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

Kathleen Chung 321 West Mifflin, #5 Madison, WI 53703 Complainant vs. Paisans 80 University Square Madison, WI 53703 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 21192

The above-captioned matter came on for public hearing before Hearing Examiner, Clifford E. Blackwell, III, on May 14, 1991 in Room G-10 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard, Madison, WI 53710. The Complainant, Kathleen Chung, appeared in person and by her attorney, Rosemary J. Fox, of the law firm of Fox and Fox, S.C. The Respondent, Paisans, appeared by two of its owners, Walter Borowski and Ed Shinnick, and by its attorney, Teresa M. Elguezabal, of the law firm of La Follette & Sinykin, S.C. Based upon the record presented at hearing and the arguments of the parties, the Hearing Examiner makes the following RECOMMENDED FINDINGS of FACT, CONCLUSION'S of LAW and ORDER:

RECOMMENDED FINDINGS of FACT

1. The Complainant is a Korean American woman who was 23 years of age at the time she applied for employment with the Respondent in August of 1989.
2. The Respondent is a restaurant located at 80 University Square Mall in the City of Madison. The Respondent employs people in furtherance of its business or enterprise. Specifically, it employs people to bus tables, to tend bar, to wash dishes and as wait staff.
3. The Respondent is owned by four individuals: Jerry Meier, Mike McCormick, Walter Borowski and Edward Shinnick.
4. The Respondent does not hire wait staff and bartenders from the general public. It promotes people to those positions from employees in other positions.
5. On August 16, 1989, the Complainant applied for a position as a bus person with the Respondent in response to a sign in the window at the restaurant. She was looking for a part-time job for approximately twenty (20) hours per week to supplement her income. She met with Borowski who reviewed her application. He thought that she would make a good employee and noted on her application that the Complainant should be hired, if possible. He noted the Complainant's schedule and told her that he did not know if they currently had any openings. He attempted to contact Shinnick to find out about openings because scheduling was more of a responsibility of Shinnick's. Borowski was unable to contact Shinnick and told the Complainant to come back the following week to speak with Shinnick.

6. Borowski also interviewed Kristin Hegley and David Peterson on August 16, 1989. He interviewed Hegley prior to the Complainant. As he knew of an opening that Hegley could fill, he hired her. Peterson was interviewed after the Complainant. Peterson was not hired.
7. The Complainant interviewed in person with Shinnick on August 21, 1589. Shinnick reviewed the Complainant's application. After verifying the Complainant's information, he concurred with Borowski that the Complainant would make a good employee. Shinnick did not offer the Complainant a position at this interview. It is not clear whether he indicated that the Complainant should check back or if he said that they would be in touch.
8. Due to the uncertainty of the schedule during that time of the year, the Respondent left a sign in the window indicating that it was accepting applications and continued to run advertising in local newspapers to that effect. This was generally done in other years also. The Respondent would only run newspaper advertisements when there were actually openings. Borowski stated that they did not have a policy or practice of maintaining a pool of applicants from which it would contact prior applicants. Instead, it would hire for vacancies from applicants that either checked back while there happened to be a position open or hired new applicants who applied while there was a vacancy.
9. The Complainant called the Respondent back again on August 28, 1589 and spoke with Shinnick. She was once again told that there were no positions available. She became suspicious of the information given her by the Respondent because of the continuing presence of the sign and newspaper advertising.
10. On August 30, 1989, the Complainant asked her then boyfriend, Kerry Wilcox, to inquire about jobs with the Respondent. After asking if there were any bus or wait staff positions available, he was told by a person who appeared to be a manager that there were positions available for people who could work both lunch and dinner shifts but that they were too busy to speak further with him. He was told that he could return later that day or the next day to speak to someone. He did not get the name of the person with whom he spoke, He did not fill out an application. He did not return the next day to speak with any one. It appeared that the Respondent was conducting interviews at the time of his inquiry.
11. Wilcox reported his contact and his impressions to the Complainant. The Complainant was upset and contacted the Respondent on August 30, 1989 and was told that there were no positions available.
12. On September 1, 1989, the Complainant filed her complaint of discrimination with the Commission.
13. The Respondent hired several employees after Kristen Hegley on August 16, 1989 and before September 1, 1989. These were mostly dish washing positions but there were two people hired for bus staff positions during that period. Jennifer Suenicht was hired as a bus person on August 17, 1989. Luz Maria Vergara was hired as a bus/kitchen/host person on August 23, 1989. The Respondent denied hiring anyone during this period in its answer to the Complainant's original complaint.
14. The Respondent knew that the Complainant was an Asian American or of Asian descent. The Respondent did not know that the Complainant was specifically a Korean American.
15. Subsequent to the Complainant's application, the Respondent hired seven (7) people between August 16, and September 11,1989 to work as bus staff. None of those hired were of the Complainant's race.
16. All of those persons hired by the Respondent between August 16, and September 11, 1989, subsequent to the Complainant's application were of the Complainant's age group. None of them were either significantly younger or older than the Complainant.

17. At a Fact Finding Conference held by Investigator Mary Pierce in this matter, Borowski indicated that it was difficult to find young people to work the whole weekend because of their schedules and busy lives.
18. Karie Knapp was hired on September 1, 1989. She submitted her application on August 30, 1989.
19. Sara Darcy was hired on September 5, 1989. She submitted her application on August 29, 1989.
20. The Respondent knew of the Complainant's continued interest in a bus person position on August 28, 1989 and August 30, 1989 because the Complainant called the Respondent to inquire about her application on those days.
21. The Respondent stated that all persons hired as bus or wait staff had to work at least one weekend shift. A weekend shift is defined as Friday lunch, Friday dinner or Saturday dinner. Amy Mosher was hired as bus staff on September 5, 1589. She was assigned to work Tuesday and Thursday lunch and Sunday dinner. She was not assigned a weekend shift as defined by the Respondent.
22. Though the Complainant's schedule appeared to prevent her from working Friday lunch or dinner, she could change her schedule to meet the Respondent's needs. She was available to work Saturday dinner. She told Borowski that she could change her schedule if the Respondent needed her to make a change. Her application indicated that she could change her schedule if need be. The Respondent did not ask her to see about changing her schedule.
23. The requirements for the position of bus person are not difficult. The Complainant was qualified to be a bus person.
24. In August of 1989, a bus person was paid three dollars and forty five cents ($3.45) per hour. At the end of 1989, the rate of pay for a bus person was increased to three dollars and seventy cents ($3.70) per hour. Bus persons did not receive an increase in their base pay for seniority. The only way that a bus person could increase his or her wage was by promotion to a position on the wait staff or other position.
25. The Complainant could have earned two thousand nine hundred and thirty nine dollars ($2,939) by working as a bus person until she took a higher paying job with Dane County in June of 1990.
26. As a result of the Respondent's refusal to hire the Complainant, she was angry and frustrated at being denied a menial position for which she was qualified.

CONCLUSIONS of LAW

27. 27. The Complainant is a member of the protected group age because she is over eighteen (18) years old.
28. The Complainant is a member of the protected group national origin/ancestry because she is a Korean American.
29. The Complainant is a member of the protected group race because she is an Asian American.
30. The Respondent is an employer within the meaning of the ordinance.
31. The Respondent did not discriminate against the Complainant on the basis of her age in failing or refusing to hire her in August and September of 1989.
32. The Respondent did not discriminate against the Complainant on the basis of her national origin/ancestry in failing or refusing to hire her in August and September of 1989.
33. The Respondent discriminated against the Complainant on the basis of her race in failing or refusing to hire her in August and September of 1989.
34. The Complainant suffered an economic loss of wages in the amount of two thousand nine hundred and thirty nine dollars ($2,939) as a result of the discrimination on the part of the Respondent.

35. The Complainant suffered a compensable loss of seven hundred and fifty dollars ($750) as a result of the embarrassment and humiliation of having been discriminated against.
36. The Respondent did not act in such a manner as to support an award of punitive damages.
37. In order to be made whole, the Complainant is entitled to be awarded her costs of pursuing this action including a reasonable attorney's fee.

ORDER

37. The Respondent shall cease and desist from discriminating against the Complainant on the basis of her race. However, this does not require the Respondent to offer employment to the Complainant.
38. The Respondent shall not discriminate against any other prospective employee on the basis of his or her race or for any other reason prohibited by the ordinance.
39. The Respondent shall pay to the Complainant two thousand nine hundred and thirty nine dollars ($2,939) less appropriate payroll deductions as back pay within sixty (60) days of this order becoming a final order.
40. The Respondent shall pay prejudgment interest on the award of back pay at the simple rate of five (5) percent per annum. The interest shall be paid at she same time as the back pay.
41. The Respondent shall pay to the Complainant the amount of seven hundred and fifty dollars ($750) as general damages for her emotional distress. This amount shall be paid within sixty (60) days of this order becoming final.
42. The Complainant shall submit no later than thirty (30) days from the undersigned date to the Commission and serve a copy on the Respondent, her Petition for costs including a reasonable attorney's fee. The Respondent shall file any objections to the Petition within fifteen (15) days of its receipt. Additional proceedings may be scheduled if required.

MEMORANDUM DECISION

The Complainant alleges that the Respondent discriminated against her in violation of the ordinance by failing to hire her for a position on its bus staff in August and September of 1989. It is the Complainant's contention that the Respondent's discrimination was premised on her age, national origin/ancestry or race or some combination of these factors. The Respondent asserts several reasons for its failure to hire the Complainant. It contends that there were no positions available during the period when the Complainant applied. Also, it contends that there were positions available but none that could be filled by the Complainant. Additionally, it contends that the Complainant's schedule was not flexible enough to hire her and that she failed to call back or check in when there were openings.

Many of the issues in this complaint are relatively straightforward, while others require closer examination. The method of analysis used by the Commission in cases such as this comes from the decisions in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). The procedure set forth in these cases is one that shifts the burden of production between the parties but the ultimate burden of proof remains with the Complainant at all times. In this case the Complainant fails to meet her burden on her claims of age and national origin/ancestry discrimination.

With respect to the claim of national origin/ancestry discrimination, there is no question that as a Korean American the Complainant is generally covered by the ordinance. However, the question presented by this case is whether the Respondent knew that the Complainant was a Korean American. The Respondent knew that the Complainant was an Asian American because she had appeared in person for interviews on August 16, 1989 and August 21, 1989. There is a significant difference

between knowing of the Complainant's race and knowing of the Complainant's national origin/ancestry. Neither attorney drew any distinction between the Complainant's race and national origin/ancestry claims. There must be a difference in the coverage of these protected groups since they are specifically and individually set forth as protected groups. Generally, national origin/ancestry refers to the country, nation, tribe or other identifiable population from which one's forebears came or to which they belonged. Cook v. Therapy & Support Services, (LIRC, 11/08/91) It is linked to a location. In this case, the Complainant's national origin/ancestry relates to her or to her relatives origin as Korean. Discrimination premised upon race proscribes actions based upon ones racial identity. In this case, the Complainant's race is Asian or Asian American. Race is a broader concept than national origin/ancestry because it can and does extend over national or cultural borders.

In this case, there is no evidence to suggest that the Respondent knew of the Complainant's identity as a Korean American. There is no indication on the Complainant's job application (Ex. 1) that would lead one to the knowledge of the Complainant's national origin/ancestry. There was no testimony that the Complainant told either Borowski or Shinnick that she was a Korean American. There was nothing in the record to indicate that the Complainant's physical appearance demonstrated her status as a Korean American separate from being an Asian American. Without evidence that the Respondent actually knew of the Complainant's membership in a protected class, there can be no fording of discrimination. Rhone v. Marquip, MEOC Case No. 20967 (July 31, 1989). Knowledge of one's membership in a protected class is a critical element of proof because without such knowledge a contrary action cannot be imputed to one's membership in the protected class. Because there is no evidence of the Respondent's knowledge of the Complainant's national origin/ancestry, her claim for this protected group fails.

With respect to the Complainant's allegation that she was discriminated against on the basis of her age, it too fails. The Complainant does not state how the Respondent's actions discriminated against the Complainant on the basis of her age. The Complainant concedes that its entire case of age discrimination is based upon a statement of Walter Borowski at the Fact Finding Conference in this matter. In a response to a question of the Investigator, Mary Pierce, Borowski indicated that it was difficult to get young people to commit to working all weekend because of the demands on their lives and personal schedules. While this statement can be taken as one indicating a preference for a work force devoid of young people with busy schedules and a preference for a work force of less busy people, there is nothing in the record that even remotely suggests that the Complainant's age had anything to do with the hiring decision. The Complainant is unable to draw any convincing connection between Borowski's statement and the Complainant. If anything, Borowski's statement should indicate that the Respondent would look more favorably on the Complainant because she did not have the complication of a school schedule.

The record compellingly demonstrates that the vast majority of the Respondent's work force is comprised of people of approximately the same age as the Complainant. Given the reality of the Respondent's work force, it is difficult to see any reasonable argument that can be made that the Complainant was treated differently than those not of her age. The Respondent bred those of approximately the same age as the Complainant and failed to hire others of her age as well as those both younger and older than her.

The essence of a discrimination claim is differential treatment based upon a particular characteristic. If one is not treated less favorably as a result of their protected characteristic, there can be no discrimination that violates the ordinance. With respect to her age, the Complainant has failed to articulate much less to demonstrate how the Complainant was treated less favorably than those not of her age. It is true that the Complainant was not hired but she does not draw any nexus between the

failure to be hired and her age. The Complainant has not presented a case that even requires the Respondent to come forth with an explanation of its conduct with respect to age. The Complainant's age claim falls for lack of proof.

The Complainant's claim that she was discriminated against on the basis of her race is somewhat more complicated and must be examined more carefully. It was not contested that the Complainant is a member of the protected group race by virtue of her being a Korean American. In broad terms, this would make the Complainant a member of the Asian race. Similarly it was not contested that Borowski and Shinnick knew of the Complainant's race. Both Borowski and Shinnick met the Complainant in person and could have seen and did see her. Equally it was not contested that the Complainant was capable of performing the duties of a person on the bus staff. Both Borowski and Shinnick testified that they believed that the Complainant would have made a good employee.

Further, there seems to be no dispute that the Complainant was not hired for a position on the bus staff, while other people not of the Complainant's race were hired for positions on the bus staff shortly after the Complainant had applied.

Having stated the elements of a prima facia case that are not in dispute, it remains to determine whether there were positions open for which the Complainant could have qualified. The issue of whether the Complainant's race was a factor in the decision not to hire her is really one of the ultimate questions and need not be answered in order to shift the burden of proof to the Respondent.

There is no question that the Complainant was a busy person at the end of the summer in 1989. She worked two driving shifts for Union Cab and had recently obtained a shift as a telephone answerer for Union Cab. Additionally, she volunteered as a driver one evening a week at the Women's Transit Authority (WTA). Her driving shifts at Union Cab were Thursday and Sunday from 3:00 p.m. until 2:00 a.m. Her telephone shift was on Fridays from 2:00 p.m. until 2:00 a.m. Her WTA shift was on Monday night from 11:00 p.m. until 2:00 a.m. Despite this schedule, the Complainant wished another part-time job for additional income. When she met with Borowski on August 16,1989, the Complainant set forth her schedule and indicated that beyond wishing to maintain her WTA shift, her schedule could be changed if need be. Borowski wrote this information on the Complainant's application. The Complainant testified at the time of hearing that she had been willing to adjust her schedule at Union Cab in order to accommodate the scheduling needs of the Respondent. She indicated that it would have required little effort to make the change at Union Cab at least in part because she was not going to be a student in the fall of 1989.

The question of the Complainant's schedule is important because the Respondent has indicated that problems with the Complainant's schedule were, in various respects, the reason for refusing to hire the Complainant. Borowski told the Complainant that in order to work at Paisans, she would have to work at least one weekend shift in addition to other shifts to which she might be assigned. Weekend shifts for the restaurant were Friday lunch from approximately 11:00 a.m. to approximately 2:00 p.m., Friday dinners from approximately 5:00 p.m. until closing or until business slowed down and Saturday dinner from approximately 5:00 p.m. until closing or until business slowed down. The requirement that bus staff work at least one weekend shift was allegedly universal. The Complainant was available to work all Saturday dinners. Even though at the time of her interview, the Complainant had a schedule conflict with Friday lunches and dinners, it is clear that she could have been available for work at those times, if the Respondent wished her to work them.

Borowski and Shinnick both attempted to indicate during the hearing that they had reservations about the Complainant's ability and willingness to alter her schedule. Borowski testified that the

Complainant seemed to be reluctant to change the schedule at Union Cab. Shinnick tested that he had taken the Complainant's willingness to change her schedule to apply only to her WTA shift. The Respondent also argued that the Complainant could not have been serious about changing her schedule at Union Cab because she was getting paid significantly more at Union nab than she would have been paid as a bus person.

Further, there was testimony that if the Complainant were to change heir Union Cab schedule, she would have to give up some seniority, pay or other advantage. The Complainant's testimony in no way corroborates these theories.

The Complainant's testimony clearly indicates that she was willing to change her Union Cab schedule. This is reflected by Borowski's handwritten note on her application. (Ex, 1) Contrary to Shinnick's statement that he interpreted the note to apply to the Complainant's WTA shift, there is little doubt in the Hearing Examiner's mind that it applied to the Union Cab duties. Had the Complainant been reluctant to alter her schedule as Borowski suggests in his testimony, one would have expected him to reflect some degree of uncertainty in his note. The note does not reflect any such uncertainty. Though the Respondent might have elicited from the Complainant at the time of hearing some admission that a change in her Union Cab schedule would have had adverse consequences for her, there was no such admission. To the contrary, the Complainant testified that all she would have had to do was to leave a note that she needed to change her schedule.

Similarly with the Respondent's suggestion that the Complainant could not have been willing to change her Union Cab schedule because of the difference in pay between Union Cab and Paisans is unsupported. There was no credible testimony that the Complainant would lose the opportunity for a telephone shift if she had to reschedule the day that she worked. A more realistic inference to be drawn is that she would have moved her telephone shift to another day and been available to work at Paisans on Fridays.

It seems clear that despite the position of the Respondent, the Complainant was available to work one weekend shift, i.e. Saturday dinners, and could have been available to work any of the weekend shifts needed by the Respondent. Other successful applicants appeared to have possible weekend conflicts that the Respondent was able to resolve, while some successful applicants were not required to work a weekend shift at all. Kristin Hegley's application indicated shat she could not work all weekends and Amy Mosher was hired to work Tuesday and Thursday lunches and Sunday dinners. It is true that Sunday falls on the weekend but it was not one of the shifts defined as a weekend shift by either Borowski or Shinnick. These examples of the Respondent's failure to apply its own standards can give rise to an inference of discrimination by themselves.

Given the elements of a prima facia case that are undisputed and the conclusion that the Complainant was available or could have been reasonably available under the conditions of the Respondent, we now must turn to the reason or reasons proffered by the Respondent for its refusal to hire the Complainant. As indicated previously the Respondent has offered several different though related reasons for its failure to hire the Complainant. In general, these reasons seem to come down to there were no positions available that the Complainant could fill and that when positions came available, the Complainant had not checked in at the precise time of availability. If there were no positions available, this would represent a legitimate nondiscriminatory reason for not hiring the Complainant. Equally, if the Respondent did not know that the Complainant remained available when positions became available, it could not be necessarily faulted for not hiring her. This too could be a legitimate nondiscriminatory reason for its actions. Borowski testified that after he had hired Kristin Hegley on August 16, 1989 that it was his impression that there were no other positions available on the

schedule. Shinnick testified that there were no positions available on August 21, 198! and August 28, 1989, when he spoke with the Complainant. Additionally, in its response to the initial complaint in this matter the Respondent stated that there were no positions available from August 16, 1989 until September 1, 1989. Both Borowski and Shinnick testified that as a general matter, they hired people who came into the restaurant or happened to called back while there was a position open. Shinnick tested that the Complainant must not have called back when there was an opening. There is evidence in the record indicating that the Respondent had a legitimate nondiscriminatory reason or explanation for its failure to hire the Complainant.

Pursuant to Burdine, supra, the Complainant can overcome the Respondent's explanation of its actions by demonstrating that either the Respondent's proffered explanation is simply not credible or that it is a pretext for other discriminatory motives. The Complainant bears the burden of proof and persuasion.

There is reason to doubt the credibility of the Respondent's proffered explanations for its refusal to hire the Complainant. With respect to the contention that there were no positions available, the record contradicts this assertion on three occasions. Exhibit 15 which was submitted by the Respondent demonstrates that on two occasions between August 16, 1989 and September 1, 1989 the Respondent hired people when it claimed there were no positions available. On August 17, 1989, Jennifer Suenicht was hired for a bus person position. On August 23, 1989, Luz Maria Vergara was hired to fill several positions including bus person and host. These people were hired during a period when the Respondent asserted that there were no positions for a bus person. Exhibit 15 may have some inconsistencies but it is up to the Respondent as the party offering it to explain those inconsistencies. One such inconsistency is that Exhibit 15 indicates that Kristin Hegley began her employment on August 16, 1989, the same day as her interview. Exhibit 15 states that the date hired for purposes of the exhibit is the first day worked. The Respondent testified that Kristin Hegley's first day of work was actually August 19, 1989. Given the fact that the exhibit indicates that her date of hire was August 16, 1989, it leaves open to question whether Suenicht and Vergara actually began work on the date indicated in the exhibit or whether those were the dates upon which they were offered employment. At a minimum, it raises a serious question about the Respondent's claim that there were no positions open during the critical period.

The next part of the record that calls into question the Respondent's claim that there were no bus positions open from August 16,1989 to September 1, 1989 is the testimony by deposition of Kerry Wilcox. In the summer of 1989, Wilcox was the boyfriend of the Complainant. They had been involved for a number of years but were not then living together. After the Complainant's third contact with the Respondent on August 28, 1989, she was suspicious of the Respondent's protestations that there were no positions available. The Complainant asked Wilcox to stop by the restaurant to see if he could find out if there were positions available. He went to the restaurant in the mid-afternoon of August 30, 1989. He asked if there were any bus or wait staff positions available. He then spoke to a person who appeared to be a manager. Though Wilcox did not get the name of the person to whom he spoke, the person generally fits the description of Borowski. Shinnick was not present at the restaurant on August 30, 1989. Wilcox was told that there were bus or wait positions available for people who could work both lunch and dinner shifts. The person to whom Wilcox was speaking stated that they were too busy interviewing to speak with him at that time. He was invited to come back later that afternoon or the next day. Wilcox did not return and did not fill out an application.

After Wilcox related his experience to the Complainant, she was angry. That day, August 30, 1989, she called the Respondent to inquire about the availability of bus positions She identified herself but did not learn to whom she was speaking. She was told that there were no positions available.

This type of "test" calls directly into question the testimony of the Respondent. Despite some weaknesses in the testing procedure used by the Complainant, it is credible. Most glaring of the weaknesses is the lack of a recording and identification of the person to whom Wilcox spoke. Even if the person was not Borowski, Wilcox's testimony that he appeared to be a manager is buttressed by the fact that Wilcox was directed to this person and Wilcox's observation that this person seemed to be conducting interviews. Wilcox testified that he asked specifically about bus and wait staff positions. The Respondent testified that there were quite a few dishwasher positions open during this period but Wilcox made it clear that it was bus or wait staff positions in which he was interested. Since the Respondent does not hire wait staff except from the ranks of its own employees, the only positions that he could have been considered for were bus staff. There can be little argument that there was no confusion over the positions in which Wilcox was interested. The credibility of Wilcox's recounting is further supported by his indication that the flexibility of Wilcox's schedule seems to have been the primary interest of the "manager". This rings particularly true given the emphasis put on schedule flexibility by Borowski and Shinnick at the hearing.

The final point concerning the confusion over the alleged lack of positions also has applicability to the Respondent's argument that Complainant was not selected because she did not call back while there was an opening. Exhibit 10 and exhibit 15 highlight the inconsistency of the Respondent's position. Exhibit 10 is a package of applications of people who were hired between August 16, 1989 and September 1, 1989. This package does not contain the applications of Jennifer Suenicht and Luz Maria Vergara. The applications of Karrie Knapp and Sara Darcy indicate that they were submitted on August 30, 1989 and August 29, 1989 respectively. Exhibit 15 which purports to demonstrate the date of hire which is defused as the first day of work shows that Knapp was hired on September 1, 1989 and that Darcy was hired on September 5, 1989. The same confusion as was demonstrated above with respect to similar dates for Kristin Hegley exists here. It is not possible to tell whether Knapp was hired on August 30, 1989 to start on September 1, 1989 or whether she was hired on September 1, 1989 and started that day or some later day. The same is true with respect to Darcy. Given Wilcox's statement that he was told on August 30, 1989 that there were positions available as bus staff, the confusion deepens. The Respondent does not explain or clarify this mix up in dates.

As a result of these points of confusion and contradiction, the Respondent's proffered explanation that there simply were no positions open is not credible. For the reasons stated in the above discussion of the Complainant's availability for work on Fridays, discussion of the Respondent's further explanation that the Complainant was not available for times when there were openings is unnecessary. Karrie Knapp was hired or began work on September 1, 1989 and was assigned to work Tuesday and Friday nights. Sarah Burgess was either hired on or began work on September 1, 1989 and was assigned to work Wednesday and Friday nights. If the Complainant had been given the opportunity to change her schedule, she would have been able to work either of these shifts. The Complainant was not given an opportunity to demonstrate that she was available for these shifts despite having contacted the Respondent twice within the four days immediately preceding these hires to express her continued interest.

The Respondent also seems to argue that the Complainant was not hired because she had not called in or checked at the restaurant precisely at the time that a position became available. Both Borowski and Shinnick testified that they did not as a general rule call back persons who had submitted applications earlier when a position came open. Instead they would hire someone who came in while the position was open or someone who had applied earlier but called back in when the position was open. The explanation for this practice is that it was too difficult to determine whether the Respondent had current information particularly about schedules and interest in the position. Shinnick testified that it

was just easier to take someone who happened to be there. If this is the practice, then there is virtually no reason for the Respondent to accept and hold applications. Borowski testified that they did keep applications that they called out on some infrequent basis. In this specific case the Respondent knew that the Complainant was still interested in the position because she had spoken with Shinnick on August 28, 1989 and someone again on August 30, 1989. If a position became available on September 1, 1989, it strains credulity to think that the Respondent could not have known of the Complainant's interest. The positions filled on September 1, 1989 were both ones that included working on Friday nights. As discussed earlier, the Complainant could and would have changed her schedule to be available. While there is some appeal in the simplicity of the Respondent's position, i.e. that it simply fills positions from the pool of applicants standing in its lobby, the testimony supporting this explanation of the facts was mere conjecture on the part of Borowski and Shinnick who could only testify that successful applicants had probably called back or come in at the right time. That type of speculation is insufficient to support the proffered reason.

The Respondent has too many statements that are either subject to differing interpretation or contrary proof not to find that its proffered reasons are not credible. Under McDonnell-Douglas, supra and Burdine, supra, the Complainant has proven out a case of discrimination on the basis of race. We must now turn to the issue of damages.

The Complainant does not seek an order for employment. While this would be one of the customary remedies sought in an employment discrimination case, it will not be discussed further.

The Complainant seeks an award of back pay. MGO 3.23(9)(2)(b) specifically authorizes awards of back pay. In this case the Complainant, by use of tax returns and testimony demonstrated that she would have received two thousand nine hundred and thirty nine dollars ($2,939) in wages from the Respondent until she obtained another job. The testimony is clear that the Complainant wished to work approximately twenty (20) hours per week. The Respondent presented no testimony that her request could not be accommodated. While it is true that the Complainant had a busy personal schedule, she was not attending school and could, with some limited restrictions, set her own schedule. It is clear from the record that at the time that the Complainant applied, a bus person would have made three dollars and forty five cents ($3.45) per hour. At the end of 1989, this rate was increased to three dollars and seventy cents ($3.70) per hour. The testimony was clear that these base rates did not increase with seniority unless a bus person was promoted to the wait staff or some other position. Such promotions seem likely though promotion cannot be assumed. The Complainant gained full-time employment with Dane County at a higher wage than offered by the Respondent in June of 1990. Again it cannot be assumed that the Complainant would have maintained her position with the Respondent after obtaining this employment. Given these facts, the Complainant would have worked twenty (20) hours per week at three dollars and forty five cents ($3.45) per hour for nineteen (19) weeks in 1989. She would have worked twenty (20) hours per week at three dollars and seventy cents ($3.70) per hour for twenty two (22) weeks in 1990 until she became employed on a full-time basis with Dane County.

The Respondent in its reply brief proposes a different method of calculation. It asks that the Hearing Examiner compare the wages earned per month by other bus staff. This is inappropriate because there is nothing in the record to indicate that these employees would work comparable schedules. Given the fact that the Complainant was not a student, it is not unreasonable to believe that the Complainant might work more hours per week than an employee that was a student with a class and study schedule. There is also nothing in the record to indicate whether and when the employees singled out by the Respondent were promoted to the wait staff or some other position.

In addition to an award of back pay, the Complainant seeks an award of compensatory damages for emotional distress. The Commission has determined that it has the authority to award such damages in employment cases. In the first decision to award these damages, the Hearing Examiner awarded the Complainant three thousand five hundred dollars ($3,500) where it was shown that the Complainant suffered a public attack of incontinence as a result of the Respondent's discrimination resulting in great embarrassment to the Complainant. Nelson v. Weight Loss Clinics of America Inc. et al., MEOC Case No. 20684 (September 29, 1989) In Perez v. Affiliated Carriage Systems Inc., MEOC Case No. 20938 (December 30, 1991) the Hearing Examiner awarded the Complainant two thousand dollars ($2,000) for the loss of dignity and the embarrassment of discrimination. In Leatherberry nka Lopez v. GTE Directory Sales Corp., MEOC Case No. 21124 (January 5, 1993) the Hearing Examiner awarded the Complainant twenty five thousand dollars ($25,000) as a result of the loss of personal motivation and the distress of losing her future in the company accompanied by being exposed to a supervisor who used racial expletives.

The Complainant testified that she was "pissed" and upset when she came to realize, despite having given the employer the benefit of the doubt, that she had likely been the victim of discrimination. In comparison to the evidence of emotional impact in other Commission cases, this is relatively slight.

However, it cannot be denied that discrimination has an emotional impact. The United States Supreme Court likened the effect of discrimination to a tort on ones dignity. Curtis v. Loether, 415 U.S. 189, 94 S. Ct. 1005 (1974) Such damage need not be demonstrated by way of expert testimony and may be presumed from the circumstances. Chomicki v. Wittekind, 128 Wis. 2d 188, 381 N.W.2d 631 (App. 1985)

Under the circumstances of this case a nominal award of damages is appropriate. While the Complainant seems to be a resourceful and highly motivated young woman, she was angered and frustrated by the Respondent's unfair treatment in denying her a position for which she was undoubtedly over-qualified. However, there was no testimony that these effects were long lasting or caused a serious disruption in the Complainant's life or relationships. Given the degree of impact that can be gleaned from the record the Hearing Examiner will award seven hundred fifty dollars ($750) to the Complainant as compensation for the emotional distress caused by the respondent's discrimination.

In order to be made whole, the Complainant must also be compensated for the costs of bringing this action. Such an award must include a reasonable attorney's fee. If such fees are not included in the awards to prevailing Complainants the Commission would be likely to lose its most effective tool for enforcement of the ordinance, the private complaint. Prospective Complainants might be discouraged from bringing a complaint because of the expense of hiring an attorney and pursuing their rights. The order of the Hearing Examiner must include such costs.

Signed and dated this 10th day of February, 1993.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Kathleen Chung 321 West Mifflin, #5 Madison, WI 53703 Complainant vs. Paisans 80 University Square Madison, WI 53703 Respondent	DECISION AND ORDER Case No. 21192

On February 10, 1993, the Hearing Examiner issued his recommended findings of fact, conclusions of law and order in the above captioned matter. As part of the order he directed the Complainant to file a Petition for her costs including a reasonable attorney's fee. The Complainant filed her Petition, along with a supporting brief and affidavits, on March 15, 1993. Pursuant to the provisions of the order, the Respondent filed objections to the Complainant's Petition on April 2, 1993. These objections were both legal and factual.

The factual objections are to the number of hours and the specific hours accounted for by the Complainant. As a result of these objections, the Complainant, on May 25, 1993, reduced the hours claimed for work performed in connection with this matter limiting her claim to work performed prior to October 17, 1991. The Respondent maintains its objection to the accounting. A public hearing was held with respect to these factual issues on July 9, 1993. Briefs will be submitted and a decision on these factual issues will be addressed at a later date.

MEMORANDUM DECISION

The Respondent has raised three legal objections to the submission of the Complainant. First, it objects to the hourly rate of one hundred forty dollars ($140) per hour. The Respondent claims that this does not necessarily represent the market rate for legal services in the related area in Madison and that therefore the Complainant has failed to demonstrate part of the elements necessary for proof of an attorney's fee award.

An element of any attorney's fee award is a determination of a reasonable hourly rate. Hensley v. Eckerhart, 103 S. Ct. 1933 (1983) This is part of the petitioner's burden of proof. The materials provided by the Complainant demonstrate that her attorney billed her work at the rate of one hundred and forty dollars ($140) per hour. An attorney's usual billing rate is presumptively reasonable. Gusman v. Unisys Corp., 61 EPD para. 42,075 (7th Cir. 1993). There is nothing in the submission of the Respondent to rebut this presumption. This, by itself, is sufficient to resolve this part of the Respondent's complaint. However, in the case of Leatherberry v. GTE Directory Sales Corp. MEOC Case No. 21124, the Commission has received affidavits in support of a fee petition that indicate that the hourly rate of Ms. Fox is modest in comparison to that of other equally qualified attorneys in Madison working in the area of civil rights litigation. From the information available to the Commission, it would appear that a reasonable market rate for an attorney with significant civil rights experience is one hundred and seventy five dollars ($175) an hour.

While the record and case law support the Complainant's rate of one hundred and forty dollars ($140) per hour, the Complainant did not help in reaching this determination. The affidavit of attorney Jeff Scott Olson submitted in this matter is next to useless. It provides no information concerning his hourly rate or that of any other attorney in the Madison area. It seeks to substitute Mr. Olson's opinion on the reasonableness of the petition for that of the Commission. It is the Commission that must ultimately pass judgment on the reasonableness of the petition. The opinion of a member of the local bar is not probative of the petition's reasonableness within the standards of the Commission. Additionally, Mr. Olson apparently only reviewed the petition and its attachments. Since the Complainant's attorneys mistakenly included hours that should not have been included for this matter, Mr. Olson's affidavit can only be read to find that such a practice is reasonable when it is clearly not. The Complainant seems to have supported her attorney's hourly rate almost by mistake but it is reasonable under the law.

The second contention of the Respondent is that the relatively modest outcome of the complaint should be considered in determining whether the requested award of attorney's fees is "reasonable" or not. This element of discretion in the making of an award has been recognized in the Hensley case. The key consideration in the exercise of discretion in this regard is to what extent the litigation accomplished what it intended or at least something significant. Helms v. Hewitt, 780 F.2d 367 (3d Cir. 1986), cent. granted, 106 S. Ct. 2914 (1986). In this case, the Respondent argues that the dollar amount awarded should be considered insignificant. Also, the Respondent argues that the litigation did not pave any new ground or present any significant new issues for resolution.

The Hearing Examiner disagrees with the characterization of the result of this case as "modest". It is true that there was not an award of tens of thousands of dollars in this case but not all civil rights cases can or should generate large damage awards. This litigation accomplished, by and large, its initial goals. Those goals would seem to have been the redress of the Complainant's rights through an award of back pay and damages for the deprivation of her rights. She did not seek an order for employment or other equitable relief, though the Hearing Examiner entered an order requiring the Respondent to cease and desist from discrimination. The only area of relief which the Complainant sought that was denied to her was an award of punitive damages. Given the high standards of proof applicable to a claim for punitive damages, it is only the exceptional case that results in such an award.

The Respondent's position seems to be premised upon the assumption that only cases involving new or difficult issues or major awards of damages should result in a full attorney's fee award. Such a position would result in depriving counsel for the complainant in the run of the mill civil rights case of a just fee for his or her work. This result would tend to make representation unavailable to many, if not most, civil rights complainants. This is clearly not the intent of the Commission. The Commission's mandate is to make the complainant whole and to implement the protections provided in the Ordinance. Anything that would tend to hinder complainants from enforcing their rights under the Ordinance would be counter to the Commission's mandate.

It is true that the Complainant did not receive a large award for the emotional damage component of her injuries. Under the circumstances of this case, to use the lack of significant emotional damage as a reason to reduce the attorney's fee award would be to reward the Respondent for being fortunate in who their actions discriminated against.

There is nothing in this record to indicate that this action was brought or pursued as a vehicle of personal gain or for any other less than honorable purpose. The Respondent has presented no

compelling arguments for why the Hearing Examiner should exercise his discretion and disturb the usual circumstance of a full award of attorney's fees.

The third argument presented by the Respondent in support of its contention that the attorney's fee award should be reduced in this matter is that the Complainant's complaint stated three possible grounds for the Respondent's discriminatory action but she prevailed on only one. The Respondent argues that there should be a reduction, possibly a proportional reduction, because the Complainant did not win on all claims of discrimination. The Hearing Examiner rejects this overly simplistic approach for two reasons.

First, neither party spent any significant time dealing with the issues of national origin/ancestry or age discrimination. As the Hearing Examiner noted in the underlying decision, both parties seemed to assume that race and national origin/ancestry discrimination were one and the same. Virtually no time was spent by either side proving or disproving national origin/ancestry discrimination. It is for this exact reason that the Complainant lost on this claim. While the parties did spend some additional time on the issue of age discrimination, the record cannot be read to support a contention that either party spent more than a minimal amount of time on this issue. It is clear that the majority of time spent by both sides was over the issue of whether there was differential treatment of any kind. Once this issue was established, then the additional time spent in connecting one of the Complainant's protected classes was relatively slight. These circumstances do not warrant a reduction in the award of attorney's fees.

The second reason for the Hearing Examiner's rejection of the Respondent's position is somewhat related to the first. Case law at the federal level recognizes that where a Complainant loses on some issues that a reduction in attorney's fees might be appropriate. However, there has been a clear rejection of the Respondent's proportional approach. The test adopted by most courts is whether there is a relationship between those issues upon which the Complainant prevails and those upon which he or she loses. Hensley (supra), Zabkowicz v. West Bend, 789 F.2d 540 (7th Cir. 1986) As indicated above, the primary factual issue in this litigation was whether there was differential treatment. The issues relating to the basis of that differential treatment all depended upon a finding of differential treatment. Though three different protected classes were identified, a finding of discrimination involving any or all classes relied upon a central body of facts. The claims upon which the Complainant did not prevail are closely related factually and are almost indistinguishable legally from the one upon which she did prevail. The Respondent has not established that there is the requisite lack of connection or relationship between the Complainant's race and her national origin/ancestry and age claims to warrant a reduction in the attorney's fee award.

It is an established part of attorney's fee litigation that a prevailing party is entitled to include the costs of preparing and defending an attorney's fee petition. Burke v. Guiney, 700 F.2d 767 (1st Cir 1983), Balark v. Cumin, 655 F.2d 798 (7th Cir. 1981). It is the intention of the Hearing Examiner to hold to this general principle in this matter. At the end of these proceedings the Complainant shall be entitled to submit a supplementary petition covering the hours and cots related to the preparation and defense of its petition.

It should be understood by both parries, however, that the Hearing Examiner will entertain an argument by the Respondent that this supplementary petition must be adjusted in light of the Complainant's earlier improper inclusion of hours unrelated to the pending matter and her subsequent withdrawal of her request for a contingency fee enhancement. While the Hearing Examiner is aware of the difficulties engendered by Attorney Fox's leaving the case and Mr. Halloran's subsequent assumption of responsibility, the Complainant's handling of this matter is a cause of concern for the

Hearing Examiner. The mistakes that were admittedly made by the Complainant's counsel in the preparation and defense of this matter are not ones for which the Respondent should be made to pay.

The Respondent's legal objections to the Complainant's petition for attorney's fees are dismissed. The parties shall submit briefs pertaining to the supplementary hearing held on July 9, 1993 in accordance with the following schedule:

The Respondent shall submit its brief and argument in support of its position with regard to the supplementary hearing held on July 9, 1993 no later than twenty one (21) days from the date of this Decision and Order.

The Complainant may submit her response to the Respondent's brief and argument within twenty (20) days of her receipt of the Respondent's brief.

The Respondent shall have ten (10) to reply to the Complainant's response.

Signed and dated this 29th day of July, 1993.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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

Kathleen Chung 321 West Mifflin, #5 Madison, WI 53703 Complainant vs. Paisans 80 University Square Madison, WI 53703 Respondent	RECOMMENDED DECISION AND ORDER ON ATTORNEY'S FEES Case No. 21192

BACKGROUND

The Recommended Order entered in this matter on February 10, 1993 awarded the Complainant her costs and reasonable attorney's fees and established a schedule for the submission of a petition for costs and attorney's fees, and for briefs in support of and in opposition to such a petition. On March 14, 1993, the Complainant filed her petition for $9,557.00 in attorneys fees, $552.46 in costs and a contingency fee enhancement of $9,557.00. Respondent filed its objections on April 2, 1993. On May

18, 1993, the Complainant submitted additional material in support of her petition reducing her claim for attorney's fees to $7,770.00 and costs of $552.46.

On May 24, 1993, the Hearing Examiner held a supplementary scheduling and status conference with regard to this matter. The Complainant had reduced the total amount of her petition in response to the Respondent's objections. However, the Respondent still objected to the petition. The Complainant submitted an amended petition on May 25, 1993 pursuant to the direction of the Hearing Examiner.

A supplementary hearing was held on July 9, 1993. On July 8, 1993, the Complainant again submitted another and somewhat different accounting of her costs and attorney's fees. The July 8, 1993 material set forth attorney's fees attributable to Ms. Fox of $6,734.00 and Mr. Halloran of $1,140.00 and costs of $552.46.

On July 29, 1993, the Hearing Examiner issued a Decision and Order disposing of certain objections of the Respondent to the Complainant's amended petition dealing with legal challenges to an award of attorney's fees. That Decision and Order set a schedule for the submission of additional briefs on the factual objections of the Respondent to the Complainant's amended petitions.

Subsequent to the July 9, 1993 supplementary hearing and the July 29, 1993 Decision and Order, the Hearing Examiner received no briefs or other information from the parties. The Hearing Examiner has reviewed the several petitions and affidavits submitted by the Complainant and has considered the arguments advanced by both parties and now makes the following:

RECOMMENDED FINDINGS OF FACT - ATTORNEY'S FEES

1. On February 10, 1993, the Hearing Examiner entered a recommended order awarding the Complainant her costs and reasonable attorney's fees in the proceeding.
2. On March 14, 1993, the Complainant filed her petition for costs and attorney's fees, together with affidavits executed by her attorney, Thomas G. Halloran and attorney Jeff Scott Olson, in support of the petition. On May 18, 1993, May 25, 1993 and July 8, 1993, the Complainant's attorney submitted supplemental or amended petitions and affidavits in support of the claim for costs and attorney's fees.
3. The Complainant has incurred certain costs in connection with the proceeding, which are as follows:
   a. Photocopying costs in the amount of $25.90
   b. Fees for postage in the amount of $1.90;
   c. Telephone expenses in the amount of $4.08;
   d. A document delivery fee of $9.95;
   e. A fee of $454.98 for a copy of the transcript of the hearing held on Complainant's complaint of discrimination and for deposition transcripts.
4. The Complainant's attorneys, Rosemary J. Fox and Thomas G. Halloran, are employed by the firm of Fox and Fox S.C., which was formed in 1991. The firm has a general practice, with an emphasis on civil litigation and particularly civil rights and employment discrimination. Rosemary J. Fox has been licensed to practice law for a number of years and has worked principally in the areas of civil rights and discrimination law since her admission. Thomas G. Halloran has been licensed to practice law since 1977 and has practiced in the areas of civil and criminal litigation since then. Ms. Fox had primary responsibility for the Complainant's case from its inception until she took a leave of absence from the law firm. Mr. Halloran has had principle responsibility for the Complainant's case since February of 1993.

5. The usual and customary fee charged by Rosemary J. Fox to her individual clients for legal services is $140.00 per hour. Thomas G. Halloran's usual and customary fee for the provision of legal services to his individual clients is $150.00 per hour.
6. The Complainant has filed an itemized bill which reflects that her attorneys expended a total of 55.7 hours representing the Complainant in the proceeding. Ms. Fox accounts for 48.1 of these hours and Mr. Halloran accounts for 7.6 of these hours. All but five hours attributable to Mr. Halloran were reasonably expended in representing the Complainant. None of the hours billed by the Complainant's attorneys were for duplicative, unnecessary or non-productive time except for the five hours attributable to Mr. Halloran. The unnecessary hours attributed to Mr. Halloran concerned research and brief writing on the issue of contingency fee enhancement which was withdrawn by the Complainant and for preparation of a petition that included hours that were clearly not related to the present matter.
7. The reasonable hourly rate for the legal services rendered the Complainant by her attorneys is $140.00 per hour for the work of Rosemary J. Fox and $150.00 per hour for the work of Thomas G. Halloran.
8. The Complainant has incurred additional costs and attorney's fees in support of her petition that have not yet been accounted for.

RECOMMENDED CONCLUSIONS OF LAW - ATTORNEYS FEES

9. A Complainant in proceedings before the Equal Opportunities Commission is entitled to recover costs and reasonable attorneys fees on any significant issue on which she or he prevails. MEOC Rule 17; see also, Vance v. Eastex Packaging, MEOC Case No. 20107, (Aug. 29, 1985) (citing Hensley v. Eckerhart, 461 U.S. 424 (1983)); Cf. Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984).
10. One of the fundamental purposes of a fee award is to compensate an attorney for her or his efforts. Accordingly, the fee award should be determined by allowing the attorney to recover a reasonable hourly rate for all time reasonably expended in representing her or his client. Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (enbanc).
11. It is appropriate to use an attorney's or law firm's customary billing rate in setting a reasonable hourly rate in awarding fees to that attorney or law firm. See, Laffe v. Northwest Airlines, Inc., 746 F.2d 4, 15 (D.C. Cir. 1984).
12. The fees awarded to a prevailing Complainant in a civil rights case ought not be limited by any monetary award because substantial non-monetary benefits are also realized by successful Complainants, and because an adequate fee is necessary to attract competent counsel in such cases. City of Riverside v. Rivera, 477 U.S. 561, 573-78 (1986); Copeland v. Marshall, 641 F.2d at 987.
13. A prevailing party is entitled to her or his costs including a reasonable attorney's fee incurred in support of a fee petition. Bond v. Stanton, 630 F.2d 1231, 123.5 (7th Cir. 1980) appeal after remand, 655 F.2d 766 (7th Cir.), cert. denied, 454 U.S. 1063 (1981).

RECOMMENDED ORDER

14. The Respondent is ordered to pay the Complainant's attorney's fees in the amount of $7,124.00.
15. The Respondent is ordered to pay the Complainant costs in the amount of $552.46.
16. The Complainant may file a supplementary petition including a brief and supporting affidavits for her costs and attorney's fees incurred in supporting or defending her petition and amended petition for costs and attorney's fees within 20 days of the undersigned date. The Respondent may file objections, briefs and affidavits to the Complainant's supplementary petition within 20 days of the receipt of the Complainant's supplementary petition. The Complainant may file a

reply to the Respondent's objections including an additional brief and affidavits within 10 days of the receipt of the Respondent's objections. The Hearing Examiner may hold additional proceedings if necessary.

MEMORANDUM DECISION

On February 10, 1993, the Hearing Examiner issued Recommended Findings of Fact, Conclusions of Law and an Order concluding that the Respondent had discriminated against the Complainant on the basis of her race and ordering various remedies. Among these remedies, the Complainant was directed to file a petition for her costs including a reasonable attorney's fee. On March 14, 1993, the Complainant submitted her petition along with supporting affidavits and a brief. On April 2, 1993, the Respondent submitted its objections to the petition in the form of a brief. The Respondent's objections went to both the factual and legal basis of the Complainant's petition.

The Respondent objected to the inclusion of hours on the time or billing records for work relating to a matter unconnected with the complaint of discrimination. The Respondent also objected to the hourly rate of compensation claimed by the Complainant. The Respondent argued that because the Complainant had prevailed only on one of three claims of discrimination and that because the relief ordered by the Hearing Examiner was arguably modest that the Complainant should not be entitled to attorney's fees or at least the fees awarded should be reduced to reflect the outcome. The Respondent also objected to the Complainant's request for a contingency fee enhancement of the attorney's fee.

On May 18, 1993, the Complainant submitted additional information in support of her petition. This submission was made in response to the Respondent's April 2, 1993 objections and in anticipation of a conference ordered by the Hearing Examiner for May 24, 1993. The Complainant reduced her request by removing the hours attributable to the firms work on an unrelated matter and withdrew her request for a contingency fee enhancement of the attorney's fee.

At the May 24, 1993 conference, the Complainant outlined the reductions that had been made to her petition. The Respondent maintained its legal objections and indicated that it still had some unresolved doubts about the factual basis of the petition. The Hearing Examiner set a supplementary proceeding for July 9, 1993. The Complainant was directed to provide a new, clear and complete accounting in support of her petition.

On May 25, 1993, the Complainant submitted new materials in support of her petition. These reflected the Complainant's withdrawal of her request for a contingency fee enhancement and the removal of hours from the time sheets unrelated to the complaint of discrimination.

On July 8, 1993, the Complainant submitted yet another explanation setting forth her request for fees and costs.

On July 9, 1993, the Hearing Examiner convened a supplementary proceeding in this matter to take testimony on the Respondent's factual objections to the petition. At the end of the testimony, the parties agreed that prior to briefing the factual issues, they would like the Hearing Examiner to issue his decision on the legal objections. It was agreed that a briefing schedule would be held in abeyance pending a decision on the Respondent's legal objections.

On July 29, 1993, the Hearing Examiner issued his decision on the Respondent's legal objections to the Complainant's petition for costs and attorney's fees. The parties received this decision on August 2, 1993 as evidenced by signed return receipts for the decision. At the: end of the decision, the

Hearing Examiner established a schedule for the submission of briefs. The first briefs were due at the end of August. The Hearing Examiner has not received briefs from either party.

The July 29, 1993 decision of the Hearing Examiner essentially determined that the legal objections of the Respondent had no applicability in the current case. The Conclusions of Law reached herein are not intended to supervene those reached in the July 29, 1993 decision but are intended to supplement the earlier decision.

The Complainant has stipulated that she is not requesting any compensation for time expended between October 17, 1991 and February 10, 1993. It is during this period that Rosemary J. Fox undertook an additional representation of the Complainant in a matter unrelated to the complaint of discrimination. This was also the period of time for which the Respondent had the majority of its concerns with regard to issues surrounding the accuracy of the Complainant's billing.

At the July 9, 1993 hearing, the Respondent questioned Ms. Fox about other entries on the time records outside the October 17, 1991 to February 10, 1993 period. These questions were intended to demonstrate that the billing entries were too vague to be able to assure that the entry was for work reasonably necessary and actually performed in connection with the complaint in this matter. Ms. Fox testified that she undertook no other representation on behalf of the Complainant beyond that necessary in this complaint until after October 17, 1991 . There is no evidence in the record challenging her credibility in this regard. It is true that many of the time records are not stated with the degree of precision that would be preferable when reviewing a petition for fees, but there is no evidence in the record from which one could conclude that any specific billed item was unnecessary or not reasonably connected with the representation of the Complainant. Given the Complainant's stipulation that she is making no claim for the period of October 17, 1991 to February 10. 1993, the Hearing Examiner concludes that the number of hours (48.1) and the amount charged per hour ($140) attributable to Rosemary J. Fox were reasonable, necessary and not duplicative. The Hearing Examiner finds that an award of fees based upon Ms. Fox's representation of the Complainant in the amount of $6734.00 is appropriate and supported by the record.

Sometime during the period October 17, 1991 to February 10, 1993, Ms. Fox took a leave of absence from her firm including her representation of the Complainant. When the Hearing Examiner issued his decision on February 10, 1993, Thomas G. Halloran took over representation of the Complainant. It fell to him to review the decision and to prepare the fee petition. He submitted the petition, supporting affidavits and a brief on March 14, 1993. After reviewing the Respondent's objections filed on April 2, 1993, he submitted additional materials in support of the petition on May 18, 1993. In this submission, Halloran recognized that hours attributable to Ms. Fox's representation on an unrelated matter were erroneously included in the petition's supporting documentation. The additional material submitted on May 18, 1993 deleted the inappropriate late hours.

A scheduling/status conference was held on May, 24, 1993. The Respondent was not satisfied that the deletions made by Halloran resolved all of its objections to the fee petition. A supplementary proceeding was scheduled for July 9, 1993. The Hearing Examiner directed Halloran to submit an amended petition to clarify the accounting of the hours and the issues before the Hearing Examiner. Halloran submitted the amended petition on May 25, 1993.

In the cover letter to this petition, Mr. Halloran asserts that the amended petition withdrew the Complainant's request for a contingency fee enhancement, deleted the hours between October 17, 1991 and February 10, 1993 and reduced the hours he claimed to account for the withdrawal of the request for contingency fee enhancement. This reduction would have presumably been for the hours

related to research and preparation of the Complainant's brief submitted on March 14, 1993. He also stated in his motion that the hours he was claiming were limited to the date of the filing of the fee petition on March 14, 1993.

On July 8, 1993, Halloran submitted more materials in support of the Complainant's amended petition. In his cover letter, Mr. Halloran again asserts that he had adjusted his hours to reflect the withdrawal of the request for a contingency fee enhancement.

Review of the record shows that at the time of the March 14, 1993 submission, Mr. Halloran claimed fees of $975.00. This amount was derived from 30 minutes of time on February 12, 1993 and 6 hours of time on March 11, 1993. The first work revolved around the review of the Hearing Examiner's decision and discussion with the Complainant about the decision. The second block was attributable to the work necessary to the preparation of the fee petition. Halloran's May 25, 1993 submission indicates that Halloran had reduced his hours to reflect only work that he performed up through March 15, 1993 and that he reduced his hours relating to the withdrawal of the request for a contingency fee enhancement. These assertions were repeated in the July 8, 1993 submission.

There is no indication that Halloran made either of the above indicated reductions in the hours that he claimed. In the May 25, 1993 submission, Halloran's time sheets show a reduction in the initial $75 charge for work performed on February 12, 1993, to a charge of $37.50. Instead of a reduction of the $900.00 charge for 6 hours of time on March 11, shown on the time sheet submitted with the original petition, the May 25, 1993 amended petition shows a $450.00 charge on March 10, 1993 and a $450.00 charge on March 11, 1993. A $900.00 charge is not reduced by breaking it down into two $450.00 charges. The charge stemming from work performed on February 12, 1993 that is reduced in the May 25, 1993 amended petition would seem to have nothing to de with the Complainant's decision to withdraw her request for a contingency fee enhancement. The fact that this representation is repeated in the July 8, 1993 submission causes the Hearing Examiner to question how closely Halloran has reviewed his time sheets.

Halloran also states in his May 25, 1993 Motion that he is making a claim only for work performed prior to March 15, 1993. The time sheet submitted by Halloran with the May 25, 1993 petition clearly shows additional charges in April and May. The total amount of Halloran's claim is $1140.00. Given the one reduction made by Halloran in the May 25, 1993 amended petition, this amount could only be reached if Halloran claimed hours after March 15, 1993.

The Hearing Examiner finds that Halloran's claim must be reduced by 5 hours. Halloran states that a reduction is appropriate but fails to make the reduction that he claims. As indicated above, the only reduction that appears in the time sheets submitted by Halloran was on the day that he received the decision of the Hearing Examiner. This could not rationally be the reduction that Halloran claims relates to the withdrawal of the request for a contingency fee enhancement. The portion of the Complainant's brief dedicated to the contingency fee enhancement must have taken more than the 15 minutes by which Halloran actually reduced his hours given its length in relationship to the brief as a whole (16 out of 21 pages plus much of the affidavits).

Since Halloran admits that a reduction is appropriate and for whatever reason he failed to make that reduction, it falls to the Hearing Examiner to determine an appropriate reduction. A reduction of 5 hours is appropriate because of the substantial time and importance placed on this issue as reflected in the Complainant's brief. The Respondent had to expend time in responding to this issue. Though the Respondent's time is not directly being compensated for by this reduction, the Complainant should not benefit from raising an issue that it would almost immediately withdraw.

Additionally, the Complainant's March 10 and 11, 1993 charges included the time to prepare time sheets and part of a petition that included obviously inapplicable hours. Had the Complainant spent some of the time that her attorneys wish to be compensated for in verifying the hours they were claiming, this reduction would not be necessary. Given the broad description of the items being charged for in the Complainant's time sheets, it is not possible for the Hearing Examiner to fix the hours that should be deleted with great precision. It is the Complainant's burden to establish the time that should be included in her fee petition and she bears the risk of loss if her petition is not sufficiently clear to support her claim. However, it does not seem unreasonable to reduce Halloran's 6 hour claim by 5 hours where the issue dropped from the Complainant's brief consumed approximately three quarters of the space not to mention the space dedicated to this issue in the affidavits of Halloran and Olson.

The Respondent has not objected to the Complainant's petition with respect to the costs of pursuing the complaint. Accordingly, the Hearing Examiner finds that the costs as outlined in the Complainant's petition are reasonable.

As indicated in the Hearing Examiner's decision dated July 29, 1993, the Complainant may file an additional petition for her costs and reasonable attorney's fees incurred in support of her petition for costs and fees. This additional petition will be judged in light of the reasonableness of the Respondent's objections to the original petition and in light of the Hearing Examiner's July 29, 1993 decision.

Accordingly, the Hearing Examiner enters the above order for costs including a reasonable attorney's fee.

Signed and dated this 23rd day of September, 1993.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner