejudiced against the Complainant because of her associations with Black- and Hispanic males. In two of these situations, the statements of Hamilton draw a connection between the Complainant's conduct of her personal life and her advancement within the Respondent's ranks. The Respondent, through the testimony of Hamilton, denies that any of the events occurred as alleged by the Complainant. This presents the Hearing Examiner with the difficult task of determining who is telling the truth in circumstances under which both sides have an incentive to have their story believed. In order to make such judgments, the Hearing Examiner must judge the credibility of the witnesses and make determinations of the inherent plausibility of the respective sides explanations.

The first incident related by the Complainant occurred shortly after Hamilton became the Division Sales Manager in Madison replacing James Bluecher who had left for a different position with the Respondent. The exact dates of Hamilton's appearance in Madison seem to be obscured by the passage of time but the parties agree that it must have been at the end of January or the beginning of February of 1988. Hamilton, as a new supervisor, was over time introducing himself to the staff by walking through the offices and talking with the employees that he met. On the occasion of his passage through the Complainant's work area, he met Cindy Esch, Brad Wachowiak and the Complainant. Though the individual recollections of this meeting differ in detail, the overall impression is of an uncomfortable and awkward situation resulting from what at best were inappropriate comments from Hamilton, the new Division Manager, and at worst represent evidence of racial bias. After meeting Esch and Wachowiak, Hamilton indicated that he had met the Complainant on a company trip to Brazil. He asked if she was the woman who had taken a Black man on the trip. The Complainant had in fact been accompanied on a company sponsored trip to Brazil by a Black male acquaintance that she had met while training with the Respondent. All of the participants in this situation excluding Hamilton felt that Hamilton's statement were not intended as simple identification but indicated displeasure with the Complainant.

The differences in the recollections of Esch, Wachowiak and the Complainant, instead of weakening the Complainant's contention as argued by the Respondent, tends to strengthen it. In the experience. of

the Hearing Examiner, different parties to a conversation will tend to remember different portions of the conversation or will take away somewhat different impressions or recollections. It would be of a greater concern to the Hearing Examiner if all the witnesses testified in almost identical manners to a conversation that had occurred three years prior. Ms. Esch testified that the Complainant reminded Hamilton that they had met and that Hamilton used the term "nigger" to identify the Complainant's traveling companion. Mr. Wachowiak and the Complainant testified that Hamilton brought up the subject of the Complainant's traveling companion and that he identified him as either the "Black guy" or the "Black man". Hamilton testified that he recalled meeting the three co-workers but denies the substance of the conversation.

The differences in the testimony of the Complainant's witnesses might be striking if they are compared word for word. However, they all tend to show that Hamilton remembered the Complainant as a person who was accompanied on a company-sponsored trip with a man not of her race. Under the circumstances of this conversation it is unusual that Hamilton would have picked out the race of the Complainant's companion as the only identifying characteristic of the Complainant. While interracial dating is not a common occurrence today, it is not so unusual an event that it should somehow mark a person or erase other characteristics such as one's sales history. The Complainant, by the time, of this first meeting, had already distinguished herself on a national basis in the sales area with the Respondent.

The second event relied upon by the Complainant to establish an illegally discriminatory motivation for Respondent's action in passing the Complainant over for promotion in August of 1988 occurred at the end of April or the beginning of May, 1988. Again the precise date is obscured by the mists of time. The Complainant had traveled to the Washington D. C. area to interview for a sales position with a joint venture in which the Respondent was involved. Her interview came about as the result of a recommendation from James Bluecher, Blake Hamilton's immediate predecessor in Madison. While traveling for the interview, the Complainant met a manager of the Respondent with whom she flirted. Upon her return to the Madison office, she showed several co-workers pictures taken during her trip. One picture showed the manager with whom the Complainant had flirted. He was a married Black man. It is not clear from the testimony who was present while the Complainant was showing the pictures to her friend Brenda Tichner. It appears that in addition to the Complainant and Ms. Tichner that Mr. Wachowiak was also present. It is apparent from the testimony however, that Hamilton passed by the group and commented on the pictures being shown by the Complainant.

Hamilton denies recollection of the incident. The testimony of Ms. Tichner, Mr. Wachowiak and the Complainant all agree that Hamilton made some comment about the pictures as he passed. Ms. Tichner limits her statement to Hamilton's commenting on the marital status of the person in whom the Complainant had shown an interest. The Complainant offers a detailed description of racial comments made by Hamilton including "that's one nigger you can't date . . ." and "you sure like those broskis". Mr. Wachowiak's testimony tends to make the Complainant's testimony somewhat more likely. He testified that this was the second incident in which he had heard Hamilton make a racial comment about the Complainant's choice of companions. He further testified that he heard Hamilton make a comment about liking those kinds of people. Wachowiak was unable to testify specifically about the use of a racial expletive but felt that Hamilton's comment was derogatory. It is not clear how much of the conversation occurred in Ms. Tichner's hearing. In her testimony, the Complainant states that Hamilton came over by where she was standing to discuss the pictures and her past choice of companions.

Shortly following this incident another incident occurred that tends to support the Complainant's recollections. Hamilton approached Mark Stoveken by the photocopier that was in the same general

area as the photo incident. Stoveken was then employed by the Respondent as a District Sales Manager-Premises. Stoveken stated that Hamilton again identified the Complainant as the woman who took a "nigger" on a trip to Brazil and proceeded to indicate that if the Complainant intended to advance with the Respondent, she had-better stop dating "niggers". After Hamilton left the area, Stoveken approached Ms. Tincher because he believed that she had been close enough to hear. Hamilton's comments. Tincher testified that she had not heard because of the arrangement of the office and the general noise level. She did not deny that Stoveken had related the substance of the conversation to her. Again, Hamilton denies that the conversation occurred.

The Respondent argues that the testimony of Esch, Wachowiak, Stoveken and the Complainant should not be believed because they were all terminated by the Respondent and were disgruntled as a result of their terminations and wished to even the score with the Respondent by testifying against it. There is no evidence in the record that leads the Hearing Examiner to doubt the testimony of Esch or Wachowiak for these grounds. While they may not have been happy with the Respondent, there was no showing that this displeasure was of such a degree that it would lead them to commit perjury or otherwise alter their testimony to get back at the Respondent. The Complainant's testimony, by itself, would be as suspect as that of Hamilton's by itself. Both the Complainant and Hamilton have significant reason to give self-serving testimony. In determining that the Complainant's testimony is more credible with respect to these incidents, the Hearing Examiner has reviewed the record with an eye towards finding testimony that corroborates one side or the other. There are some aspects of the testimony that simply cannot be reconciled with other aspects. In these cases, the Hearing Examiner has had to rely on his experience of the world and his feelings about which witness is more truthful.

The question of Mark Stoveken's testimony and the weight to be accorded it is somewhat more difficult than that of Esch and Wachowiak. James Bluecher in his testimony gave a more detailed description of the circumstances that lead Stoveken to leave the Respondent's employ. Primarily these reasons were that Stoveken had been involved in a major marketing or sales disaster in the LaCrosse area that resulted in adverse economic conditions for him and that Stoveken had been prevented from moving to the Respondent's joint venture with Bluecher by Marilyn Carlson. Bluecher concluded that Stoveken had been so angry with the Respondent's treatment of him that he could be expected to lie to get even with the Respondent. Bluecher's testimony represents a more specific showing of possible bias than is present with regard to the testimony of Esch or Wachowiak. Despite Bluecher's testimony, Stoveken's testimony is accepted by the Hearing Examiner.

At the time that Stoveken left the Respondent's employment, he completed a final exit questionnaire and interview. The questionnaire does not allude to the problems detailed by Bluecher. In fact the questionnaire tends to support Stoveken's testimony that he was concerned about the conduct of managers such as Hamilton. Stoveken admitted that Hamilton had brought some improvements to the office but also felt that Hamilton represented a source of significant liability to the Respondent and other managers. Bluecher's testimony is also suspect for two reasons. First, he apparently thought highly enough of Stoveken to offer him a new position with the joint venture. If he had doubts about Stoveken's veracity or personal stability, surely that would have been apparent before Bluecher offered the position. Second, Bluecher testified that he had lied to the Complainant about his conversation with Hamilton. He stated that there was some sort of duty to hold such discussions confidential and that managers needed to share information for the good of the company. There was no reason for Bluecher to lie particularly since the Complainant told him that Hamilton had told her of Bluecher's negative recommendation. It would have been more acceptable to indicate that he was not at liberty to discuss his conversation with the Complainant. This behavior is consistent with conduct described by the Complainant. The "circle the wagons" management style is not unusual within the

experience of the Hearing Examiner. Though Bluecher did not appear particularly evasive in his testimony, Bluecher's willingness to lie makes it difficult to credit his testimony with much credibility without some clear corroborating testimony. In the case of Stoveken's bias, there is no such corroborating evidence.

The next incident alleged by the Complainant to demonstrate the prejudice of Hamilton occurred early in the summer of 1988. The Respondent sponsored a gathering for its Madison office in Wisconsin Dells. There was no testimony indicating where in the Dells this gathering took place. The gathering was held in a public area or place but in a somewhat closed off area. While it does not appear that the general public had access to the Respondent's gathering, all of the Respondent's Madison employees were apparently free to attend. The Complainant and Michael Lopez overheard Hamilton telling ethnic jokes to other people attending the gathering, presumably other employees of the Respondent. Neither the Complainant nor Lopez remember the specific joke or the specific ethnic group that was the subject of the jokes. Both the Complainant and Lopez were offended by the jokes but neither informed Hamilton that they were offended or requested him to stop.

Hamilton asserts that he remembers the gathering but does not recall telling any ethnic jokes. The Respondent argues that if Hamilton told ethnic jokes that the Respondent is somehow relieved of responsibility for the actions of its manager because the Complainant has also told ethnic jokes from time to time or because the ethnic jokes were not directed at Mr. Lopez's ethnic group.

The second contention of the Respondent is ridiculous. If such were the case, the concept of associational rights would be meaningless. If one were free to embarrass or humiliate an ethnic group when a member of that group is not present, this would give license to discriminate so long as one were careful about when or to whom such prejudice is manifested. It also fails to recognize that all persons are entitled to a harassment-free environment whether the harassment is directed at them specifically or not. The first contention of the Respondent is equally wrong. The Hearing Examiner does not condone the Complainant's telling of ethnic jokes particularly if told at work, but her telling of such jokes is significantly different from that of Hamilton's telling of such jokes because of Hamilton's status in the company. As a managerial employee, he has authority over the working conditions and environment. He is held to a somewhat higher standard of conduct, particularly in public, because of his stature in the company and the perception that he sets the standards for behavior.

What is somewhat more troubling to the Hearing Examiner in this instance is the lack of identification of the jokes and how or why they were offensive. Also, there is nothing in the record to indicate whether the Complainant's or Mr. Lopez's offense was personal to them or whether the jokes were in patently bad taste and would have offended a "reasonable person". Humor is an extremely subjective concept and it is difficult to assess the propriety of a joke without knowing the joke. There are some elements of humor that are generally considered unacceptable for most public occasions. Jokes that use derogatory or offensive terms for racial or ethnic groups such as "nigger", "spick", "hebe" or "wop". Jokes that use sexually explicit language or refer to specific bodily functions are also generally deemed inappropriate in public settings. There are many jokes that may approach these prohibited areas that would offend some and not others. Without some better definition, it is not possible to determine whether Hamilton's conduct was really unacceptable or merely questionable.

Another troubling aspect of this incident is that neither the Complainant nor Lopez nor apparently anyone else asked Hamilton to stop telling the offensive jokes. While it does place a burden on the person offended by a joke to complain, such a burden is appropriate given the variable nature of what is or is not funny to a given person.

The final incident used by the Complainant to support her contention of discrimination occurred on July 29, 1988. The date and circumstances of this incident can be fixed with more certainty because they coincided with a birthday celebration for Brenda Tincher. Several employees of the Respondent had agreed to gather at the Bombay Bicycle Club, a bar that was close to the Respondent's office. The Complainant, a long time friend of Tincher's, expressed her concern about attending the party because she was afraid of running into Hamilton. She was concerned about her past contacts with him and was also concerned because she was scheduled to interview with Hamilton for the vacant DSM-Telephone position. Tincher prevailed upon the Complainant to attend and the Complainant did go to the bar. The Complainant was joined by her fiancé, Michael Lopez. While at the Bombay Bicycle Club, the Tincher party ran into Hamilton and two other employees of the Respondent. Hamilton moved away from his group and asked the Complainant to have a word with him. The Complainant who had been standing at the bar next to Lopez took a few steps away from her position to speak with Hamilton. This placed her and Hamilton so that neither the Tincher party nor the Hamilton party could hear the conversation. However, the Complainant and Hamilton were close enough to Lopez so that he could hear the conversation.

Hamilton wanted to know who the Complainant was taking on an upcoming company trip to Cancun. The Complainant indicated her intention to go with Lopez. Hamilton told her that if she wished to advance in the company, she should pay more attention to who she took to company functions. Her earlier choice of a companion for the trip to Brazil was not wise and the company would not look favorably on her choice of Lopez even if he or his ancestors were from there (Mexico). This upset the Complainant and she terminated the conversation. Lopez was also upset because he had heard Hamilton's remarks about his ethnicity.

The Complainant told Tincher that she could not believe what Hamilton had just said to her. She asked Tincher if she had heard the conversation. Tincher had not but the Complainant recounted her conversation with Hamilton to her. The Complainant and Lopez left the party because they were upset.

The next week, the Complainant told Jill Nichols of the conversation. Nichols advised that the Complainant continue with the interview process and see what happens instead of raising the issue before the interviews. The Complainant interviewed with Hamilton and on August 8, 1988 was told that Gable would receive the promotion.

Hamilton admits to having been at the Bombay Bicycle Club and admits speaking to the Complainant. He states that he only said hello to the Complainant. Hamilton denies having the conversation testified to by the Complainant and Lopez.

In general, the Hearing Examiner is faced with having to decide between two entirely different versions of the same event. These different versions are both inherently plausible and are told by people with a specific point of view to maintain. The Hearing Examiner credits the Complainant's version over that of Hamilton. Ms. Tincher's testimony concerning the Complainant's reaction to the conversation tends to corroborate the testimony of the Complainant. Tincher's description of the Complainant's reaction is consistent with that of one having been told that their future was bleak because of who their friends were. At the hearing Tincher appeared extremely nervous. She spoke quickly but softly. She was somewhat hesitant in responding to the questions of both lawyers. Her nervousness is understandable since her testimony could help or hurt her long-time friend or her current employer. Despite her nervousness, her testimony is credible. In relationship to the July 29, 1988 incident, her testimony tends to support the Complainant.

With the exception of the Wisconsin Dells incident, these incidents support a finding that the Complainant's associations with men not of her race was a substantial factor in the Respondent's decision not to promote her in August of 1988. Particularly important are the conversations between Hamilton and Stoveken and the July 29, 1988 incident. In these two incidents, there is evidence that Hamilton, the person with direct authority over the Complainant's advancement, linked her advancement with her not associating with men not of her race. The decision not to promote the Complainant came within days of Hamilton's statement on July 29, 1988. The connection is compelling. The Respondent argues that each individual incident does not add up to a finding that discrimination occurred. While to some extent that is true of the first and second incidents they, when taken as a whole with the other incidents, demonstrate a discriminatory motive behind Hamilton's decision. The Stoveken and July, 1988 incidents by themselves would lead the Hearing Examiner to a finding of discriminatory motivation.

The race of the Complainant's companions was something with which Hamilton had a problem. From the onset of his management of the Madison office, Hamilton identified the Complainant as a person who associated with men not of her race. This focus on the part of Hamilton is not explained by the Respondent except to deny it. Several of the Respondent's witnesses testified that they did, not believe Hamilton to be a prejudiced individual. James Bluecher, James Billmeyer and Jill Nichols all gave essential character testimony in favor of Hamilton. It must be noted that these individuals all remain as employees of the Respondent and did not testify about any of the specific instances brought up by the Complainant. Mr. Bluecher's credibility has already been commented upon and there is no need to expand upon that here. Billmeyer's testimony was contradictory and often reflected information or events that occurred subsequent to the promotional decision. Nichols is still directly supervised by Hamilton. Her support of him is consistent with a managerial system that comes to the aid of an embattled manager.

Under these circumstances, it is the Hearing Examiner's finding that the Complainant has established that an illegally discriminatory motive substantially affected Hamilton's decision not to promote the Complainant. The parties spent some time arguing whether the Commission should or must use an "in part" test for finding discrimination or whether the "but for" or "sole factor" test articulated by the 7th Circuit (McQuillen v. Wisconsin Education Association Council, 830 F.2d 659 (7th Cir. 1987)) should be used in determining discrimination. The Commission has consistently used the "in part" test. Harris v. Paragon Restaurant Group, Inc. et. al., MEOC Case No. 20947 (Examiner's Decision: June 28, 1989). While the Commission will look to Federal and State law and decisions for guidance, ultimately the Commission must attempt to decide the intent of the Madison City Counsel in adopting MGO 3.23(7) and its protections. It has decided that the "in part" test best achieves that purpose. However, it is the belief of the Hearing Examiner that the proof produced at the Hearing goes beyond that necessary to show that discrimination played only a small part in Hamilton's decision.

Having found that illegal discrimination was a substantial factor in Hamilton's decision not to promote the Complainant, we must move to the next steps in the analysis. Under the McDonnell-Douglas burden shifting approach, it is incumbent on the Respondent to demonstrate that it had a legitimate, nondiscriminatory reason for its action. Under the Price Waterhouse approach, the Respondent must demonstrate by a preponderance of the evidence that even though discrimination played a substantial role in its decision that it would have made the same decision anyway. The Price Waterhouse formulation, to some extent encompasses the third step in the McDonnell-Douglas approach. We will attempt to treat both approaches as we continue our analysis.

The Respondent asserts that it promoted Dan Gable over the Complainant because Gable was the clearly more qualified candidate. The Commission has found in the past that hiring a person who is

more qualified than a person who is a member of a protected class is a legitimate, nondiscriminatory action. Oviawe v. Madison United Hospital Laundry, Ltd., MEOC Case No. 20723 (Commission's Decision August 3, 1990). In support of its claim, the Respondent provided the testimony of James Bluecher, James Billmeyer and Blake Hamilton. All testified that Gable was more qualified than the Complainant for the vacant position. This, under the McDonnell-Douglas approach is sufficient to shift the burden to the Complainant to demonstrate that either the proffered reason is a pretext for discrimination or that it is entirely without credence. Under the Price Waterhouse approach, the Respondent must prove that it would have hired Gable in any event.

What is really at question here is whether Gable was more qualified than the Complainant and whether the Respondent demonstrated that qualification by a preponderance of the evidence. In his testimony, Hamilton stated that he used an eight step or eight criterion analysis to decide between Gable and the Complainant. Originally there were five (5) candidates for the vacant position. All of the candidates except for Gable and the Complainant were eliminated as the result of an initial screening that looked at factors such as the number of years with the Respondent, the number of years in their current position and whether the candidate was in a position from which they could be promoted to the position of DSM-Telephone. Once the field had been narrowed to Gable and the Complainant, Hamilton stated that he looked at their respective production or performance history, their knowledge of policy, their support of die company and policy, their attendance, their recommendations from prior managers and their performance at their interviews. After Hamilton made his decision, it was reviewed and approved by his supervisor, Marilyn Carlson. Production or performance history includes the employee's percent to budget ratio, their 30.06 history (complaints resulting in the loss of revenue), management of the market, and control of the market. It is unclear from the testimony how these factors break into an eight step approach. However, Hamilton testified that these were the factors considered by him in reaching the decision to promote Dan Gable and not to promote the Complainant.

The evidence in the record concerning Gable's qualifications is somewhat sparse. It consists of the supporting statements of James Bluecher, James Billmeyer and Blake Hamilton and a somewhat supportive statement of Jill Nichols and four or five pieces of documentary evidence. The documentary evidence includes two quarterly evaluations of Gable, one of which was completed after he had been promoted, the written recommendation of Gable by James Billmeyer which is part of his application, a written statement of James Billmeyer written almost two years after the promotion decision and subsequent to the Complainant's filing of this complaint, several field coaching reports of Gable and an article showing how well Gable had performed in the position of DSM-Telephone. What is lacking in the documentary evidence are most of Gable's evaluations and other documentary evidence showing how well Gable met the criteria used by Hamilton. Since these documents are most likely in the control of the Respondent and the Respondent failed to produce them, it can be inferred that the information contained in them at best did not support the Respondent's case and at worst worked against the Respondent's case. It is an interesting point that the Respondent did not produce Gable to testify about his background. Again, it can be inferred that Gable's testimony which might have helped to support the Respondent was not called for because his testimony would hurt the Respondent more than it would help.

The Complainant became a Telephone Sales Representative early in 1986. This was after she had been a Sales Assistant for a number of months. The position of Sales Assistant was created by James Bluecher to allow the Complainant to advance into the area of sales. She handled low end or difficult accounts. She reported to James Bluecher. Bluecher testified that the Complainant performed well in

this position. Gable began work as a Telephone Sales Representative around the beginning of October, 1986. He had not worked for the Respondent prior to assuming this sales position.

The Complainant's annual performance appraisal for 1986 (ex. 24) reflected that the Complainant had performed well during the year as a sales representative despite some personal problems. It reflected that she was well liked and supportive. It indicated that the Complainant had expressed interest in advancing within the company. The primary point on which the Complainant needed to work was the reduction of 30.06 reports. These are customer complaints and can result in a reduction of revenue. While the Complainant's 30.06 record was somewhat higher than desired, it did not result in large reductions in revenue and seemed to be a result of small misunderstandings. There is no record of Gable's performance in 1986. Such a record would be small since he had only been employed for the final quarter of 1986.

In 1987, the Respondent changed the appraisal and evaluation process that had been used prior to that time. The record contains the Complainant's third quarter appraisal and Performance Plan dated October 14, 1987 prepared by Jill Nichols. (ex. 30) This appraisal again reflected a high level of performance by the Complainant. It indicates that the Complainant regularly filled in for Nichols when the DSM was out of the office. It further indicated that the Complainant was a leader in her unit and was well liked. The Complainant was gaining knowledge of policy and was a help to Nichols. Her sales numbers were somewhat reduced from the year prior. In 1987, the Respondent began to use a numerical rating system along with the general appraisal procedures. The Complainant received a rating of 2 of 6 where 1 is the highest ranking. This is the last performance evaluation in the record for the time prior to Blake Hamilton's arrival.

The Complainant's 1987 Annual Performance Appraisal (ex. 65) was prepared on April 20, 1988 and was signed by Blake Hamilton on April 20, 1988. On this appraisal, the Complainant received a rating of 4 of 6. Nichols, in this appraisal, while recognizing that the Complainant's sales numbers were down somewhat from the prior year, felt that the Complainant had worked hard and that a large portion of the reduction of performance might be due to family problems and the additional duties that the Complainant had tackled while the DSM was gone. The appraisal again reflects a high number of 30.06 reports but finds that they were the result of small misunderstandings and that there was little revenue loss. The appraisal recognizes that the Complainant remained interested in advancement to a DSM position and that the Complainant was working towards that goal. Though Hamilton signed this appraisal, it covered a period of time for which he could have no personal knowledge. He did not testify that he had consulted with James Bluecher, the Complainant's Division Manager to find out if the Complainant's rating was justified by her actual performance in 1987.

The only record of Gable's performance in 1987 is found in Ex. 4. This is a compilation of national sales figures for the Respondent. It shows that as of late in 1987, the Complainant's sales figures were ahead of Gable's by about 14 percentage points and that she was ranked 4 and Gable 5. At the hearing, there was contradictory testimony about the potential effect of a percent to budget figure appearing in the national sales reports. In general, it would result in less of an increase in pay and would have a negative impact upon one's final annual rating. Since the Hearing Examiner was not provided a copy of Gable's 1987 Annual Performance Appraisal, it can be assumed that Gable's lower sales numbers as reflected by Ex. 4 resulted in a performance rating of at least 4 or less.

The first quarter of 1988 is the first period for which the record contains a head to head comparison of the Complainant and Gable. Gable received a rating of 2 of 6. (Ex. 48) While the Complainant received a rating of 3 of 6 (ex. 35 and ex. 35a) There was some discussion of an alleged agreement between the Complainant and Hamilton to revise the rating to a 2 of 6. There is insufficient evidence

to be able to conclude that there was such an agreement. Both Hamilton and Nichols deny the agreement and there is only the Complainant's statement and her handwritten note on Ex. 35 to support the agreement. The Complainant's appraisal recognizes that she was the unit's acting co-manager while Jill Nichols was on maternity leave. The Respondent strongly objected to this characterization of the Complainant's but the Appraisal indicates that the objections represent a willingness to rewrite history to suit the Respondent's position. The importance of the Complainant's designation is that it supports her contention that she had management experience of which the Respondent was aware. Gable on the other hand had no managerial experience.

The two first quarter appraisals appear to show the Complainant and Gable as being roughly equal in most areas of production. The addenda to each of the appraisals emphasize different aspects of their performance. Gable received "OK" on most communication and leadership areas. The Complainant's addendum emphasized the improvements that she had made and her beneficial attributes such as being a leader for the unit and that she was supportive of her manager.

The second quarter Appraisals and Performance Plans would normally be an opportunity to compare Gable and the Complainant. However, the Complainant's evaluation was prepared and signed by Hamilton on July 20, 1988. Gable's evaluation was not finalized and signed by Hamilton until at least two days after Gable had been promoted. This delay in completion of the evaluation renders it highly suspect as a true measure of Gable's performance. The numerical portions such as percent to budget may not be subject to alteration as a result of promotion but the narratives such as the addendum would be. In this light, the more complete description of Gable's performance in the second quarter appraisal than that in the first quarter appraisal is particularly suspect.

The Complainant's second quarter appraisal indicates that the Complainant was continuing to show progress and the only areas of needed improvement seem to be in reduction of 30.06 reports and better familiarization with company policy for purposes of promotion.

The third area of possible direct comparison between the Complainant and Gable was through the recommendations accompanying their applications for the DSM position. Gable's recommendation was unreservedly glowing. (Ex. 50) The Complainant's recommendation was positive though somewhat guarded about the Complainant's maturity. It raised no concerns about the support of the unit for the Complainant or the Complainant's ability to handle the job. Though it is difficult to compare recommendations prepared by two separate persons Gable's recommendation is more positive than that of the Complainant.

Both parties submitted a number of "Field Coaching Reports" to support their positions in this matter. These reports are prepared on a regular basis by a sales representative's supervisor as a training and motivational tool. They deal specifically with sales techniques. As such they are essentially irrelevant in this case. Both sides are quite willing to admit that the Complainant was a great salesperson. Somewhat more to the point are the quarterly evaluations and the National Sales Reports. For the period of January 1, 1988 up to the beginning of August of 1988, Gable had a slight edge in sales. However these figures do not demonstrate the additional duties assumed by the Complainant in January and February. The Complainant was generally in the same range of sales as Gable with only a couple of exceptional periods that Gable had.

The Respondent submitted two additional documents in support of its claim that Gable was clearly the more qualified candidate for the position of DSM. The first is a newsletter announcing a supervisory award given to Gable for his work as a DSM. Clearly this is irrelevant to these proceedings. It is information that was not available to Hamilton at the time he made his decision. Additionally, there is

no proof that the Complainant would not have been equally likely to achieve such an award if she had been promoted. This type of after the fact justification of a decision does nothing more than demonstrate that Gable was qualified for the position; it does not demonstrate that he was clearly more qualified as contended by the Respondent. The second piece of documentation is a memorandum written by James Billmeyer and dated October 12, 1990. Billmeyer was asked by Hamilton to prepare this memorandum during the processing of this complaint. Such a document has virtually no probative value given the period of time that had passed since the chronicled event and the circumstances under which the document was prepared. It is of particularly dubious value given Bluecher's testimony that a manager had a duty to support another manager.

Given this record, has the Respondent met its burden, under the Price Waterhouse test or has the Complainant met her burden under the McDonnell-Douglas test?

If the Price Waterhouse test is applicable because this represents a mixed motive case, the Respondent has not met its burden to show by a preponderance of the evidence that even though a discriminatory motive was a substantial factor in the decision not to promote the Complainant that it would have promoted Gable nevertheless. Both the Complainant and Gable were recognized as terrific salespeople. The Complainant's sales figured suffered slightly as a result of her personal family problems but they were once again on the increase in 1988. Throughout 1987 she outsold Gable and was generally close to Gable's sales figures in 1988. It appeared from the quarterly appraisals that the Complainant had a continuing small problem with 30.06 reports. However the appraisals seem to indicate that even though the Complainant's numbers were high they seldom resulted in a write off of revenue. Gable's appraisals are relatively quiet on the subject of 30.06 reports but indicate that he should work to reduce them. Both the Complainant and Gable exercised good territory control and used their markets. It is noted that the Complainant had a problem with managing these factors in 1987 because of Nichols turning over managerial responsibilities to the Complainant without reducing her work load. Nichols left the Complainant partially responsible for the unit in 1988 and Nichols felt that the Complainant had performed better on her own duties than the previous year. Gable's attendance record was better than that of the Complainant. However the time missed by the Complainant was primarily due to family illnesses or to her attendance at divorce proceedings. Nichols indicated that the Complainant had taken vacation time rather than sick leave at one point to help the unit's sales time. There is nothing in the record to indicate whether Gable had to exercise the same family responsibilities as the Complainant. However, if he did not, then treating the Complainant differently as a single parent comes close to sex based discrimination.

Both of the candidates were supportive of the company and their immediate supervisors. The "one on one" reports demonstrate that the Complainant liked her job and her prospects within the company. There was testimony by Jill Nichols that she had some difficulties with the Complainant's support. However, the appraisals indicated that either those problems had been resolved or that they were personal in nature and that the Complainant supported her manager.

Both the Complainant's and Gable's immediate supervisors recommended them for the position. James Bluecher apparently recommended Gable and specifically panned the Complainant Bluecher's testimony is suspect since he had thought highly enough of the Complainant to help with an interview at the Respondent's east coast joint venture. It is also suspect given Bluecher's admission that he had lied to the Complainant and because of his continuing employment with the Respondent

The above factors are those allegedly used by Hamilton to decide between Gable and the Complainant. There is nothing in the record to demonstrate whether or not certain criteria were weighted in the decision making process. It is difficult to know how all these factors may have been

viewed by Hamilton but the Hearing Examiner is left with the conclusion that the Complainant was at least as qualified as Gable. Given her managerial experience with the Respondent she was likely more qualified than Gable and therefore the Respondent has failed to demonstrate by a preponderance of the evidence that it would have promoted Gable even with the discrimination of Hamilton under the Price Waterhouse test.

Applying the McDonnell-Douglas test to the same facts results in the same conclusion. Here the question is whether the Respondent's contention that it promoted Gable because he was more qualified is either not credible or is a pretext for discrimination. The record indicates that the Complainant appears to be at least equally qualified with Gable in most respects. The record also shows that the Complainant had significant managerial experience dating back to 1987 and that Jill Nichols relied upon her to run the unit while Nichols was out of the office. Nowhere does Hamilton discuss how this experience factor was taken into account in making his decision. It is simply not credible in the mind of the Hearing Examiner that such relevant experience was not an important criteria in the decision making process. The assertion that a person who had no apparent managerial experience is more qualified than a person who has that experience without explaining why that experience is not relevant cannot be seriously considered by the Hearing Examiner.

Equally there is significant reason for the Hearing Examiner to find that the proffered reason is a pretext for other discriminatory motives. Jill Nichol's testimony was in several important respects contrary to the documentary evidence. For example, Nichols testified that the Complainant had on several occasions made Nichols duties more difficult by questioning company policy. Nichols written appraisals all indicate that the Complainant was supportive of her manager. Another example of this inconsistency is Nichols testimony that the Complainant's co-workers had complained to Nichols about the Complainant's conduct in the office with respect to sharing aspects of her personal life. Again the appraisals of the Complainant by Nichols indicate that the Complainant was well liked and was a leader in the unit. Three of the Complainant's co-workers testified at the hearing and none indicated that they had any problem with the Complainant. Rather their testimony indicated that they all believed that the Complainant would make a very good DSM. The Respondent never asked the very people who were said to have complained about the nature of the complaints.

Further evidence of pretext is found in the Respondent's assertion that the Complainant never had significant managerial experience or at least never acted for her supervisor, Jill Nichols. This is clearly contradicted by the Complainant's written evaluations and by Nichols own testimony. Nichols indicated in 1987 that the Complainant was her "fill in". In 1988, Nichols recognized that the Complainant was the "acting co-manager" of the unit while Nichols was on maternity leave. James Billmeyer and Blake Hamilton attempted to assert that the Complainant had been nothing more than a lead worker. This indicates a willingness to change the facts to support the Respondent's position.

The testimony of James Bluecher as previously indicated, gives the Hearing Examiner cause for concern. Mr. Bluecher's willingness to lie to protect another manager casts doubt on his credibility. Even if there might be circumstances that could justify lying to a colleague, a lie would not have been required to uphold the goal of confidentiality. The Hearing Examiner is only willing to credit Bluecher's testimony where there is documentary corroboration.

The above reasons led the Hearing Examiner to the conclusions that the proffered reason for selecting Gable over the Complainant is not credible and represents a pretext for other discriminatory reasons namely the Complainant's association with men not of her race.

We must now turn to the issue of remedy. The ordinance at 3.23(9) indicates that the Commission should make an award calculated to redress the discrimination and to make the Complainant whole. In the case of Nelson v. Weight Loss Clinics of America, Inc., et. al. MEOC. Case No. 20684 (September 29, 1989) sets forth some of the remedial options available to the Commission. These include an order for reinstatement back pay, an award for emotional or other noneconomic damages and prejudgment interest. This case presents some unusual factors for considering the appropriateness of these remedies.

The Hearing Examiner has recommended an order requiring the reinstatement of the Complainant. In an employment case, reinstatement is generally one of the most appropriate remedies to redress an act of discrimination. Ordinarily reinstatement would not be appropriate where there is some showing that the parties are so traumatized by the acts of discrimination that they cannot function together, or where there is the complaint that rehiring the Complainant would be an invitation to continued warfare. Where reinstatement is not appropriate an award of front pay may be considered. The Hearing Examiner has some concerns that a fruitful employment relationship may be difficult to reestablish in this case. This has been a long and bitter process that has undoubtedly raised hard feelings on both sides. However, it would seem that the Complainant has been substantially underemployed since the Respondent terminated her employment. The benefits of managerial status are important in today's market place and the only way for the Complainant to receive these benefits is to be allowed to gain the experience and knowledge that employment would permit. An award of front pay would not make the Complainant whole in the sense of the lost experience. Also her termination by the Respondent makes calculation of a front pay award exceptionally difficult.

Following reinstatement, back pay is the next most usual component of a remedial award. Generally back pay is easy to establish. In this case, there should be little problem in calculating the amount of back pay due the Complainant. The Complainant requested a back pay award to continue from the August 8, 1988, the date of the promotion, to the present. While in other cases this might be appropriate, it is not in this case. The back pay award shall extend only until the date of the Complainant's termination. The Complainant was terminated for missing work in violation of the Respondent's policy. The Complainant filed a retaliation claim with respect to this termination. The investigator assigned to the complaint, made an Initial Determination that there was no probable cause to believe that discrimination or retaliation had occurred. The Rules of the Commission provide that such an Initial Determination may be appealed for review by the Hearing Examiner. The appeal must be in writing and be filed no more than ten (10) days from receipt of the Initial Determination. The Complainant did not appeal this Initial Determination. While the Hearing Examiner may question the accuracy of the Initial Determination, he has no option but to conclude that the Complainant's termination was for a nondiscriminatory reason and therefore the back pay award must be limited to the period of time after August 8, 1988 until the Complainant was terminated. The Complainant also argues that the back pay award could be extended because if the Complainant had been promoted, she would have had greater flexibility in arranging her schedule and therefore her loss is attributable to the act of discrimination. There is nothing in the record to support this contention. The Hearing Examiner has ordered prejudgment interest on the back pay award because there has been no showing that such interest would be inappropriate or prejudicial to the Respondent.

The Hearing Examiner has recommended an award of twenty five thousand (\$25,000) dollars, to compensate the Complainant for the emotional damages suffered by her as a result of the Respondent's discrimination. The authority for the Commission's award of such damages was established in the Nelson case (supra). The Complainant testified that the decision not to promote her had a devastating effect on her. The work that she had done to advance within the company over the

preceding years had been swept away by one person who was likely to be in a position to block her advancement for some undefined period of time. She had suffered the indignities of Hamilton's comments for a number of months and she had not received the support of other managers particularly Nichols and Carlson. The professional box into which she had been placed was unfair and illegal. She had to face working with others who knew or may have known of the problems and that would be difficult. Despite these problems she did not quit and after some weeks looked forward to her proposed transfer to Gable's sales unit. This award is a reflection of the period of time that the Complainant had to deal with the discriminatory language of Hamilton and the effect on her of being unjustly deprived of a promotion for which she was qualified. The Complainant's husband, Michael Lopez, testified that the Complainant had never really recovered her enthusiasm for her work and that the discrimination had made the Complainant more cynical and skeptical about her rights and self. This new attitude had adversely affected their relationship. Though there was an effect on the relationship, it was not enough to prevent them from marrying.

The Respondent argues that the standards for intentional infliction of emotional distress should be applied in this case. The Nelson case has previously addressed this issue and the applicable law, so it need not be further discussed here.

The Complainant seeks an award of punitive damages in this case. The Hearing Examiner in the Nelson case did not address the Commission's ability to award punitive damages in an employment case. The Commission has made such awards in the cases of Ossia v. Rush, MEOC Case No. 1377 (June 7, 1988) and Sprague v. Rowe et. al., MEOC Case No. 1462 (Hearing Examiner's Decision December 27, 1991). The Sprague case was overturned on other grounds. The Hearing Examiner declines to make such an award here. There is little question that Hamilton's conduct was intentional or at least without any regard for the rights and feelings of the Complainant. I believe that a punitive damages award would be appropriate against Hamilton individually. However, Hamilton is not the Respondent. The Complainant chose to pursue Hamilton's employer. The question is whether Hamilton's conduct can be imputed to his employer. For purposes of all but punitive damages, the accepted rule is that the actions of the agent, in this case Hamilton, may be imputed to the master, in this case the Respondent. In order to impute Hamilton's action to the Respondent for purposes of a punitive damages award, there must be a showing of Hamilton acting pursuant to a company policy or that the company knew of or reasonably should have known of Hamilton's actions and by doing nothing ratified those actions. The only link to the Respondent other than Hamilton's employment is the fact that Marilyn Carlson reviewed his decision and later spoke with the Complainant. This falls short of the type of policy or knowledge required to bind the Respondent to the actions of Hamilton. There was no testimony showing that there was a policy of the Respondent to allow or to encourage such discrimination. The actual knowledge of Carlson is not before the Hearing Examiner because neither side called her as a witness. It would require an impermissible degree of speculation to allow the Hearing Examiner to make an award of punitive damages based upon Carlson's knowledge. Accordingly the Hearing Examiner declines to do so.

The Commission's authority to award attorney's fees is not an issue.

Signed and dated this 5th day of January, 1993.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner