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

Bridgett Franklin 205 Castile Ave #1 Madison, WI 53713 Complainant vs. Capital Services 900 North Shore Ste 215A Lake Bluff, IL 60044 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 21490

This matter came on for public hearing before Commission Hearing Examiner, Clifford E. Blackwell, III, on May 20, 1992 at 8:30 a.m. in Room 312 of the Madison Municipal Building 215 Martin Luther King, Jr. Boulevard Madison, WI 53710. The Complainant, Bridgett Franklin, appeared in person but without counsel. The Respondent, Capitol Services Inc., did not appear. The Hearing Examiner waited for approximately forty five (45) minutes for the Respondent or a representative to appear before commencing to take testimony in this matter. Based upon the record in this matter the Hearing Examiner makes the following

RECOMMENDED FINDINGS of FACT

1. The Complainant is a black or African American woman.
2. The Respondent is an Illinois corporation and is solely owned by Tom Herbick. At all times relevant to this matter, the Respondent held a contract to perform janitorial services for the United States Department of Agriculture, Forest Products Laboratory located at l Gifford Pinchot Drive in the City of Madison. The Respondent employed ten (10) persons within the City of Madison in the performance of this contract.
3. This matter was noticed for a public hearing by a Notice of Hearing sent to the parties and received by the Respondent on January 21, 1992. The Respondent did not contact any employee of the Commission prior to the commencement of testimony. A person who identified himself as being a representative of the Respondent called the Commission office shortly before the end of testimony indicating that Tom Herbick had experienced car trouble and wished to reschedule the hearing. The person indicated that Mr. Orris, the Respondent's local Representative, was expected to appear for the Respondent. Mr. Orris did not appear at any time.
4. The Hearing Examiner did not reschedule the hearing since the request of the Respondent came after the commencement of testimony and there was no showing of why the Respondent's local representative failed to appear or why the Respondent's owner could not have called before the commencement of the hearing.
5. The Complainant began employment with the Respondent on or about January 2, 1991 as a janitor. She performed general cleaning duties including dusting, sweeping, vacuuming and throwing away trash. Her wage at the time of employment was $5.96 per hour. Her employment

with the Respondent was involuntarily terminated on May 23, 1991. At the time of her termination, her wage was still $5.96 per hour.

6. At the time of her termination, Marshall Orris told her that she was being terminated because she had violated a policy concerning the use of certain telephones at the work site.
7. Prior to Orris becoming the Complainant's supervisor, she had been told by the supervisor that she could use the telephone to call home to check on the condition of her ill husband and family. Apparently this policy was continued by Orris but the Complainant was no longer to use a telephone on the fifth floor of one of the buildings that the Complainant cleaned. Once the Complainant was made aware that she was no longer to use this telephone, she used the telephone on at least one occasion approximately four (4) days prior to her to her termination. On that occasion, a white male employee named Vic Carmello or Vic Carvello also used the same telephone. Carmello or Carvello was not terminated.
8. The Complainant states that Orris, a white male, also used the telephone on the fifth floor.
9. Prior to the Complainant's termination, she had not received a performance evaluation. She had not been criticized for her job performance with the exception that she had been told that she had missed some dusting. At the time of her termination, she was not told that her performance was the reason for her termination.
10. During the term of her employment, the Complainant wished to be considered for a position performing floor care such as waxing and stripping the floors. This type of position paid more than the type of position held by the Complainant.
11. The Complainant was not informed by the Respondent when it hired two persons for floor care positions. The Respondent hired a white male and a black male for those positions. They had not been employees of the Respondent.
12. The Respondent told the Complainant that she should not be interested in that kind of position because as a woman she could not operate the big machines. The Complainant held a certificate for basic cleaning from the Madison Opportunity Center. This certificate did not include training for the operation of waxing or stripping machines.
13. The Complainant did not state how much more the floor care position paid than the general cleaning position.
14. The Complainant testified that the Respondent's on-site manager, Marshall Orris, followed her and another female co-worker around the areas assigned to them for cleaning. She did not state whether Orris followed other employees around.
15. Since her termination on May 23, 1991, the Complainant has only been able to find temporary positions. These positions have paid an average of five (5) dollars per hour. She has worked an average of fifteen (15) hours per week. The position that she held with the Respondent was a forty (40) hour per week position.
16. The Complainant has received unemployment compensation from the State of Wisconsin in an undetermined amount since her termination by the Respondent.
17. The Complainant has suffered humiliation and embarrassment as a consequence of the Respondent's termination. Her level of personal stress has increased and she has had an increase in high blood pressure and hair loss from that stress. For a period of time, the Complainant and her family were left homeless as a result of the loss of income.

CONCLUSIONS OF LAW

18. The Complainant is a member of the protected class "race" because she is a black or African American.
19. The Complainant is a member of the protected class "sex" because she is a woman.

20. The Respondent is an employer within the meaning of the ordinance because of its performance under its contract with the United States Department of Agriculture Forest Products Laboratory located within the City of Madison.
21. The Respondent discriminated against the Complainant in violation of the ordinance on the bases of race and sex by terminating her employment for violation of its telephone restrictions and not terminating a white, male employee named Vic Carmello or Vic Carvello under similar circumstances.
22. The Respondent did not discriminate against the Complainant on the bases of race or sex in failing to offer her a position performing floor care.
23. The Respondent did not discriminate against the Respondent on the bases of race or sex in following her and another co-worker around her assigned areas.
24. The Complainant suffered a loss of back pay in the amount of sixteen thousand, six hundred, sixty six dollars and eighty cents ($16,666.80).
25. The Complainant suffered embarrassment and humiliation and other emotional injuries which may be compensated under the ordinance.
26. Two thousand dollars ($2,000) is an appropriate award to the Complainant for her emotional damages.
27. Five (5) percent is an appropriate award of pre-judgment interest.
28. The Complainant is entitled to an order of reinstatement.

ORDER

29. The Respondent shall offer the Complainant the next available position under any contract held by the Respondent with the United States Department of Agriculture performing duties substantially similar to those that she performed at the time of her termination. The Complainant shall receive retroactively all benefits including wage increases as if she had been continuously employed by the Complainant from January 2, 1991.
30. If the Respondent no longer holds a contract for the performance of janitorial services for the United States Department of Agriculture Forest Products Laboratory but holds other contracts for substantially similar services within the City of Madison, the Respondent shall offer the Complainant the next available position performing duties substantially similar to those performed by her at the time of her termination that becomes available at one of its other sites. The position shall pay an equivalent amount to that received by the Complainant at the time of her termination including all pay raises and benefits to which she would have been entitled had she been continuously employed by the Respondent from January 2,1991.
31. If the Respondent no longer holds any contracts for the performance of janitorial services within the City of Madison, then the Respondent shall pay to the Complainant front pay for a period of six months from the date of this order calculated at the rate of pay to which the Complainant would have been entitled had the Complainant been continuously employed by the Respondent since January 2, 1991.
32. The Respondent shall pay to the Complainant back pay in the amount of sixteen thousand, six hundred, sixty six dollars and eighty cents less any amount received by the Complainant from the State of Wisconsin as unemployment compensation and those other deductions made in the normal course of things such as payroll taxes. The Respondent shall pay the amount received by the Complainant as unemployment compensation directly to the Wisconsin Unemployment Compensation Trust Fund.
33. The Respondent shall pay pre-judgment interest on the back pay award from May 24, 1991 until the amount of back pay is paid in full.

34. The Respondent shall pay to the Complainant, the amount of two thousand ($2,000) dollars as compensation for the Complainant's emotional injuries. The Respondent shall pay this award no later than the thirtieth day after this order becomes final.
35. The Respondent shall cease and desist from discriminating against the Complainant or any other employee on any basis protected by the Equal Opportunity Ordinance.

MEMORANDUM DECISION

This matter was heard as a Motion for Default Judgment. The time and date of the hearing in this matter had been set in the Notice of Hearing that was received by the Respondent on January 21, 1992. The Respondent failed to appear at the appointed time. The Hearing Examiner waited approximately forty (40) minutes for the Respondent or its representative to appear before taking any testimony. The Respondent had not appeared nor contacted the Commission when the taking of testimony began. At no time prior to the taking of testimony did the Respondent request a postponement or other rescheduling of this matter.

Approximately ten (10) or fifteen (15) minutes after the commencement of testimony, the hearing was interrupted briefly by the appearance of Cordia Taylor, the receptionist for the Commission. Ms. Taylor reported that she had received a telephone call from someone who identified himself or herself as being with the Respondent. This person wished Ms. Taylor to tell the local representative of the Respondent that Tom Herbick's car had broken down on the way to the hearing and that Herbick would not be able to attend. The telephone caller expected the local representative of the Respondent, Marshall Orris, to be present at the hearing. The caller asked if the hearing could be rescheduled. Mr. Orris had not appeared. The Hearing Examiner indicated that because the taking of testimony had commenced that it would be inappropriate to adjourn or reschedule the hearing particularly in light of the expectation of the Respondent that its local representative was to have been present. The Hearing Examiner continued to take the testimony of the Complainant.

At no time since the telephone call received by the Commission on May 20, 1991 has the Respondent requested a new hearing or to have the record reopened. The Respondent has not explained in any manner the absence of its local representative, Marshall Orris. The Respondent has not submitted any information to the Commission to verify the reason for its absence at the hearing.

The Complainant testified at the hearing in support of her complaint. She was not allowed to call any other witnesses or produce any exhibits because she neither submitted a list of witnesses nor submitted any exhibits as required by the Scheduling Order.

The Complainant testified that she was a black or African American woman. At the time of the termination of her employment with the Respondent, she was told that she was being terminated because she had made telephone calls from a telephone whose use was prohibited to the Complainant and other employees. The Complainant acknowledges that she had been told that the employees were only to use the telephones in the first floor lobby. A previous supervisor had agreed to allow the Complainant to call home during her work shift to check on her husband who was ill and on her family. The supervisor at the time of her termination, Marshall Orris, had apparently also agreed to allow the Complainant to make such calls. Neither of these agreements however acted to permit the Complainant to use the telephone in the fifth floor lobby instead of or in addition to the telephone in the first floor lobby.

Despite her apparent knowledge of the prohibition concerning the use of the fifth floor telephone, the Complainant used that telephone on or around May 19, 1991 or May 20, 1991 to call home. A white

male employee of the Respondent named Vic Carmello or Vic Carvello, used the prohibited telephone immediately after the Complainant on the same date. The Respondent had asked the Department of Agriculture to trace or track telephone calls made from the fifth floor lobby. This request was apparently made because Marshall Orris had seen the Complainant and Vic Carmello or Vic Carvello using or waiting to use the fifth floor telephone. The Complainant was shown a printout containing a list of numbers called from the prohibited telephone. In addition to telephone calls made by the Complainant, there appeared an additional number that had been scratched out. The Complainant testified that the scratched out number was attributed to the white male employee who used the telephone after her.

The Complainant's employment was terminated on May 23, 1991. At that time she was told that the only reason for her termination was her unauthorized use of the fifth floor telephone. She asked if she was being terminated because of her work performance but was told that was not the reason. Other than being reminded to be more careful about her dusting, the Complainant's work performance had not been criticized in the month prior to her termination.

Despite Mr. Carmello or Carvello's use of the prohibited telephone right after the Complainant's, and the Respondent's apparent knowledge of his use, he was not terminated. The Complainant testified that Mr. Carmello or Carvello told her several months after her termination that he had recently quit because he was sick of what was going on.

The Complainant has established a prima facie case of discrimination on the bases of race and sex in her termination. The Complainant also alleges discrimination by the Respondent in its refusal to promote her to the higher paying position for floor care and in the terms and conditions of employment by the shadowing of her work by Marshall Orris. The Complainant fails to demonstrate discrimination in either of these circumstances.

With respect to the claim concerning her lack of promotion, the Complainant did not offer any evidence to show that she was qualified for the position or, assuming her qualification, that the persons who were hired were less qualified than she was. She possessed a certificate for basic cleaning that did not include certification for the use of waxing and stripping machines. She admitted that this equipment was different from that on which she had experience or training. The statement attributed to her supervisor that women could not handle such machinery does indicate that some discriminatory motive might be present but it does not alleviate the Complainant's responsibility to prove all elements of her claim. One of the persons hired for the floor care positions was a black or African American. Based upon this testimony, the Complainant fails to demonstrate that she was treated differently on the basis of her race in not receiving the promotion because a person of her race did, in fact, receive the position.

Similarly, the Complainant did not demonstrate that her supervisor, Marshall Orris, did not follow other employees not of her sex or race. It would be fairly natural to expect a supervisor of janitorial personnel to check on his or her employees from time to time. It would not be unusual for such inspections from time to time to be somewhat surreptitious. Without some credible evidence in the record showing that Orris did not follow other employees around, the Complainant cannot make out a prima facie case of discrimination with respect to this allegation.

The Complainant having proved a prima facie case of discrimination on her termination claim, we must now look to the issue of remedies. The Equal Opportunities Ordinance MGO 3.23(9) provides that the Commission, where discrimination is found, shall provide an order that remedies the act of discrimination and makes the victim of discrimination whole again. In the case of Nelson v. Weight

Loss Clinics of America Inc. et al., MEOC Case No. 20684 (September 29, 1989) the Hearing Examiner found that such an award may contain provisions for back pay including pre-judgment interest and damages for emotional injuries. This decision has been followed in the cases of Leatherberry v. GTE Directory Sales Inc., MEOC Case No. 21124 (Ex. Dec. January 5, 1993, Com. Dec. April 8, 1993), Chung v. Paisan's MEOC Case No. 21192 (February 10, 1993), and Morgan v. Hazleton Laboratories Inc., MEOC Case No. 21005 (April 2, 1993). Additionally, where it is necessary to make the Complainant whole and there is no evidence of the impracticability of such an order, the Commission shall order reinstatement. Harris v. Paragon Restaurant Group Inc. et al., MEOC Case No. 20947 (Ex. Dec. June 28,1989, Com. Dec. February 14, 1990), Leatherberry v. GTE Directory Sales Inc., supra. Reinstatement is the preferred remedy under federal law.

There is nothing in the record that suggests that putting the Complainant back to work with the Respondent would pose any unusual difficulties or problems for either the Respondent or the Complainant. It is never easy when a Complainant goes back to work with an employer that has been found guilty of discrimination but, those problems can generally be overcome. The Complainant's testimony concerning her desire to regain her employment and the importance of this particular job to her was very compelling. Loss of this job has caused great dislocation and pain in her life. Not to award her reinstatement in this case would not make her whole.

The only difficulty that could pose a barrier to reinstatement is the possibility that the Respondent no longer holds a contract with the United States Department of Agriculture to provide janitorial services at the Forest Products Laboratory. Given the period of time that this matter has been waiting for decision, such a change in the Respondent's status not unusual. It is to guard against this possibility that the Hearing Examiner has ordered alternative forms of relief. Ordering "reinstatement" at a work site other than that at which the Complainant originally worked poses no particular difficult problems for the Respondent. Should the Respondent be unable to offer reinstatement to the Complainant because it no longer has any presence in the jurisdictional area of the Commission, an award of liquidated front pay should allow the Complainant an economic breather until she can find approximately equivalent work. It would be inappropriate to make an award of front pay indefinite if the Respondent no longer employs workers within the City of Madison because if the Complainant had remained employed with the Respondent, she would have presumably lost her position for a nondiscriminatory reason when the Respondent withdrew from Madison.

The back pay award is specifically contemplated by the ordinance. In this instance, the testimony on the Complainant's wage was clear. She testified that she was hired at the rate of five dollars and ninety six cents ($5.96) per hour and that was what she was paid at the time of her termination. Her position with the Respondent was a forty hour per week, full-time position. She is entitled to receive those wages that she would have been paid absent the act of discrimination less those wages that she actually received or could have received through reasonable diligent search for employment. The back pay award must also take into account any amount of unemployment compensation paid by the State of Wisconsin. The amount of the award is not actually reduced by the amount of the unemployment compensation but that amount is ordered to be sent to the appropriate state agency.

In this case the Hearing Examiner took the number of weeks from the date of the Complainant's termination until the issuance of the order and multiplied that number by forty hours per week. That figure was multiplied by the Complainant's hourly wage. This amount is then reduced by the amount of wages actually earned by the Complainant. She testified that since her termination she had worked an average of fifteen hours per week at an average wage of five dollars per hour. The back pay figure would also be reduced by the required deductions for taxes on the Complainant's wages.

The Respondent will need to establish by appropriate contact with the Wisconsin Unemployment Compensation Trust Fund, the amount of unemployment compensation paid to the Complainant. It would reduce the back pay award paid to the Complainant by this amount. The amount of the reduction shall be paid to the State of Wisconsin.

Because the Complainant has been without the benefit of the wages that would otherwise be due to her, it is necessary to increase the back pay award by the payment of pre-judgment interest. The amount of this interest is set by reference to Wis. Stats. Sec. 138.04. Pre-judgment interest shall be calculated at the rate of five percent per year from the date of the Complainant's termination until the back pay is fully paid. This amount of interest has been previously awarded by the Commission in Harris v. Paragon Restaurant Group Inc. supra.

The Complainant testified with force about the effects that the act of discrimination has had on her and her family. These effects include a loss of hair and increase in hypertension, worry about family finances and a period of homelessness and living in quarters with her sister and her family. The Complainant placed the amount of compensatory damages that would make her whole at two thousand dollars. While given the Complainant's testimony this seems a modest amount, her request, under the circumstances, stands as the best evaluation of her damages.

Signed and dated this 14th day of May, 1993.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner