STATE OF WISCONSIN

CIRCUIT COURT
Branch 13

DANE COUNTY

OSCAR BOLDT CONSTRUCTION COMPANY,

Petitioner

-vs-

Case No. 94CV3781

CITY OF MADISON, et al.,

Respondents.

HONORABLE MICHAEL NOWAKOWSKI,

Presiding.

APPEARANCES:

For the Petitioner, PAUL LAWENT, Attorney at law, 4814 E. Broadway, Madison, Wisconsin.

For the Respondent EQUAL OPPORTUNITIES COMMISSION, CAROLYN HOGG, Assistant City Attorney, 210 Martin Luther King Jr. Blvd., Madison, Wisconsin.

For the Respondent JAMES DISCHLER, DAVID RESNICK, Attorney at law, 148 E. Wilson Street, Madison, Wisconsin.

DATE:

May 11, 1995.

PROCEEDINGS:

Oral Decision.

THE COURT: Okay. As I indicated at the outset, this is an action which seeks certiorari review of a November 29, 1994 decision and order of the Madison Equal Opportunities Commission which concluded that the petitioner had violated Sec. 3.23(8) of the Madison General Ordinances when it terminated the employment of the respondent, James Dischler. The standard of review on certiorari is well understood and has been so often repeated that I need not recite it in detail here. It has been properly cited in both the City's and Dischler's briefs which I adopt by reference.

The petitioner seems to contend that the MEOC decision is contrary to law and is not supported by the evidence. That appears to be the attack and the challenge which is made. As to its argument that the MEOC acted contrary to law, Boldt seems to make several claims and I'll deal with them in order.

First, it argues that the MEOC used the wrong standard of proof. Here the MEOC and the hearing examiner quite clearly used the preponderance of the evidence standard. Petitioner does not make clear what it believes the MEOC did wrong in this regard since at page 2 of its brief it argues that this

was one of the two acceptable standards. In any event, it cites three cases to support its view that the MEOC erred. In Reinke, the court there concluded that the preponderance of the evidence standard was proper in an employment termination case under state civil service rules. In Cudahy v. DeLuca, the court concluded that the standard of preponderance of the evidence was proper in an ordinance violation case unless the ordinance had a statutory criminal counterpart. In Carlson & Erickson, the court concluded that the middle burden must be used for crime-like torts where penal damages can be awarded. In short, none of these cases support petitioner's argument and each either directly or by analysis confirm that the MEOC acted according to law in the standard of proof it employed here.

Secondly, petitioner next argues that the activity for which Dischler was found to have been fired was not protected activity. This claim is so undeveloped, that it need not be seriously addressed and should be rejected out of hand. It appears also not to have been made before the MEOC and thus was probably waived. However, because both respondents have briefed it at great length, I will respond to it briefly even though the petitioner failed to reply to any of their legal arguments in the reply brief.

Let me begin by pointing out that I have reviewed this letter which is the central point of concern in this case and without getting into details and reading from it since everybody here has already seen the letter at issue and it was received as part of the record in the case, there is no question that this is a letter that whoever wrote it was objecting to sexual harassment. There is no serious dispute that can be raised about that. The ordinance prohibits retaliation against one who objects to sexual harassment by one's employer. The objection need not be accompanied by "substantiating the allegation" in order to be protected as petitioner summarily argues and it cites, that is Boldt, cites to no language in the ordinance or any law from any other source to support this conclusory contention that in order for a letter to qualify or any activity for that matter to qualify as objecting to discrimination, that the objection somehow has to be proven to have merit before one can be guilty of retaliating against the person who made the objection. That is a proposition that is so absurd on its face that it really once said is revealed for what it is.

Whether a union grievance, arbitration process was available to address Dischler's termination is not a matter that Boldt has shown to be a part of the record and it is not for the Court to search the record to locate it. In addition, Boldt has presented no law to support the implicit proposition in its argument that the union grievance was the exclusive remedy available to Dischler. This is no doubt because the overwhelming authority is that an employee cannot be deprived of the right to redress under anti-discrimination laws by contracts.

Now one final point is in order. Even though Boldt did not argue that the MEOC had erred in this regard, the MEOC found that Dischler had not, in fact, objected to sexual harassment by his employer, but further found that he had been fired because his supervisors believed he had done so. That was a factual determination which the hearing examiner made and which the MEOC adopted. The question from a legal standpoint is whether that is a violation of the ordinance.

In my estimation, it clearly is a violation of the ordinance. The ordinance prohibits discrimination, and now I speak not only about the singular aspect and provision of the ordinance that is at issue in this case, but of the entire Equal Opportunities Ordinance. It prohibits discrimination in a variety of settings and on a number of bases. The focus in all proceedings is on why a respondent took the negative action complained of against a complainant. Where, as here, that action is shown to have been taken on the basis of a prohibited reason, the violation is proven. It's unnecessary to prove that the respondent was correct in his or her belief about the facts to support the reason. It is simply necessary to prove the reason why the action was taken.

For example, if it was proven that Dischler had been fired for being Jewish, this would establish the violation. Proof that his employer was mistaken, because he was, in fact, Catholic would be no defense and would not change the outcome. It would be anomalous and wholly inconsistent with the purposes of the ordinance to construe the law otherwise.

Moreover, this construction that I have adopted is one given to the ordinance by the MEOC, the agency entrusted with administering the ordinance and with expertise in matters involving the elimination of discriminatory practices. It involves a value judgment under these circumstances because the MEOC Conclusion of Law is clearly reasonable, it is entitled to deference. For all of these reasons, I conclude that the MEOC acted according to law when it made the order it did on November 29, 1994.

Now as to Boldt's arguments that various of the Findings of Fact were not supported by the evidence, these can be dealt with quite quickly. On certiorari review, this Court does not find facts. The determinations of the MEOC as to the credibility of witnesses and the weight to be given the evidence is binding on this Court. All that I look for is whether there is enough evidence in the record that I can say that a reasonable person could have made the finding made by the MEOC. I look for evidence to support the findings that were made, not to support findings that could have been but were not made.

I have reviewed the attacks made by Boldt on the MEOC findings and they are wholly insufficient to sustain Boldt's burden of showing the findings were not supported by substantial evidence. For the most part, the arguments are the kind that should have been made to the primary fact-finder, not to a reviewing court. Suffice it to say, that while several findings were made on the basis of inference, the inferences drawn were reasonable and that the findings made by the hearing examiner and adopted by the MEOC were all amply supported by substantial evidence in the record.

Substantial evidence is not necessarily direct evidence. A finder of fact at an agency level is entitled to make those Findings of Fact on the basis of circumstantial evidence and circumstantial evidence is often necessary in order, as in a case like this, to prove the mental state or intent or motivation of a person such as Boldt and that is a necessary ingredient of the nature of the proceeding. Therefore, there is nothing questionable in the least about the fact that in this instance the hearing examiner and ultimately the MEOC relied upon circumstantial evidence to reach the findings and make the findings that it did.

Now one final point does need to be made. Boldt argues that a new hearing before a seeing examiner rather than Mr. Blackwell who is blind must be conducted because the examiner needs to see the weather-beaten face of Jerry Schwartz in order to assess the claim that he looked mad as he left the work trailer on July 15, 1991. I trust that this specious argument was not intended to imply that only those without a sight impairment are qualified to sit as examiners. The quality and thoroughness of Mr. Blackwell's decision refutes categorically any such contention.

If the argument is solely directed at Examiner Blackwell's ability to assess the evidence of how Jerry Schwartz looked on July 15, 1991, it has no merit. Dischler was the one who testified about this and he had known Schwartz for six months. He was subject to cross-examination and Schwartz was free to describe his weather-beaten demeanor when he testified, if he had wished.

In short, having the opportunity to visually assess Jerry Schwartz at the hearing before the hearing examiner was insignificant, immaterial and probably of no value to the ability that Examiner Blackwell had to reach the conclusion he did which was how did Jerry Schwartz look on July 15, 1991.

As a result, the November 29, 1994 decision of the Madison Equal Opportunities Commission is affirmed, this action is dismissed and I would ask Miss Hogg to prepare a short order that need not recite all the reasons that I have given but can simply include in its preface something along the lines for the reasons noted on the record, the decision is affirmed and the action is dismissed. And if you'd send Mr. Resnick, Mr. Lawent a copy of that, provide each of them a period of five days to object to its form. And then counsel, if I hear nothing from you after five days, I'll go ahead and sign it at that time.

We are adjourned.

(Proceedings ended at 1:50 p.m.)

STATE OF WISCONSIN)

) ss.

DANE COUNTY)

I, LYNETTE SWENSON, Certified Merit Reporter in and for the State of Wisconsin, certify that the foregoing is a true and accurate record of the proceedings held on the 11th day of May, 1995 before the Honorable Michael Nowakowski, Circuit Court Judge, Branch 13, in my presence and reduced to writing in accordance with my stenographic notes made at said time and place.

In witness whereof, I have hereunto set my hand and affixed my seal of office this 7th day of June, 1995 at Madison, Wisconsin.

Lynette Swenson, CM
Official Court Reporter

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

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| James Dischler<br>P.O. Box 6275<br>Springdale, AR 72766<br><br>Complainant<br><br>vs.<br><br>Boldt Construction, Inc.<br>Post Office Box 419<br>Appleton, WI 54912<br><br>Respondent | HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER<br><br>Case No. 21545 |

This matter came for a public hearing before Hearing Examiner, Clifford E. Blackwell, III, on November 9, 1992 in Room 312 of the Madison Municipal Building, 215 Martin Luther King, Jr.

Boulevard in the City of Madison, Wisconsin. The Complainant, James Dischler, appeared in person and by the law firm of Kelly and Haus by attorney David Resnick. The Respondent, Oscar J. Boldt Construction Co., Inc. appeared by Curt Wagner, its Vice-President for Special Projects and by its attorney Paul Lawent. Based upon this proceeding and the record in this matter, the Hearing Examiner makes the following Recommended Findings of Fact, Conclusions of Law and Order:

1. The Complainant, at the time of hearing, was a 53 year old white male. He has been a carpenter by trade since the early 1960's. He was employed in various capacities by the Respondent from early January, 1990 until July 17, 1991. He began as a carpenter and was promoted to the position of carpenter foreman in late March or early April of 1990 as the Respondent hired more carpenters. On approximately June 1, 1991, he was promoted to the position of Lead Foreman. Accompanying both of his promotions, he also received increases in salary. His promotion to Lead Foreman was generated by an increase in work on the site and an increase in the number of other foremen.

2. The Respondent is a construction company based in Appleton, Wisconsin but working on projects nationwide. It has been engaged in Madison since early 1990 as the general contractor and builder for a project to expand and remodel Saint Mary's Hospital. It has maintained a physical presence at the Saint Mary's work site in the form of either an office trailer or an office on the premises of Saint Mary's. The trailer accommodated offices for five or six employees including but not necessarily limited to, Kurt Wagner, Project Manager, Davie Crumrine, Project Engineer, Jerry Schwartz, Site Superintendent.

3. Kurt Wagner has been employed by the Respondent for at least the past 16 years working mainly on large hospital projects. As the Project Manager he is responsible for all aspects of oversight at the Saint Mary's project. He is responsible for the completion of the project, the hiring and firing of supervisors and assuring that the project stays on time and within budget. Wagner reports to Warren F. Parsons, the president of the Respondent. Wagner supervises, amongst others, Jerry Schwartz.

4. Jerry Schwartz was the Complainant's direct supervisor in 1991 and specifically at the time that the Complainant's employment was terminated. Schwartz has approximately 30 years of experience in the construction field.

5. On July 10, 1991, the Complainant noticed that they were out of hand cleaning lotion and requested David Crumrine to pick up a small supply of lotion until a larger supply could be obtained from the Appleton office. The Complainant did not know that Schwartz had already ordered the lotion. When Schwartz discovered the Complainant's action, he became angry. He yelled at the Complainant saying something to the effect of, "If you want my fucking job, you can have it." Schwartz then went to his office in the construction trailer, while the Complainant left the trailer by the front door.

6. On July 11, 1991, the Complainant came to work but left not wishing to confront Schwartz until their differences had been resolved. The Complainant called Wagner and indicated that he needed to take a couple of days off to try to settle down after the confrontation with Schwartz. Wagner attempted to have the Complainant come to work that day so that he could mediate the dispute. The Complainant indicated that he needed the time off but that he would return on Monday July 15, 1991 and that things should be back to normal. Wagner did not tell the Complainant that he would not be in the office on Monday or Tuesday July 15 and 16, 1991

because he would be attending a management seminar in Appleton. Wagner did not commit to meet with the Complainant and Schwartz on July 15, 1991.

7. On July 15, 1991, the Complainant returned to the work site to find that Wagner would not be back until July 17, 1991. As he approached the trailer he observed Schwartz leaving the trailer in what the Complainant believed to be a very bad mood. Though no words were exchanged, the Complainant believed that Schwartz had seen him. Schwartz admits that the Complainant may have been on the work site on July 15,1991, he has no specific recollection of having seen him. The Complainant told Crumrine that he would return to work on July 17, 1991 when he would be able to speak with Wagner and Schwartz together. This information was not passed on to Schwartz but may have been given to Wagner.

8. The Complainant's absences on July 11 and July 12, 1991 were approved by Wagner. The Complainant's absences on July 15 and again on July 16 were not specifically approved by any supervisor but were made known to a representative of the Respondent.

9. On July 16, 1991, Schwartz prepared a Notice of Termination for the Complainant stating as the grounds of termination that the Complainant had been absent without permission on July 11, July 12, July 15 and July 16,1991. At the time that the Notice was prepared, Schwartz did not know that the Complainant's absence on July 11 and July 12 had been approved by Wagner. Schwartz left the Notice on Wagner's desk.

10. Wagner returned to the work site early on the morning of July 17, 1991. He found the Notice prepared by Schwartz and questioned Schwartz about it when Schwartz came into the trailer about 5:30 a.m. After a discussion that included Wagner's asking Schwartz if anything could be done to preserve the Complainant's employment, Wagner concurred in the termination but changed the Notice to indicate that the Complainant was being terminated pursuant to a reduction in force. This change was made pursuant to a company policy to allow workers the chance to obtain unemployment compensation.

11. At approximately 7:00 a.m. on July 17,1991, the Complainant came to work and was met on the steps of the trailer by Wagner. Wagner told the Complainant that he had been terminated stating that because of all that had happened in the past few days, it was the best for all concerned and for the project in general. The Complainant was shocked by the news and informed Wagner that he was going to drive to Appleton to see what could be done and to tell others in the company about undefined problems at the work site caused by or attributable to Schwartz.

12. At the time of hearing, Connie Thompson was a 41 year old white female. She was employed by the University of Wisconsin Family Practice Residency Program as a Resident Recruiter and had offices in Alumnae Hall which is adjacent to Saint Mary's Hospital. Her job duties require her to show people through the hospital facilities. As part of her job duties she must portray the hospital and its surrounding environments as a "nice" place to work. To this end, she tries, to be friendly and outgoing to those she meets in the public areas of her work.

13. Shortly after Schwartz began working at the Saint Mary's site Thompson met him while on the Saint Mary's site. She treated him as she would have treated anyone else that she met while working, that is to say in a friendly and open manner. Schwartz became interested in a more personal and intimate relationship with Thompson. She consistently and repeatedly rebuffed Schwartz's overtures without any noticeable effect on Schwartz. After several months of increasing attention from Schwartz, Thompson wrote to the Respondent's president,

anonymously, complaining of Schwartz's sexual harassment of her. This letter was dated July 11, 1991 and was received in the Respondent's Appleton office on July 12, 1991.

14. The Respondent facsimile transmitted a copy of Thompson's letter to Wagner on July 12, 1991 at 3:40 p.m. Wagner immediately contacted Warren Parson, Respondent's president to discuss the letter. Wagner took no further action with respect to this matter until July 17, 1991. Wagner could not discuss the letter with Schwartz because Schwartz had left for the day at or before 3:30 p.m. Wagner was not at work on July 15 and 16 because he was attending a seminar. Wagner asserts that he destroyed the original facsimile copy after making a photocopy for his files.

15. On July 17,1991, Wagner discussed Thompson's July 11, 1991 letter with Schwartz for the first time. It is not clear whether this discussion took place before or after Wagner and Schwartz had agreed upon the termination of the Complainant. Neither Wagner nor Schwartz offered an opinion about who may have authored the letter. Schwartz suspected that the Complainant may have written it because the letter was written so soon after the dispute between Schwartz and the Complainant on July 10, 1991. Schwartz did not share his suspicions with Wagner.

16. On July 19, 1991, Schwartz saw Thompson in the vicinity of her car and approached her to show her the July 11, 1991 letter. Schwartz did not know that Thompson was the author. Schwartz indicated that he thought that the letter had been written by a disgruntled employee and that he had fired him. After questioning from Thompson, Schwartz confirmed that the disgruntled employee was the foreman Jim, the Complainant.

17. Thompson was extremely upset by her conversation with Schwartz on July 19, 1991. After some thought she contacted officials of Saint Mary's Hospital and the University of Wisconsin to inform them of her concerns that she may have caused the termination of the Complainant's employment by accident. She also continued her complaints against Schwartz.

18. The Complainant was a satisfactory employee for whom there was work at the time of his termination and for some period of time thereafter.

19. At the time of the Complainant's termination, neither Schwartz nor Wagner had received complaints about the Complainant's work.

## CONCLUSIONS OF LAW

20. The Complainant is a person who is entitled to protection by Sec. 3.23(8) M.G.O.

21. The Respondent is an employer within the meaning of the ordinance and is a person within the meaning of Sec. 3.23(8).

22. The Respondent retaliated against the Complainant and thereby violated Sec. 3.23(8) by terminating his employment on July 17, 1991 because of the perception that he had opposed a discrimination practice.

## ORDER

23. The Respondent is ordered to cease and desist from retaliating against the Complainant or any other person for the exercise of rights protected by the ordinance.

24. An additional hearing shall be scheduled to determine what may be required of the Respondent in order to make the Complainant whole and to generally effectuate the purposes of the ordinance.

## MEMORANDUM DECISION

The record in this complaint contains the usual array of factual disputes, issues of the credibility of witnesses and legal authority of the Commission to act. Despite some factual disputes many of the facts and sequences of events are not in controversy.

The Respondent is a construction company based in Appleton, Wisconsin. It is engaged nationwide in large scale construction projects. From either late 1989 or early 1990, the Respondent has been the general contractor on a project at St. Mary's Hospital in the City of Madison. The project involves building a new wing of the hospital and remodeling other facilities at the hospital. As with most large scale construction projects, the Respondent's physical presence began with only a few employees and gradually grew as the project proceeded. The Respondent began its presence with a construction trailer at the site and eventually an office in the building. The trailer contained office space for approximately five or six employees. At all times pertinent to this complaint, the Respondent's supervisory employees had offices in the construction trailer.

The project supervisor is Curt Wagner. His title is Vice President for Special Projects. He is a long-term employee of the Respondent and has extensive experience in construction of health care facilities. Among other employees, Wagner is responsible for the supervision of Jerry Schwartz. Schwartz supervises various foremen and laborers throughout the project. At the time of his termination, Schwartz was the Complainant's supervisor. At the time that the Complainant began his employment, the Complainant's supervisor was Frank Gratton. Schwartz became the Complainant's supervisor when Gratton retired.

The Complainant began his employment in early 1990 as a carpenter. He was one of the first carpenters hired by the Respondent for the St. Mary's project. As the project quickly expanded, more carpenters were hired by the Respondent. In late March or early April of 1990, the Complainant was promoted to the position of carpenter foreman. He was responsible for the supervision of a group of other carpenters. In June of 1991, Schwartz, with the approval of Wagner, approached the Complainant to see if the Complainant would be willing to take on additional responsibilities. The Complainant agreed to help with the supervision and coordination of other foremen. He was designated a lead foreman and his salary was increased to compensate for the additional responsibility. The Complainant was not told at this time that there might be a reduction in work in the near future. Schwartz considered the Complainant to be a good and reliable worker.

On July 10,1991, the Complainant became aware that hand cleaner was needed by some of his carpenters. He asked David Crumrine to pick up a small quantity of hand cleaner as a stopgap measure until the usual shipment of supplies arrived from the Respondent's warehouse. Crumrine was the Project Engineer and had an office in the construction trailer. The Complainant's request was overheard by Schwartz. Schwartz took exception to the Complainant's performing a duty that was Schwartz's and that had already been done. Schwartz confronted the Complainant and heatedly stated something along the lines of, "If you want my fucking job you can have it. You seem to be doing a good job already." The Complainant was greatly surprised and offended by the attitude of Schwartz. Later, in a conversation with Connie Thompson on July 19, 1991, Schwartz recognized that he had overreacted anal his hostility had been uncalled for.

On July 11, 1991, the Complainant came to work to unlock the work site but felt that he could not work with Schwartz that day because of Schwartz's outburst the day before. The Complainant spoke with Wagner by telephone. The Complainant requested to be allowed to take the rest of that day and the next day off to allow things to calm down. While Wagner wished the Complainant to come in immediately and to meet with him and Schwartz to work things out, he allowed the Complainant to have the time off. Wagner specifically directed the Complainant to appear at work the following Monday, July 15, 1991. At that time Wagner, Schwartz and the Complainant could sit down and resolve their differences. Wagner forgot that he would not be in the office that following week until Wednesday because of his scheduled attendance at a meeting in Appleton on Monday and Tuesday, July 15 and 16.

Separate from the events at the work site on July 11, 1991, Connie Thompson wrote and mailed an anonymous letter to Warren F. Parsons, the president of the Respondent. This letter informed Parsons of Thompson's complaints and concerns about her treatment by Schwartz. Schwartz had seen Thompson around the St. Mary's facilities and had become interested in getting to know her better. Schwartz, a married man with a family in Appleton, had been engaged in a campaign to date Thompson. Thompson had repeatedly rebuffed Schwartz's advances. Growing tired of Schwartz's increasingly unwanted attention, Thompson began altering her schedule, parking and routine in an effort to avoid Schwartz. Eventually, Thompson felt that the only way to end Schwartz's conduct toward her was to inform Schwartz's employer. To that end, she wrote and mailed the July 11, 1991 letter.

Thompson's letter was received in the Respondent's Appleton office on July 12, 1991. Parsons was out of the office on that date but was informed of the letter by telephone. A copy of the letter was sent to Curt Wagner in Madison by facsimile transmission at 3:40 p.m. on July 12, 1991. Wagner spoke with Parsons by telephone once he received the facsimile copy.

Thompson's letter specifically identifies Schwartz as a supervisor of the Respondent named Jerry who is sexually harassing women at the St. Mary's project site. The letter does not use Schwartz's last name but identifies his position and uses his first name, Jerry. The letter indicates that unless something is done to eliminate the sexual harassment that legal action may follow.

On Monday, July 15, 1991, the Complainant came to work as directed by Wagner on July 11, 1991. He came to the trailer expecting to have a meeting with Schwartz and Wagner to clear the air over the July 10, 1991 incident. David Crumrine informed the Complainant that Wagner would not be in the office until Wednesday because of the Appleton meeting. The Complainant had seen Schwartz as the Complainant came to the trailer that morning. Schwartz did not say anything to the Complainant or appear to acknowledge his presence in any way. Schwartz appeared to the Complainant to be very upset about something. Given the Complainant's impression of Schwartz's mood, the Complainant asked Crumrine to tell Wagner that the Complainant would continue to stay away from the project site until he, Schwartz and Wagner could meet together. He said that he would report first thing on Wednesday, July 17, 1991.

On Wednesday, July 17, 1991, the Complainant approached the construction trailer to meet with Wagner and Schwartz. He was met at the trailer steps by Wagner. Wagner told the Complainant that he was being fired or laid off. When the Complainant questioned why this action was being taken, Wagner indicated that because of the recent events at the project site, the Complainant's termination would be best for all concerned. The Complainant was extremely upset and shocked by his termination in such an abrupt fashion. The Complainant threatened that he was going to drive to

Appleton to straighten things out and to let the Appleton office know about what was going on at the St. Mary's site.

On July 19,1991, Schwartz approached Connie Thompson in the parking lot where her car was parked. As he approached, Thompson noticed that Schwartz was holding a letter or piece of paper. The paper was a copy of the letter that Thompson had sent to Parsons on July 11, 1991. Thompson was very alarmed that Schwartz had a copy of this letter because of its content about Schwartz. Once Thompson realized that Schwartz did not suspect her of writing the letter, she became less frightened. Schwartz showed Thompson the copy of the letter and indicated that he could not believe that someone would write such a complaint about him. He stated that he thought that the letter had been written by a disgruntled employee but that the employee had been fired and that he wouldn't be around any more. Thompson was concerned that her letter had led to the termination of an innocent person. She got Schwartz to confirm that the terminated employee was named Jim.

The above facts are basically not in dispute. There are disputes about what happened and the motivation for what happened from the middle of Friday afternoon, July 12, 1991 up to the Complainant's termination on Wednesday, July 17, 1991.

It is the position of the Complainant that at some point prior to deciding to terminate the employment of the Complainant that Schwartz was made aware of the July 11, 1991 letter from Connie Thompson. The Complainant draws the conclusion that Schwartz then decided to rid himself of a troublemaker by terminating his employment. The Respondent contends that Schwartz had no knowledge of the July 11, 1991 letter until after the decision to terminate the Respondent's employment for nondiscriminatory reasons had been made.

In support of its position, the Respondent states that Schwartz left the job site early on Friday afternoon, July 12, 1991 and was gone before the facsimile letter arrived from the Appleton office. The Respondent asserts that it was a common practice for supervisors to leave early on Friday afternoons. The Complainant disputes the assertion that Schwartz left early on July 12, 1991 or generally left early on Fridays. The Respondent also asserts that once Wagner received the facsimile letter, he made a photo-copy of the letter and then threw out the original. Wagner stated that he did not give Schwartz a copy of the letter until Wednesday morning July 17, 1991 prior to meeting the Complainant but after deciding to terminate the Complainant's employment.

To resolve these disputes, we must apply the analytical framework adopted by the Commission. That is the process set forth in McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 5 FEP Cases 965 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 48, 25 FEP Cases 113 (1981). The Commission has not yet ruled on the applicability of the Supreme Court's ruling in St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). For purposes of this analysis, the Hearing Examiner will assume that there is legal authority for the Complainant's complaint. This legal issue will be addressed later in this decision.

The elements of the prima facie case for this complaint are: 1. The complainant is qualified for the position in question. 2. A complaint regarding activity that is protected by the ordinance has been made. 3. The complainant suffered an adverse job action as a consequence of the complaint.

The fact that the Complainant in this case was qualified for his job cannot seriously be questioned. He was one of the first carpenters hired for the project. He was one of the first carpenters promoted to the position of foreman. Within a month or so of his termination he was asked to assume special and additional duties by Schwartz. Schwartz admitted that the Complainant had performed his job well

and that only after his termination did he hear any complaints about the Complainant's performance. Clearly, the Complainant had no performance problems relating to his job.

Equally, there is no question that there was a complaint alleging conduct that would violate the ordinance. Connie Thompson's letter of July 11, 1991 sets forth allegations of sexual harassment against a supervisory employee of the Respondent. The Hearing Examiner need not and does not decide here whether the conduct of which Thompson complained actually constituted sexual harassment on the part of Schwartz. It is sufficient that Thompson makes the allegation of sexual harassment. Sec. 3.23(7)(k), M.G.O. clearly sets forth protections relating to sexual harassment. As such, her complaint involves conduct regulated by the ordinance. There is no contention on the part of the Respondent that it did not receive Thompson's letter. The testimony of Wagner admits that the Respondent received the letter on July 12, 1991 and that he received a copy on the same day. He understood the seriousness of the complaint as reflected in his telephone contact with Parsons shortly after receiving the letter.

The final element is in dispute. The record contains no direct evidence that the Respondent's action was triggered by the complaint sent by Thompson. Discrimination need not be demonstrated by direct evidence and often can only be inferred from evidence in the record.

The primary difficulty for the Complainant comes from the lack of direct evidence that Schwartz knew of the existence of the Thompson letter until after the decision to terminate the Complainant's employment had been made. Related to this argument is the lack of direct evidence that Wagner knew or had reason to know that Schwartz believed that Thompson's letter had come from the Complainant until after the decision to terminate the Complainant had been made.

The Complainant seeks to overcome this lack of direct evidence by pointing to isolated facts and seeks to draw inferences from those facts that support his case. For example, the Complainant asserts that because of the Respondent's sexual harassment policy and the prompt actions taken by the Respondent on July 12, 1991 to respond to Thompson's letter, it is more likely than not that the letter was immediately given to Schwartz on July 12, 1991 or at least left for him to find on July 15, 1991. The Respondent, given its actions on July 12, 1991, obviously takes seriously claims of sexual harassment. The quick responses of the Appleton office and of Wagner make it likely that Schwartz would have been promptly given the letter for his response since he was clearly identified as the alleged harasser.

This assumption or inference is supported by the description of Schwartz's demeanor on the morning of July 15, 1991. The Complainant's testimony described Schwartz as looking as if he would like to hit someone or something. This would be consistent with the appearance of a person who has just discovered that he has been accused of something that could significantly affect his career or employment, i.e. sexual harassment.

The final element of the Complainant's circumstantial case is the conversation between Schwartz and Connie Thompson held on July 19, 1991, two days after the Complainant was fired. Thompson testified that during that conversation Schwartz showed her a facsimile copy of the letter that she sent to the Respondent on July 11, 1991. She was sure that the copy was on facsimile paper because she is familiar with that type of paper from work. Schwartz admitted that he had shown Thompson a copy of the letter at that time but testified that it was on photocopy paper. During this conversation, Schwartz told Thompson that he believed that Dischler had written the letter but that Dischler had been let go so there wouldn't be any further problems.

If true, the above facts are sufficient to establish a prima facie case of retaliation. If this were a review of an Initial Determination of no probable cause to believe that discrimination had occurred, the Hearing Examiner would have to accept the version of these facts presented by the Complainant. Since this is a determination of discrimination or no discrimination, the Hearing Examiner must determine the facts after weighing the testimony of both parties.

Based upon the record as a whole, the Hearing Examiner concludes that the testimony presented by the Complainant is more credible than that of the Respondent. Most important in this determination is the testimony surrounding the July 19, 1991 conversation between Thompson and Schwartz. Schwartz is likely to have possessed the original facsimile copy of Thompson's letter only if it had come into his possession relatively soon after its arrival at the work site. This could either have occurred on July 12, 1991 or first thing on Monday morning July 15, 1991. It makes no difference to the outcome of this issue whether Schwartz was present on the work site when the facsimile copy was received or if he was gone and Wagner left the copy, for him to receive on Monday because in either instance, he would have had the document prior to making his decision to terminate the Complainant.

Having determined that the Complainant has presented a credible prima facie case in support of his complaint, the Hearing Examiner must review the record to determine whether the Respondent has presented a legitimate nondiscriminatory explanation for its conduct. The Respondent's burden is one of articulation and not one of proof. Burdine, supra.

The Respondent presents, somewhat in the alternative, at least two different explanations for its actions.

First, the Respondent asserts that the decision to terminate the Complainant's employment was Schwartz's and that Schwartz did not know of the letter's existence until after he made his decision. Further, the Respondent asserts that Schwartz's decision was based solely on business factors, particularly the Complainant's failure to appear for work on July 15 and 16. The second reason proffered by the Respondent is that the Complainant was essentially laid off because there was little work for him to do given the stage of the construction project. Since the Respondent's burden is to articulate a legitimate, nondiscriminatory reason for its conduct, the Hearing Examiner does not at this stage have to determine the validity of the proffered reasons. The explanations given by the Respondent represent credible, legitimate, nondiscriminatory reasons for its actions. A lack of work to keep an employee busy is a legitimate reason for an employer to terminate that employee. Equally, an employer has no obligation to retain an employee if the employee is not meeting the employer's legitimate expectations for performance such as appearing for work as scheduled.

Since the Respondent has stated legitimate, nondiscriminatory reasons for its actions, the Hearing Examiner must examine the record to determine whether the reasons proffered for the Respondent's action are either not credible or are a pretext for other discriminatory motives. A simple finding that the employer has lied about its reasons is not sufficient by itself to find discrimination. St. Mary's Honor Center, supra. The Complainant must carry the ultimate burden of demonstrating that discrimination motivated the Respondent. St. Mary's Honor Center, supra; Burdine, supra.

As discussed above, the Respondent's explanation that Schwartz did not know of the complaints about his alleged sexual harassment until after he had made his decision are not credible. This issue has already been decided in favor of the Complainant. It is apparent from the record that Schwartz either received a copy of the letter on July 12 or July 15. The earliest indication that Schwartz had made a decision to terminate the Complainant was the termination notice that he prepared the evening of July

16 to give to Wagner the next day. This is after either of the likely times for Schwartz to have received a copy of the July 11 letter.

The reason stated in the July 16, 1991 termination notice for the Complainant's termination was the Complainant's failure to appear for work on July 11, 12, 15 and 16. The Complainant's absence on July 11 and 12 had been previously excused. One of Schwartz's coworkers, David Crumrine, knew of the Complainant's reason for the Complainant's absence on July 15 and 16. Presumably, Wagner also knew or could have known of the reasons for the Complainant's absence.

The reasons for the Complainant's termination changed on July 17 to reflect a lack of work. At hearing, Wagner testified that this was done to allow the Complainant to file for and receive Unemployment Compensation. However, this explanation arose very late in the process and after the Respondent had offered several other reasons for the Complainant's termination. The explanation that there was insufficient work to require the retention of the Complainant is not credible. The Respondent increased the responsibilities of the Complainant a few short weeks before his termination because of the need for someone to supervise additional carpenters. The record reflects that the Respondent continued to hire carpenters after the Complainant had been terminated and that work intensified in some areas of the project.

Another explanation offered for the Complainant's termination is that given all that had happened, it was the best for all concerned. The Respondent's representatives were unable, at the time of hearing, to explain how being terminated was in the Complainant's best interest or what had happened to make it in its best interest to terminate the Complainant's employment. There is support in the record for the proposition that the Complainant was overly sensitive about Schwartz's criticism but that does not seem to rise to the level that might require the Complainant's termination. The incident over the hand cleaner appears to have been the first and only such incident. The Respondent indicates that there were complaints about the Complainant from other workers at the site.

The Respondent admitted, at the hearing, that these complaints only came to light after the Complainant's termination and therefore could not have been a basis for his termination.

As indicated above, the Respondent has at various times offered different explanations for its termination of the Complainant. None of these explanations by themselves is particularly convincing. When one looks at the number of explanations given and the staggered timing of the explanations, the Hearing Examiner concludes that the Respondent's reasons are pretextual and the real reason for the Complainant's termination has not been given by the Respondent.

As indicated above, it is not sufficient for the Complainant to merely demonstrate that the Respondent's explanations are not credible or are a pretext. To prevail, the Complainant must establish that illegal discrimination motivated the Respondent. To that end, the Complainant contends that the Complainant's termination so soon after the receipt of the July 11 letter, in combination with the Complainant's observation of Schwartz on the morning of July 15 and the testimony concerning Schwartz's conversation with Connie Thompson on July 19 demonstrate that Schwartz, the person who actually made the decision to terminate the Complainant, did so as a direct result of his concern and outrage at having been accused of sexual harassment. Schwartz's decision, regardless of its motivation, was ratified by Wagner on July 17 and was carried out on the same day. This ratification and execution clearly binds the Respondent for the action of Schwartz, a lower level supervisor.

The Hearing Examiner agrees and finds that the record demonstrates that Schwartz's decision was substantially motivated by a retaliatory motive. As shown by the July 19 conversation that Schwartz

had with Connie Thompson, he believed that the Complainant was the source of the letter accusing him of sexually harassing women at the work site. There was already some difficulty between Schwartz and the Complainant because of the incident over the ordering of hand cleaner and the Complainant's reaction to Schwartz's outburst of temper. Schwartz took the first opportunity to rid himself of the source of some potentially damaging accusations. It was Schwartz on his own who decided to terminate the Complainant and then convinced Wagner to support his decision. Wagner did so but attempted to lessen the impact of the decision on the Complainant.

The remaining question to be addressed is whether even if the Respondent's conduct was motivated by a desire to retaliate against the Complainant, that conduct represents a violation of the ordinance's provisions. It is customary for provisions that protect against retaliation to apply to those individuals who actually took part in activity that is protected by the ordinance or other legal provision. In the circumstances of this case, the Complainant was a victim of a mistake on the part of Schwartz. Schwartz mistakenly attributed to the Complainant activity protected under the Ordinance that was actually undertaken by Thompson. It is clear, however, that Schwartz intended to even the score with someone for their exercise of rights protected under the ordinance i.e. opposing sexual harassment by Schwartz. Under these circumstances, it would seem inequitable not to hold Schwartz and hence his employer, the Respondent, responsible for conduct that would quite clearly violate the ordinance except for the oddity of the facts herein. The case is somewhat analogous to a person's being held responsible for homicide where he or she intends to kill one person but by a mistake of identity kills another. In either case, the killer is liable for the death.

There is some authority in other forums for applying the retaliation provisions of related laws to third party circumstances. In the cases of De Medina v. Reinhardt, 444 F. Supp. 573 (D.C. D.C., 1978) and U.S. v. City of Socorro, 11 EPD para. 10,698 (D.C. N.M., 1976), plaintiffs were permitted to pursue a claim of retaliation where they had suffered an adverse action as a result of protected activity on the part of their spouse. In the case of Tidwell v. American Oil Co., 332 F. Supp. 424 (D.C. Utah, 1971), the plaintiff was permitted to bring an action for her termination where she opposed a discrimination practice affecting others and not herself. In a case brought under the Wisconsin Fair Employment Act, a complainant was permitted to maintain a claim of discrimination where he was terminated as a result of a friend's opposition to sexual harassment at the job site. Christensen v. UW-Stevens Point, (Wis. Personnel Comm., 01/24/92). These cases make clear that persons other than those exercising their own rights can be victims of retaliation and have a right to redress under most discrimination laws.

Given the broad remedial purposes of the ordinance, and the adoption of a particularly broad provision prohibiting retaliation, it would not serve the purposes of the ordinance to preclude the Complainant's complaint. He suffered as much damage as the plaintiffs in De Medina, City of Socorro and Christensen. The Hearing Examiner concludes that the Commission has jurisdiction over this complaint.

The parties prior to hearing and with the consent of the Hearing Examiner stipulated to the bifurcation of this complaint along the lines of liability and damages. This matter will be set for additional proceedings once there is a Final Order entered establishing liability on the part of the Respondent.

Signed and dated this 11th day of July, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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

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| James Dischler<br>P.O. Box 6275<br>Springdale, AR 72766<br><br>Complainant<br><br>vs.<br><br>Boldt Construction, Inc.<br>P.O. Box 419<br>Appleton, WI 54912<br><br>Respondent | DECISION AND INTERIM FINAL ORDER<br><br>Case No. 21545 |

## BACKGROUND

On August 14, 1991 the Complainant, James Dischler, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, Boldt Construction, Inc., discriminated against the Complainant on the basis of his sex in terminating his employment and retaliated against him for the perceived exercise of rights protected by the Ordinance. After investigation of the allegations of the complaint, the Investigator/Conciliator to whom the complaint had been assigned issued an Initial Determination concluding that the Respondent had discriminated against the Complainant on the basis of his sex. The Investigator/Conciliator did conclude that there was probable cause to believe that the Respondent had retaliated against the Complainant for the perceived exercise of rights protected by the Ordinance. The Complainant did not appeal the Initial Determination's conclusion of no probable cause.

Efforts to conciliate the remaining allegation of the complaint failed. The complaint was transferred to the Hearing Examiner for a public hearing on the allegation of retaliation. A public hearing was held on November 9, 1992. The parties stipulated that the hearing would only consider the issue of liability. A hearing on the issue of damages would be held only if a violation of the Ordinance was established. Subsequent to the hearing on liability, the parties were given the opportunity to submit written briefs and argument. On July 11, 1994, the Hearing Examiner issued his Recommended Findings of Fact, Conclusions of Law and Order determining that the Respondent had retaliated against the Complainant in violation of MGO 3.23(8).

The Respondent appealed from the Hearing Examiner's decision. The Commission accepted additional written argument from the parties but declined to hold oral arguments. The Commission considered the appeal of the Respondent on November 10, 1994.

## DECISION

The Commission adopts the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order in their entirety. The Hearing Examiner's factual findings are supported by the record and he has applied the proper legal standard and has correctly applied the facts to the law.

The Respondent takes exception to Findings of Fact 7, 11, 13 and 14. The Respondent failed to explain what in these findings might be erroneous or otherwise contrary to the record. It is the Respondent's burden to state, with some specificity, the basis of its exceptions. The Commission declines to accept these particular exceptions as they lack any guidance for the Commission to be able to judge the validity of the exceptions.

The Respondent objects to the second sentence in Finding of Fact 8. The Finding is not inconsistent with the interpretation of the Respondent. The record supports the Findings as stated by the Hearing Examiner. However, the Hearing Examiner did not find that the Complainant's absences on July 15 and 16 were approved.

The Respondent's objections to the remaining Findings of Fact were considered by the Commission. Upon review of the record as a whole, the record supports the Findings as set forth by the Hearing Examiner.

The remaining exceptions stated by the Respondent are to the ultimate facts and conclusions embodied in the Conclusions of Law and Order and the Hearing Examiner's Memorandum Decision. The Commission's review of the record as a whole leads it to the conclusion that the Hearing Examiner did not err in his application of the law to the facts and that his statement of the applicable law, either explicit or implicit, is correct. The Respondent states no exception in this regard that would support reversing of the Hearing Examiner's decision.

The Respondent specifically complains that the Hearing Examiner found Thompson to be a credible witness. The Commission gives deference to such conclusions of the Hearing Examiner and will only replace them when there is evidence that the conclusion is arbitrary, capricious or is clearly contrary to the record. The Respondent presents no such support other than its dissatisfaction with the Hearing Examiner's conclusion.

The Respondent objects to the Hearing Examiner's drawing of inferences from the facts and asserts that where there is little or no direct evidence, discrimination may not be found. It is the Commission's experience that direct evidence of discrimination is seldom available and that drawing inferences from circumstantial evidence is all that can be done. There is nothing wrong with this approach. The Hearing Examiner's conclusions and the inferences he draws are supported by the record as a whole.

The Respondent argues that the Commission should require proof at a higher standard than that of a preponderance of the evidence. The Respondent fails to present any authority sufficient to convince the Commission that a higher standard is required. The Commission has utilized the McDonnell-Douglas/Burdine paradigms. McDonnell-Douglas Core. v. Green, 411 U.S. 792 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). The Commission will continue to apply this standard.

## ORDER

The complaint in this matter is remanded to the Hearing Examiner for further proceedings in this matter on the issue of damages. The Respondent's appeal is dismissed.

Joining in this decision were: Anderson, Fieber, Gardner, Miller, Verridan, Washington and Wilberg.

Signed and dated this 29th day of November, 1994.

EQUAL OPPORTUNITIES COMMISSION

Booker Gardner
President