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

Marshall Brooks Dane Co. Jail 607 West 210 Martin Luther King Jr., Blvd. Madison, WI 53709 Complainant vs. I.S.S. and Ed Hassmer 1329 Tempkin Avenue Apt. 7 Madison, WI 53705 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 21535

BACKGROUND

A public hearing in this matter was held before Commission Hearing Examiner, Clifford E. Blackwell, III, on August 3, 1992 at 1:30 p.m. in Room 500 of the City/County Building 210 Martin Luther King, Jr. Boulevard Madison, WI 53710. The Complainant appeared in person and by his attorney, Jeff Scott Olson of the law firm of Julian, Olson and Lasker S.C. The Respondents did not appear at the time scheduled for the hearing to begin. The Hearing Examiner waited thirty (30) minutes before taking any testimony. Neither Respondent appeared. Based upon the record of the proceedings in this matter, the Hearing Examiner makes the following RECOMMENDED FINDINGS of FACT, CONCLUSIONS of LAW and ORDER:

RECOMMENDED FINDINGS of FACT

1. The Complainant is a black or African American Male. He was 37 or 38 years of age as of the date of hearing. The Complainant was convicted of a felony in 1989.
2. Respondent ISS is apparently a sole proprietorship engaged in the provision of janitorial services. It held a contract to provide such services at West Town Mall within the City of Madison. It employed people to work as janitors.
3. The Respondent Ed Hassmer either owned ISS or was the on-site manager in Madison for ISS.
4. Notice of the hearing in this matter along with a statement of the issues for hearing were served upon both Respondents by publication on June 25, 1992, July 2, 1992 and July 9, 1992 in the legal notice section of the Wisconsin State Journal. Additionally, copies of the Notice of Hearing were sent by certified mail to the last known address of the Respondents. These were received back by the Commission as undeliverable.
5. The Complainant was employed by the Respondents from July 7, 1991 until July 27, 1991 as a janitor. Ed Hassmer was the Complainant's immediate supervisor.
6. During the period of his employment, Complainant did not receive any criticism of his work.
7. At the time of his employment with the Respondents, the Complainant lived at the Dane County Huber Center as a condition of his sentence for the felony of which he was convicted in 1989. Hassmer knew of the Complainant's address and his conviction record.

8. On one or two occasions, Hassmer called the Complainant "jailbird" while the Complainant was on his break.
9. Hassmer's girlfriend also called the Complainant a "jailbird" on several occasions. The Complainant objected to her and Hassmer about this. Hassmer spoke with her and she stopped calling the Complainant "jailbird" for a period of time. She did begin again after some period.
10. Hassmer told the Complainant that he was going to hire younger workers because they could work harder and faster. The Complainant observed that Hassmer, after that statement, hired workers in the nineteen (19) to twenty three (23) year old age range. Hassmer also apparently fired another worker who was about the same age as the Complainant.
11. The Complainant was the only black or African American employee of the Respondents. The Complainant was not subjected to any racial harassment. The Complainant believed that Hassmer gave him more difficult work assignments than employees not of his race.
12. On July 27, 1991, when Hassmer terminated the Complainant's employment he claimed that the Complainant had not met Hassmer's work expectations. Prior to this time Hassmer had not criticized or in any other manner found fault with the Complainant's work performance.
13. The Complainant worked forty hours per week while employed by the Respondents. He was paid six dollars per hour.
14. Subsequent to his termination, the Complainant did not regain equivalent employment until May of 1992. He worked at the Sheraton Hotel for approximately one month earning a wage of four dollars and twenty five cents per hour. He also worked for IDS performing telephone sales. He was paid five dollars per hour and worked an average of twenty five hours per week. He worked for IDS for about two months.

CONCLUSIONS of LAW

15. The Complainant, a black or African American, is a member of the protected class "race".
16. The Complainant, a person of 37 or 38 years of age, is a member of the protected class "age".
17. The Complainant, a person who was convicted of a felony in 1989, is a member of the protected class "conviction record".
18. I.S.S. is an employer within the meaning of the ordinance.
19. Ed Hassmer is an employer within the meaning of the ordinance because, at a minimum, he was the manager of I.S.S.
20. The Respondents discriminated against the Complainant in the terms and conditions of employment on the basis of his conviction record in violation of the ordinance.
21. The Respondents discriminated against the Complainant on the basis of his age in terminating his employment in violation of the ordinance.
22. The Respondents did not discriminate against the Complainant on the basis of his race in either the terms and conditions of his employment or his termination in violation of the ordinance.
23. The Complainant suffered a loss of wages in the amount of seven thousand, seven hundred eighty eight dollars and sixty cents.
24. Pre judgement interest in the amount of 5 percent per annum must be awarded in order to make the Complainant whole.

ORDER

25. The Respondents shall cease and desist from discriminating against the Complainant.
26. The Respondents shall pay to the Complainant the total sum of seven thousand seven hundred eighty eight dollars and sixty cents as back pay less any usual or customary deductions for taxes.

27. The Respondents shall pay the Complainant pre-judgement interest on his award of back pay from July 27, 1991 until the back pay award is fully paid. Interest shall be calculated at the simple annual rate of five percent.
28. The Complainant shall receive his costs including a reasonable attorney's fee. The Complainant shall submit a petition setting forth his costs including a reasonable attorney's fee no later than thirty days after this Order becomes final. The Respondents may file objections to the petition for costs within twenty days of their receipt of the petition. If such objections are filed, the Complainant may file a reply to the objections within fifteen days of his receipt of the objections.

MEMORANDUM DECISION

This case has been treated as a default judgement. The Respondents in this matter have apparently chosen not to participate in these proceedings from virtually their inception. The Notice of Hearing in this matter was served by publication by printing an abridged notice in the Wisconsin State Journal for three consecutive weeks beginning on June 25, 1992. Copies of the complete Notice of Hearing and Scheduling Order were sent by certified mail to the last known addresses of the Respondents. The Notices of Hearing and Scheduling Orders were returned to the Commission as undeliverable. The Respondents did not appear at the scheduled time of the hearing on August 3, 1992 and did not appear within the thirty minute period during which the Hearing Examiner held the proceedings in recess pending the appearance of the Respondents. At the end of this period, the Hearing Examiner granted the Complainant's motion for a default judgement and took testimony from the Complainant towards proof of a prima facie case.

The Complainant charges that the Respondents discriminated against him in both the terms and conditions of his employment and in his termination. The Complainant contends that his race (black or African American), his age (thirty seven or eight) and/or the fact that he has a conviction record were the reasons for his different treatment.

With respect to his claim of discrimination on the basis of his race, the Complainant points out that he was the only black or African American employee and that he felt that the Respondents gave him more difficult or demanding work than those not of his race. The Complainant really presents no evidence tending to show that he was treated differently than members not of his race. The fact that he was the only black or African American employee by itself does not show that either his different treatment, if any, or his ultimate termination resulted from his race. In explaining why he felt that he had been treated more harshly than those employees not of his race, the Complainant indicated that he had to do the work of others when they did not finish or show up. This seems to the Hearing Examiner more like punishment of the Complainant for being a more responsible employee or at least a more captive employee by virtue of his work release requirements than racial discrimination.

The Complainant testified that he had not been subjected to racially explicit language while at the same time, testifying to the use of demeaning language about his conviction record and explicit references to his age. One would think that an employer who would use the term "jailbird" would probably not be too shy about using similar racial epithets, if race were a motivating factor in his decisions.

Without demonstrating that his race was a motivating factor of some degree, the Complainant cannot prevail on his claim of race discrimination. This holds equally true for his terms and conditions claim as for his termination claim.

As indicated above, Hassmer used the term "jailbird" with the Complainant. He did so on more than one occasion. Additionally he allowed his girlfriend to use this language in front of and about the Complainant on numerous occasions including after the Complainant had asked Hassmer to have it stopped. Given the Commission's decision in Vance v. Eastex Packaging, MEOC Case No. 20107 (May 21, 1985) and Guyton v. Rolfsmeyer, MEOC Case No. 20424 (July 18, 1986) It is clear that when a manager participates in the harassment of an employee, a small number of incidents can trigger liability. This is because the actions of a manager are attributed to the owner or corporation as a matter of agency law. The Vance case opined that given the passage of time since the adoption of the various laws protecting against discrimination in employment that even a single incident of harassment could be sufficient to impose liability.

Given Hassmer's knowledge and participation in calling the Complainant "jailbird" there must be a finding of differential treatment of the Complainant on the basis of the Complainant's conviction record. Hassmer obviously knew of the Complainant's conviction record because that record had to be disclosed as part of the Complainant's eligibility for the Huber work release program.

Having found that the Complainant was subjected to differential treatment as a result of his conviction record, we must examine whether the record of these proceedings supports the Complainant's claim of discrimination in his termination. The same fact that shows that Hassmer knew of the Complainant's conviction record can be used to argue that the Complainant's termination was not motivated by this knowledge. If the Respondents were going to terminate the Complainant because of his conviction record, it would have been much easier not to hire him in the first place. If the Complainant had demonstrated that the Respondents were caught between a rock and a hard place and had to hire him to meet current operational needs then this argument would not apply. The Complainant made no such allegation. There is nothing inherent in the circumstances of this case that lead inexorably to the conclusion that the Complainant's conviction record was a factor in the Respondents' decision to terminate the Complainant. Accordingly, the Complainant fails to demonstrate that his termination was the result of illegal discrimination on the basis of his conviction record.

Having found liability with respect to the terms and conditions of employment claim relating to the Complainant's conviction record, we must determine an appropriate remedy. In this case that would be solely an order for the Respondents to cease and desist from their discrimination against the Complainant. The Complainant did not testify that he had suffered any economic loss as a result of the different terms and conditions. He was not paid less or made to work longer hours for the same pay. He presented no testimony with respect to the humiliation or embarrassment that he felt as a result of his differential treatment. It is up to the Complainant to prove all elements of his claim including the entitlement to damages and what those damages should be. Chomicki v. Wittekind, 128 Wis. 2d 188, 381 N.W.2d 561 (Wis. App. 1985) In this case the Complainant failed to present any evidence with respect to his damages. While the Hearing Examiner is permitted to infer such damages from the circumstances of a given case, the record in this matter is so sparse that any inference would not be supportable.

The circumstances of the Complainant's remaining claims relating to discrimination on the basis of age are roughly the reverse of those involving the claims of discrimination on the basis of the Complainant's conviction record. In this instance, the Complainant can demonstrate that his age was a factor in the decision to terminate him but not that it had any appreciable effect on the terms and conditions of his employment. There is nothing in the record that demonstrates that the Complainant's age resulted in different or harsher treatment while he was employed. He really does not discuss the terms and conditions of his employment in relationship to his age at all.

On the other hand, the Complainant testified that Hassmer specifically told the Complainant that he wanted to hire younger guys because they were better and faster workers. The Complainant observed that after he was hired, Hassmer hired only people in the age range mentioned by him i.e. nineteen to twenty three years of age. The Complainant further testified that one of the two other employees that were approximately his age had apparently been fired. He noted that the other remaining employee of about his age was a supervisor. The Complainant's observations of Hassmer's conduct support the conclusion that the Complainant's age was a motivating factor in his termination.

The Complainant testified that when Hassmer called him at the Huber center to terminate him, Hassmer stated that the Complainant's work performance had not met his expectations. This is likely to have been a pretext for discrimination since the Complainant testified that there had been no prior criticism or complaint about his performance. In fact, the earlier summarized testimony about Hassmer's reliance upon the Complainant to fill in for or to complete assignments for other workers tends to support the Complainant's contention that his performance had been acceptable.

Having found discrimination on the basis of age in the Complainant's termination, we must see what remedy will redress the wrong done to him and fulfill the intent and purposes of the ordinance. The Complainant did not seek reinstatement to his former employment. Since he was represented by a counsel with much experience in this area, it cannot be found that such a failure to request reinstatement was inadvertent. Accordingly, the Hearing Examiner will not make such an order.

The ordinance specifically contemplates, in employment cases, an award of back pay. MGO 3.23(9) The purpose of this provision is to place the Complainant in as near the position he would have been absent the act of discrimination. In calculating an award of back pay, one takes the amount of wages that the Complainant would have earned including increases from the date of discrimination until the date of the order. From this amount, one subtracts the wages actually earned by the Complainant or those that could have reasonably been earned as a result of due diligence on the part of the Complainant to find equivalent work. There should also be the standard deductions for payroll taxes. If the Complainant had received unemployment compensation during the period to be covered by the award, the amount of the unemployment compensation actually received by the Complainant would be subtracted from the amount awarded to the Complainant and paid directly to the Wisconsin Unemployment Compensation Trust Fund. The economic effect on the parties is the same. Because the Complainant has been deprived of the use of the wages that he would have reasonably earned for some time, an award of pre-judgement interest is necessary to make the Complainant whole. The Commission has generally used the amount of five percent per annum for purposes of calculating this award. This is derived from Wis Stats. Sec. 138.04. Harris v. Paragon Restaurant Group Inc. et al., MEOC Case No. 20947 (June 28, 1989). This rate of interest may be increased if there are factors in the record that would support such an increase. In this record, there are no such factors.

The final element of a make whole remedy that must be considered is an award of costs including a reasonable attorney's fee where the Complainant is represented. In this case, the Complainant is entitled to such an award. There is nothing in the record to indicate that the Complainant's counsel did nothing to benefit the outcome in this matter. In fact, the opposite is true.

For the foregoing reasons, the Hearing Examiner enters his above order.

Signed and dated this 13th day of May, 1993.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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Marshall Brooks Dane Co. Jail 607 West 210 Martin Luther King Jr., Blvd. Madison, WI 53709 Complainant vs. I.S.S. and Ed Hassmer 1329 Tempkin Avenue Apt. 7 Madison, WI 53705 Respondent	NOTICE OF RIGHT TO APPEAL Case No. 21535

Attached are the Recommended Findings of Fact, Conclusions of Law, and Order of the Equal Opportunities Commission's Hearing Examiner. The Rules of the EOC provide for appeal of this decision in the following terms:

> 10.1 Either party may appeal the recommended findings of fact, conclusions of law, and order of the Commission's designee by filing written exceptions to such findings, conclusions, or order in the EOC offices no later than ten (10) days after receipt of said findings, except that where the tenth day falls on a federal holiday or on a non-business day, the appeal will be accepted on the first business day thereafter.
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> 10.2 If neither party appeals the recommended findings of fact, conclusions of law, or order within ten (10) days, they become final findings, conclusions and order of the Commission. If an appeal is made to the Commission, it shall consider only the record of the hearing, written exceptions to the recommended findings, conclusions and order, any brief properly submitted before it, and oral arguments presented by the parties at a review hearing scheduled by the Commission. To be properly submitted, briefs by any party must be served upon opposing parties or their counsel and received by the Commission at least ten (10) days prior to any scheduled oral arguments or by another date determined by the Commission. Cross appeals are allowed in accordance with Rule 15.521. Any party requesting a written transcript of the hearing that was held by the Hearing Examiner shall pay the actual cost of preparing the transcript, including copying costs. The Commission shall affirm, reverse or modify the recommended findings, conclusions and order. Any modification or reversal shall be accompanied by a statement of the facts and ultimate conclusions relied on in rejecting the recommendations of the Commission's designee. Such decision of the Commission shall be the final findings of fact, conclusions of law and order of the Commission.

This Notice and the attached Recommended Findings of Fact, Conclusions of Law, and Order have been sent to all parties by certified mail. Any appeal from these Recommended Findings of Fact, Conclusions of Law and Order must be delivered at the offices of the EOC within ten (10) days of the date of receipt. Cross appeals are allowed in accordance with EOC Rule 15.521. Unless timely appealed, the enclosed Recommended Findings of Fact, Conclusions of Law and Order will become final without further notice to the Parties.

Signed and dated this 13th day of May, 1993.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner