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

Eddie Morris 132 Lakewood Gardens Madison, WI 53704 Complainant vs. Madison Kipp Corp. 201 Waubesa Madison, WI 53704 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 21302

This matter came on for public hearing before Madison Equal Opportunities Commission Hearing Examiner Clifford E. Blackwell, III, on October 28, 1992 in Room 312 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard, Madison, Wisconsin, 53710. The Respondent appeared by Daryll Neuser and John Hanna and its attorneys Melli, Walker, Pease and Ruhly by Attorney Thomas R. Crone. The Complainant did not appear at 8:30 a.m. as scheduled. Pursuant to MEOC Rule 9.4, the Hearing Examiner waited for thirty (30) minutes before taking any testimony. At 9:00 a.m. the Hearing Examiner took an offer of proof from the Respondent's Attorney. Based upon the record of the proceedings in this matter, the Hearing Examiner now makes the following Recommended Findings of Fact, Conclusions of Law and Order;

RECOMMENDED FINDINGS OF FACT

1. The Complainant is a Black male. He worked for the Respondent at its facility in Madison until his employment was terminated on April 18, 1990.
2. The Respondent is a corporation whose principle place of business is located at 201 Waubesa Street within the City of Madison. It is a large manufacturer and employs many people in furtherance of its enterprise.
3. The Complainant filed a complaint of discrimination on April 20, 1990 charging the Respondent with permitting his racial harassment at the Respondent's work site. The Complainant makes reference to 5 incidents of harassment occurring from June, 1989 until his termination in April of 1990.
4. The first incident occurred in June, 1989 and involved a claim that he was pushed or struck by a co-worker, Tom Weidenbeck. The Complainant also alleges that he reported this incident to his supervisor.
5. Weidenbeck would testify that he never struck the Complainant. John Hanna, the Complainant's supervisor would testify that the Complainant never complained to him of this incident.
6. The Complainant further alleges that on the day following the above incident Weidenbeck and Kathy Dobson used the racial epithet "nigger" or "lying nigger" in his presence. He also assets that this incident was reported to Hanna. The Respondent denies both of these allegations.

7. The Complainant alleges that in October or November of 1989 he was sprayed with water by several co-workers. He believes this to have been intentional and he reported the incident to management.
8. Hanna assigned Douglas Malisch to investigate the incident. The investigation revealed that the Complainant was sprayed with water when a hose broke on a piece of equipment. This type of equipment failure is not uncommon and others including Hanna have been sprayed with water under similar circumstances. At the end of his investigation, Malisch informed all the workers in the vicinity of the Complainant's work station, of the Respondent's policy against racial harassment and not to engage in conduct or use language that could be construed as offensive to the Complainant.
9. The Complainant alleges that on or about April 4, 1990, Mary Frame, a supervisor, used the expression "black ass" to direct the Complainant to obey an order.
10. Frame would deny that she ever used any racial expletives.
11. The Complainant alleges that on April 11, 1990, Charles Lehman struck him in the chest and knocked him to the ground. He further alleges that he reported the incident to management.
12. On April 11, 1990 the Complainant was working on a machine adjacent to that on which Lehman was working. The Complainant's machine jammed and the Complainant took no steps to clear the jam. Lehman stepped by the Complainant and cleared the jam. If any contact occurred, it was minor and incidental to Lehman's efforts on the Complainant's machine.
13. The Complainant alleges that on April 12, 1990, Mary Frame grabbed him by his collar and dragged him to the supervisors' office.
14. On April 12, 1990, the Complainant was working voluntary overtime. Frame, a supervisor, noticed that the Complainant had been missing from his work station for approximately 45 minutes. She conducted a lengthy search for the Complainant and eventually found him in a different part of the building. She tapped the Complainant on the shoulder to gain his attention and told him to either return to his work station or to report to the Human Resource Office to straighten out any problems. Frame is much smaller in stature that the Complainant.
15. On April 18, 1990 the Complainant was terminated for his refusal to take a "for cause" drug test.
16. The Respondent's employee manual contains a policy prohibiting the use of racial epithets or the harassment of any worker.
17. On October 14, 1992, the Complainant's Attorney, Victor Arellano, withdrew from representation of the Complainant because the Complainant had failed, neglected or refused to cooperate in the preparation of the Complainant's claim.
18. On October 26, 1992, the Complainant contacted the Hearing Examiner by telephone at approximately 2:00 p.m. He requested a postponement because he was no longer represented. The Hearing Examiner indicated that such a request must be made in writing and must be served on the Respondent's Attorney. The Hearing Examiner also indicated that the Complainant should appear at the public hearing scheduled to begin at 8:30 a.m. on October 28, 1990 and be prepared to proceed with his case in the event that the Hearing Examiner denied his request.
19. On October 27, 1990, at approximately 3:40 p.m. the Complainant hand delivered to the Offices of the Commission and to the Attorney for the Respondent, a written request for postponement of the hearing. The only ground given for this request was that the Complainant was unrepresented by an attorney.
20. The Notice of Hearing issued in this matter provides that once a hearing date is scheduled it will not be changed for the convenience of the parties. The Notice further provides that within one week of the date of hearing, there will be no postponements granted except in the case of emergencies.

RECOMMENDED CONCLUSIONS OF LAW

21. The Complainant's lack of representation at the time of the hearing does not constitute an emergency within the meaning of the Notice of Hearing.
22. The Complainant failed to offer a sufficient reason for his inability to appear at the time of the hearing.
23. The Complainant is a member of the protected class "race" as that term is used in the Ordinance.
24. The Respondent is an "employer" within the meaning of the Ordinance. The Respondent's principle place of business is located within the City of Madison.
25. The Respondent did not allow or permit the racial harassment of the Complainant and therefore did not discriminate against him in violation of the Ordinance.

ORDER

26. The Complainant's request for a postponement of the hearing is denied.
27. The complaint is dismissed.

MEMORANDUM DECISION

The Notice of Hearing issued in this case contains standard language about why and when hearings may be postponed. In general, once a hearing date is established, a hearing will not be postponed for the convenience of the parties. A hearing will not be postponed within one week of the hearing except for an emergency. The question before the Hearing Examiner in this matter is whether the Complainant's lack of representation constitutes an emergency within the contemplation of the Notice of Hearing.

The purpose of these provisions concerning postponements is to assure some stability and regularity in the hearing process. This process can be lengthy and complex. It often requires a significant commitment of time and resources. There is most frequently a major commitment of time in preparation shortly before a hearing. This time is spent reviewing documents, questioning and preparing witnesses and final evaluations of settlement possibilities. A party should be able to make plans and set schedules with a reasonable expectation that there will not be a change without a substantial reason. The provisions of the Notice of Hearing are intended to give both parties the ability to plan their time and resources so that time and resources will not be wasted or duplicated without a substantial reason.

The Complainant argues that the hearing should have been postponed because he was without the representation of an attorney. The Complainant knew of his attorney's intent to withdraw unless he cooperated with his attorney, weeks before the scheduled hearing. Despite these warnings, the Complainant failed to do what his counsel requested. Two weeks before the hearing, on October 14, 1992, when Attorney Arellano finally withdrew, the Complainant was silent. He made no request for postponement until two days before the hearing. Had the Complainant contacted the Hearing Examiner immediately after or within a couple of days of Mr. Arellano's withdrawal, the circumstances would be different. In that circumstance, a postponement would not necessarily be viewed as one for the convenience of a party. Here however, the Complainant failed to make any request until two days before the scheduled hearing. This is within the period of time that the Notice of Hearing requires a demonstration of an emergency in order to have a hearing postponed.

Customarily the term "emergency" is intended to apply to those conditions or circumstances over which a party has no actual or reasonable control. Some conditions that may constitute an emergency are illness of the party or a member of his or her family, unexpected incarceration, hospitalization, unexpected weather conditions or an accident. If the "emergency" involves an attorney for a party, these conditions would equally apply. The common thread running through this list is the lack of foreseeability of the event or the lack of control of the party over the event.

The Complainant has not demonstrated that his not having an attorney represents an emergency. Since the Rules of the Commission specifically contemplate that parties may appear unrepresented, it cannot be said that having to go forward with one's case in the absence of an attorney is anything other than a normal situation. There are many parties before the Commission that proceed through the public hearing stage without an attorney. It is true that the Complainant's situation can be somewhat distinguished from the usual situation of a party going through the whole process without an attorney by the fact that he has been represented by attorneys in this matter. However, this is essentially irrelevant in this case because he lost his second attorney as a result of his own conduct. If as in the first instance, his attorney had withdrawn as a result of circumstances beyond the Complainant's control, it might lead to a different result. However, the Complainant's lack of representation at the time of hearing was entirely due to conditions within his control. Had he cooperated with his attorney as requested by the attorney, he would have had the representation that he believes he needs.

There is no indication that granting an extension would not simply result in the same problem at a later date. The Respondent had already prepared for the hearing set for October 28, 1992. I have set yet another date would have resulted in additional cost or expense to the Respondent that may not have been necessary had the Complainant either cooperated with his attorney or notified the Commission of his request at an earlier date. This problem could have been partially solved, if the Commission had the authority to assess costs for the Respondent's preparation time as a condition of the postponement. There is nothing in the Rules of the Commission that would permit such a conditional postponement. If the Complainant had demonstrated that he had a new attorney ready to represent him and that attorney needed a short period of time to prepare the case for trial, a short postponement might have been arranged. The Complainant made no such representation and it can be assumed that the Complainant sought additional time to obtain an attorney rather than to prepare his own case or to prepare a new attorney.

Under these circumstances, I cannot conclude that the Complainant's request for a postponement was for an emergency as required by the Notice of Hearing. The request for postponement is denied.

The facts found by the Hearing Examiner are based upon the Respondent's offer of proof and the exhibits presented at the time of hearing. Undoubtedly had the Complainant appeared to give testimony, there would be some contrary evidence.

Of the incidents apparently complained of by the Complainant, only two, on their face, are connected to the Complainant's race. The second incident in June of 1989 and the incident of April 4, 1990 involved an allegation of racially explicit language. The remaining incidents, assuming for the moment that they occurred, bear no intrinsic mark of discrimination. It is true that all of the incidents happened to the Complainant who is an African American male, but except for the use of language in two cases there is nothing in the record that tends to demonstrate any racial motive. The water spraying incident in November or December of 1989 appears to have been nothing more than an accident. The Complainant alleges that he was intentionally sprayed even though the Respondent's investigation revealed that it was a malfunction of the machinery that has happened before and has happened to white employees. The Complainant, in the documents available to the Hearing Examiner,

offered no explanation for his belief that the incident was an intentional afront to him motivated by his race. The Respondent also offered that all employees in the vicinity of the alleged incident were alerted to the policy of the Respondent that it will provide a harassment-free environment.

The incident that is alleged to have occurred on April 11, 1990, similarly lacks any allegations that would make a racial motive likely. According to the proof offered by the Respondent, the Complainant and Charles Lehman were working on adjacent machines when the Complainant's machine jammed. The Complainant made no apparent effort to clear the jam. Lehman, having noticed the problem, stepped in front of the Complainant and freed the equipment. Any contact that may have occurred between the Complainant and Lehman was due to Lehman's actions in dealing with the equipment problem and had nothing to do with the Complainant's race.

The alleged incident on April 12, 1990 fails to demonstrate a racial connection. The Complainant was working voluntary overtime and was observed to have been absent from his work station for a considerable period of time. The supervisor, Mary Frame, searched for the Complainant and eventually found him elsewhere in the plant. She tapped the Complainant to signal the Complainant to the Human Resources Office to resolve any problems about his work. Ms. Frame is of small or slight stature and is not likely to have "man handled" the Complainant in the manner that he alleges, i.e. grabbing his collar or throwing her arm around his neck from behind.

The first incident in June of 1989 involving an alleged physical altercation between the Complainant and Tom Weidenbeck by itself fails to demonstrate any racial harassment of the Complainant. The Respondent denies that the incident occurred and even if it happened as the Complainant asserts, it seems more the product of a personal dispute than racial harassment. It appears that the Complainant informed supervisors of Weidenbeck's presence or activity in the parking lot prior to the elbowing incident. The provision of this information was apparently not to the benefit of Weidenbeck. The only element that raises the issue of race is the Complainant's allegation that the next day Weidenbeck and another worker racially taunted the Complainant after the elbowing incident. The Respondent also denies the second incident and that the Complainant told supervisors of either incident.

It is the Complainant's burden to submit evidence sufficient to prove all of the elements of his claim. Under the circumstances of this case where the Complainant has failed to appear and thus has failed to present any evidence in his own behalf, the Hearing Examiner must decide any question of disputed evidence and allegation in favor of the Respondent. The only exception would be if there is some evidence that indicates that the testimony of the Respondent would be entirely incredible. There is no reason on the basis of this record to have such a jaundiced view of the Respondent's veracity. Accordingly, when the offer of proof demonstrates that an event did not occur or that a supervisor was not told of an event, the Hearing Examiner is inclined to accept the proof as offered and find that the offer is dispositive of the issue.

The two incidents in which the Complainant alleges that racially explicit language was used (June, 1989 and April 4, 1990) are not capable of proof without the testimony of the Complainant and perhaps that of a corroborative witness. Since the Respondent denies the event, the Hearing Examiner is compelled to accept its offer of proof in the absence of any testimony on behalf of the Complainant. Without any testimony, the Complainant fails in his burden of proof.

While the individual incidents complained of by the Complainant lack sufficient proof to demonstrate discrimination, it could have been argued that the pattern overall tends to demonstrate a pattern or practice of mistreatment that might amount to discrimination. Because of the lack of proof on any of the individual incidents and because of the Complainant's failure to appear we need not address this or

other issues such as, whether or not 5 or 6 incidents of alleged harassment over a period of approximately one year are sufficient to demonstrate a "hostile work place" claim of racial harassment under the Ordinance.

For the foregoing reasons, the complaint in this matter shall be and is hereby dismissed.

Signed and dated this 20th day of November, 1996.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner