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

Tammy S Meeker 11093 Deer Run Dr. Lodi WI 53555 Complainant vs. James Hovde 16 N. Carroll St. Madison, WI 53703 Respondent	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION Case No. 22034

BACKGROUND

On January 11, 1994, the Complainant, Tammy S. Meeker, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondents, Hovde Realty, Inc. and James Hovde, had discriminated against her in the terms and conditions of her employment and caused her constructive discharge from employment by engaging in and permitting her sexual harassment.

Additionally, the Complainant asserts that the Respondent retaliated against her for her exercise of rights protected by the ordinance, when she was threatened with legal action and other dire consequences if she should pursue her rights. The Respondents denied the allegations of discrimination and retaliation.

After investigation, an Investigator/Conciliator for the Commission issued an Initial Determination concluding that there was probable cause to believe that the Respondents had discriminated against the Complainant on the basis of her sex. Attempts to conciliate the complaint failed and the complaint was transferred to the Hearing Examiner for a public hearing on the merits of the complaint.

Pursuant to a Scheduling Order issued by the Hearing Examiner subsequent to a Pre-Hearing Conference, both respondents filed extensive motions to dismiss the complaint for lack of jurisdiction on the part of the Commission. During the pendency of these motions one of the Respondents, Hovde Realty, Inc., reached a settlement with the Complainant.

In accordance with the terms of the agreement reached by the Complainant, the complaint was dismissed as to Hovde Realty, Inc., on April 20, 1995. Efforts to conciliate the remaining allegations of the complaint have proven unsuccessful.

DECISION

Each of the Respondents, when they filed their motions, joined in the motion filed by the other Respondent. While the Hearing Examiner is not happy with this attempt to double each Respondent's

work for half the hours, the Hearing Examiner is powerless at this stage to object to the approach taken by the Respondents. It is particularly unfortunate in the current circumstance because of the settlement reached by the Complainant and Hovde Realty, Inc. Even though the business is no longer a party, the Hearing Examiner must address the arguments put forth in its motion because they are preserved by the Respondent, James Hovde. The Hearing Examiner will address the motions as if they were all filed by James Hovde.

There are essentially four reasons put forth by the Respondent to support his theory that the Commission is without jurisdiction over the allegations of this complaint. Two of these theories assert that the Commission's jurisdiction is precluded by other state law. The remaining two arguments of the Respondent contend that the Complainant has failed to either state claims or to present sufficient evidence to support claims under the ordinance. The Hearing Examiner will first address the preemption arguments and then the remaining arguments.

First, the Respondent contends that the Madison Equal Opportunities Ordinance (MEOO) is preempted by the Wisconsin Fair Employment Act (FEA) Wis. Stats. §111.31 et seq. It is the Respondent's contention that preemption is required by the Supreme Court's holding in Anchor Savings and Loan Assn. v. Equal Opportunities Commission of the City of Madison, 120 Wis. 2d 391, 355 N.W.2d 234 (1984).

In the Anchor case, the Supreme Court established standards for determining whether a local ordinance is preempted by a state-wide regulatory scheme constructed by the legislature. The Court held that a municipality had no constitutional authority to regulate within an area of exclusively state-wide concern but that local units of government could establish regulations within an area of state-wide concern pursuant to legislative authority granted to the local units by Wis. Stats. §62.115. A local unit's regulatory efforts would be preempted by a comprehensive and all encompassing state-wide regulatory structure where:

1. The state had specifically withdrawn authority of a local unit to act.
2. The local unit's scheme logically conflicts with a state-wide regulatory scheme.
3. The local unit's scheme defeats the purpose of the state-wide scheme, or
4. The local unit's scheme or program conflicts with the spirit of the state-wide scheme.

There is a long history of cooperative efforts between the State of Wisconsin and the Madison Equal Opportunities Commission in the struggle to eliminate and remedy discrimination in employment. The Fair Employment Act was first adopted in 1945 and has been extensively amended to reflect the changing needs of the state. The MEOO, originally adopted in 1963 and dealing primarily with housing, was quickly amended to include provisions relating to employment and public accommodations. Both of these efforts predate the federal government's appearance on the regulatory scene. As with the FEA, the MEOO has been extensively amended to cope with greater demands and the changing needs of the City of Madison.

These efforts have complemented each other rather than caused conflict with each other. The Department of Work Force Development Equal Rights Division (ERD), the agency responsible for the administration of the FEA, and the Commission have worked closely to increase their regulatory impact while preserving their scarce administrative and regulatory resources. As part of this cooperative effort, the ERD and the Commission have entered into a Work Sharing Agreement by which the two agencies will defer work on cases that could have been filed with either agency to the agency where the case was first filed.

Despite this long history of cooperative efforts, the Respondent asserts that the regulatory schemes of the state and city are in such conflict that the MEOO must fall because of preemption on the part of the state. The Respondent acknowledges that the state has not specifically withdrawn the area of prevention and remedy of employment discrimination from local governmental units. In fact, where the legislature has wished to withdraw this authority it has specifically done so. Wis. Stats. §111.337 (3). Instead, the Respondent argues that the MEOO fails the last three Anchor tests and points to four areas of arguable difference in treatment of specific aspects of employment discrimination cases between the ERD and the Commission. The Respondent does not clearly articulate how each of these supposed problems either logically conflict, defeat the purpose of or conflict with the spirit of the FEA.

First, the Respondent points to the fact that the Commission, by its Hearing Examiner, has held that the MEOO is not necessarily subject to the exclusivity provision of the Worker's Compensation Act (WCA). Wis. Stats §102.03. The Respondent contends that where an injury arises in connection with one's employment, the employee's exclusive right to compensation for that injury is through the provisions of the Wisconsin Worker's Compensation Act. The Respondent asserts that the emotional injuries suffered by an employee who has suffered sexual harassment are injuries that are subject to the WCA and therefore must be brought solely under the WCA and any other action is barred. The ERD has followed this argument, while the Commission has exercised a greater degree of flexibility and has not always followed this position.

While this position was at least arguable at the time that the Respondent filed his motion, recent developments have demonstrated that the Commission's position and not the one of the ERD is correct. On April 18, 1997, the Wisconsin Supreme Court issued its decision Byers v. LIRC, ____Wis. 2d ____(1997)(slip op. 95-2490). The court held that despite the exclusivity provision of the WCA, Byers could maintain her claim under the FEA. The court reached this result by finding that the legislature could not have meant the FEA to have been preempted by the WCA because there would have been no need to adopt the FEA if all cases of work related discrimination were to be preempted by the WCA. In order to give both laws their greatest effect, the court reasoned that one should be able to maintain actions under both laws where the injury giving rise to the action triggered both laws.

Given the Byers decision, there is no conflict as stated in the Respondent's first example. In fact, as noted above, the earlier possible conflict was resolved in favor of the position taken by the Commission. Even if the possible conflict still existed, the Respondent's remedy is not to argue for the complete preemption of the MEOO but rather to challenge an individual decision as it applies the law. Commission decisions are subject to judicial review which adequately protects the Respondent's rights to be free of an excessive reach of jurisdiction by the Commission.

The second instance pointed to by the Respondent to demonstrate the incompatibility of the FEA and the MEOO deals with procedures for default judgments. The Respondent directs the Hearing Examiner to the case of Morris v. Madison Kipp Corporation, MEOC Case No. 21302 (Ex. Dec. Nov. 20, 1993). In the Morris case, the complainant failed to appear at hearing. The Hearing Examiner took the respondent's motion for default judgment under advisement and gave the respondent the opportunity to make an offer of proof to support its position and its motion. The respondent made the offer of proof and the complaint was dismissed. The Respondent in the present case seems to contend that because the Hearing Examiner gave the respondent in the Morris case the opportunity to present additional information in support of its position that it has violated its own procedures and those called for at the ERD. This alleged difference is supposed to demonstrate how fundamentally different

from each other are the FEA and the MEOO. This fundamental difference is to have the consequence of preempting the MEOO.

The Hearing Examiner finds this point to be almost frivolous. Though the Hearing Examiner may have taken a slightly different route to the result, he ended up in exactly the same position as would an Administrative Law Judge at ERD. The rules of both the ERD and the Commission call for the dismissal of a complaint where a complainant fails to appear and is unable to show good cause for the failure. The Hearing Examiner dismissed the complaint after giving the respondent the opportunity to make its position, both procedural and with respect to the merits, clear.

The third alleged difference in treatment pointed to by the Respondent relates to the application of the 300 day period of limitation found in both the FEA and the MEOO. The Respondent points to one instance where a Commission Investigator/Conciliator applied or perhaps misapplied the statute period. The Respondent entirely ignores the Hearing Examiner's rulings in Krebs v. Don Miller Pontiac Subaru, Inc., MEOC Case No. 22127 (Ex. Dec. on Jur. 03/29/96, Ex. Dec. on Jur. 03/16/95) and Ennis v. Local 965 IBEW, MEOC Case No. 22118 and Ennis v. WP&L, MEOC Case No. 22119 (Ex. Dec. on Jur. 02/03/95 and 03/17/95). These rulings generally apply the same standards as those applicable to actions under the FEA. It is laughable that the Respondent would believe that such an insignificant difference in treatment of a specific case could rise to a level that requires preemption of the MEOO.

The final point raised by the Respondent in support of his Anchor claim is that the Commission has asserted the authority to award compensatory damages for the emotional injuries stemming from employment discrimination and in an extremely limited number of cases has awarded punitive damages in an employment discrimination claim. Nelson v. Weight Loss Clinic of America, Inc. et al., MEOC Case No. 20684 (Ex. Dec. 09/29/89), Leatherberry v. GTE Directories Sales Corp., MEOC Case No. 21124 (Comm'n. Dec. 04/14/93, Ex. Dec. 01/05/93), Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. 2/6/93, Ex. Dec. on fees 7/29/93, Ex. Dec. on fees 9/23/93), Balch v. Snapshots, Inc. of Madison, MEOC Case No. 21730 (Ex. Dec. on Lia. 10/14/93, Ex. Dec. on Dam. 12/09/93) Courts have determined that the FEA does not support such damages. Bachand v. Connecticut General Life Ins. Co., 120 Wis. 2d 617, 305 N.W.2d 149 (Ct. App. 1991). This represents a legitimate and actual difference between the application of the FEA and the MEOO. However, the question is not whether there is a difference but whether this difference requires a finding that the MEOO is so fundamentally in conflict with the FEA that it requires the preemption of the MEOO.

The difference in remedial authority does not logically conflict with the FEA. Both laws are intended to remedy and prevent discrimination, To this end, both laws permit the taking and processing of complaints of discrimination. Both laws authorize the conduct of public hearings, and where discrimination is found, the issuance of orders intended to effectuate the purposes of the respective laws. By asserting that it can award a greater variety of remedial provisions, the Commission, for its limited geographic jurisdiction, enhances the overall goal of preventing discrimination. The effect of this authority claimed by the Commission may be to reduce somewhat the likelihood that a complainant may file a complaint with the ERD, but the overall purpose of the FEA, to remedy and prevent discrimination, will have been accomplished.

The difference in the remedial schemes does not defeat the purpose of the FEA. Again, the purpose of the FEA is to remedy and prevent discrimination throughout the state. The purpose of the MEOO is to remedy and prevent discrimination within the geographic limits of the City of Madison. What accomplishes the ends of the ordinance accomplishes the ends of the FEA. If the Commission's issuance of awards containing elements for emotional distress or punitive damages draws some

complaints that might have been filed with the ERD, it permits the ERD to expend more of its scarce resources outside of the City of Madison. Rather than defeating the purposes of the FEA, the MEOO enhances the effectiveness of the ERD and helps to fulfill the ultimate goal. Both the FEA and MEOO are remedial laws that encourage the prevention of discrimination through a broad variety of means. Both encourage conciliation of disputes. These conciliation efforts occur throughout the complaint process. Should there be a finding of discrimination and no conciliation has been possible, both the ERD and the Commission are to issue orders that effectuate the broad socially desirable purposes of the FEA and the MEOO. There is nothing on the face of it that leads the Hearing Examiner to the conclusion that the Commission's claimed ability to award a broader array of damages to a prevailing complainant is contrary to the spirit of the FEA.

Perhaps it is arguable that parties may be somewhat less willing to compromise their positions because there may be more at stake. However, there is no evidence in the record to support such supposition. The purposes of the FEA and the MEOO are to prevent and remedy discrimination, not to limit the potential consequences of discrimination to employers.

Both the FEA and the MEOO recognize the adverse impact of discrimination on our citizens and our economy. The Commission need not apologize for exploring all options available to it as it seeks to eliminate illegal discrimination from the work place. It is to this socially desirably goal that both the FEA and the MEOO work.

The Commission's authority to award compensatory damages for the emotional harm done to a victim of discrimination and punitive damages to deter future discrimination by a respondent or others has been challenged during judicial review only once. In the case of State of Wisconsin ex rel. Caryl Sprague v. City of Madison and City of Madison Equal Opportunities Commission, Ann Hacklander-Ready and Moreen Rowe, 94-2983 (Ct. App. 09/26/96), the Court of Appeal struck down an award of damages for emotional distress as having been beyond the contemplation of the Common Council at the time that MGO Sec. 3.23(9)(c) 2.b. was adopted. This is the section of the MEOO granting the Commission authority to make awards in the event of a finding of discrimination. While that decision has halted such awards in cases of employment discrimination, the court's decision seems to recognize the Commission's authority in the area of housing discrimination. To the extent that the Commission's claimed authority to award damages for emotional distress and punitive damages are in conflict with the FEA, the Respondent's remedy is to challenge the Commission's award, if one is made, through judicial review. It is not appropriate to eliminate the MEOO for one conflict with the FEA. As seen above, it may be that the Commission's interpretation of its authority is correct and the Court of Appeals limitation on the FEA is wrong.

The Respondent asserts that no court has ruled on the potential conflicts between the FEA and the MEOO. While it is true that such a challenge has not arisen since the Anchor case, two earlier cases did address this issue. Both Badger Produce, Inc. v. Equal Opportunities Commission of the City of Madison, 106 Wis. 2d 767, 319 N.W.2d 177 (1982) and Fed. Rural Elec. Ins. v. MEOC, unpublished opinion No. 79-538 (Ct. App. April 27, 1981), affirmed per curiam 106 Wis. 2d 767 (1982) are per curiam decisions of the Supreme Court affirming unpublished decisions of the Court of Appeals upholding the ordinance's validity in the face of a potential conflict with the FEA. While the unpublished decisions may have no precedential value, the Commission was a party to both actions and is bound by their results. Those results recognize the validity of the ordinance. The Respondent baldly asserts that those decisions were wrongly decided and in light of Anchor can have no effect. Even in light of Anchor, those decisions bind the Commission absent a ruling clearly contrary to their outcome. The Respondent has not been able to show that Anchor controls and requires a different outcome.

It is somewhat disturbing that the Respondent would demand totally identical programs from the Commission and the ERD. While both agencies are charged with the ultimate goal to prevent and remedy discrimination, they must do so in light of the particular conditions that brought about passage of their respective laws. The court in Federated Rural (supra) recognized these differences. The Court of Appeals in McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W.2d 830 (Ct. App. 1988) recognized the need to allow some flexibility in light of the special purposes of two different but similar laws. In McMullen, the court accepted that the special purposes that brought about the adoption of the FEA did not require the state to automatically accept interpretations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. This is true even though the FEA and Title VII share the same goals of remedying and preventing employment discrimination and, in fact, elements of the FEA were modeled after Title VII. The Respondent's singling out of two minor arguable differences in the process used to resolve complaints between the ERD and the Commission flies in the face of this flexibility.

The second argument forwarded by the Respondent for the preemption of the MEOO by state law has been partially addressed above. The Respondent contends that the exclusivity provision of the WCA requires dismissal of this action. The Respondent asserts that where an injury gives rise to rights under the WCA as well as some other law, the injured party is required to pursue any claim for compensation through the WCA process and any other action is barred. In support of his position, the Respondent cites both Norris v. DILHR, 155 Wis. 2d 337, 455 N.W.2d 665 (Ct. App. 1990) and Schachtner v. DILHR, 144 Wis. 2d 1, 422 N.W.2d 906 (Ct. App. 1988). Both of these cases recognize some degree of preemption of claims brought under the FEA by the WCA. The Respondent also relies on Cameranesi v. John Charles Hair Designs, Inc., ERD Case No. 9102926, (LIRC, March 7, 1994). In this claim, the LIRC held that a claim of sexual harassment brought under the FEA must be dismissed because the emotional injuries alleged were ones subject to the provisions of the WCA, and the WCA's exclusivity provision dictated that the complainant's claim could only be filed under the WCA.

Subsequent to the filing of briefs in this action, two additional decisions of the Court of Appeals muddied the waters of this argument further. In Lentz v. Young, 195 Wis. 2d 457, 536 N.W.2d 451 (Ct. App. 1995) rev. denied, 542 N.W.2d 156 (1995), the Court of Appeals found that where an employee was the subject of sexual harassment from the owner/supervisor of the business that the WCA did not bar the filing of an action under the FEA or in other forums. The Court of Appeals in Byers v. LIRC, 200 Wis. 2d 728, 547 N.W.2d 788 (Ct. App. 1996), also found that where an employee was being sexually harassed by a co-worker and the employer failed to reasonably respond to the employee's complaints, the WCA was the employee's sole remedy and an action under the FEA was barred. The Supreme Court settled this argument conclusively on April 18, 1997 when it issued its decision in the appeal of the Byers case cited above. The court specifically overruled the Court of Appeals decisions in Schachtner, Norris and Byers finding that in order to give effect to the two laws, the WCA and the FEA, an individual whose injuries could trigger relief under either law could not be limited to an action under the WCA. The court's decision recognized the different purposes of the two laws and determined that the best way to accomplish the goals of the two laws is not to give preemptive effect to the WCA but to allow an aggrieved individual to pursue remedies under either or both. The court recognized that this approach may lead to some issues of double recovery but declined to address those issues at this time.

Based upon the reasoning employed by the Court in Byers, the Hearing Examiner finds that the WCA does not preempt the pending case. As with the FEA, the MEOO is intended to address a different set of problems from the WCA. It would be incongruous to bar an action under the MEOO while

permitting an action under the FEA. While the concerns about a double recovery exist in the pending action, the Hearing Examiner need not address those concerns until it becomes clear that double recovery might arise in the context of this complaint.

The Respondent's remaining objections to the Commission's jurisdiction primarily concern the specific allegations of the complaint. While some of these objections may be categorized as a failure to state a claim upon which relief may be granted, others are more concerned with the sufficiency of the evidence to prove the claims of discrimination. The Hearing Examiner will consider the former objections but will not consider objections based upon the sufficiency of evidence.

Claims of an insufficiency of evidence are really a form of Motion for Summary Judgment not going to the subject matter jurisdiction of the Commission. While a Motion to Dismiss for failure to state a claim is often brought as a Motion for Summary Judgment, it is more closely related to a Motion to Dismiss for a lack of Jurisdiction. In a Motion to Dismiss for failure to state a claim, the argument is that no matter how much evidence is presented, there is no actual violation of the ordinance alleged and therefore no jurisdiction over the complaint. A Motion for Summary Judgment essentially admits that the claim is one brought properly under the ordinance but denies that the Complainant has or can establish a prima facie claim of discrimination. It is this latter form of motion that the Hearing Examiner may not consider. Rhone v. Marquip, MEOC Case No. 20967 (Ex. Dec. on Summary Judgment 4/5/89), Petzold v. Princeton Club, MEOC Case No. 3252 (Ex. Dec. 2/15/94).

With respect to the Complainant's claim of sexual harassment, the Respondent contends that the Complainant has failed to demonstrate a sufficiently hostile work environment to justify proceeding with her complaint. This is a matter over which there is a genuine dispute of fact. The Respondent seeks to characterize many of the incidents claimed by the Complainant to support her claim as innocent or non-sexual in nature. However, a neutral observer could find that the conduct of the Respondent was pervasive, unwelcome and frequently of a sexual nature. Where the conduct was not of an explicitly sexual nature but of a generally demeaning nature, it appears to have been directed solely at female employees and not at male employees. The Commission takes a somewhat more critical view of allegations of sexual harassment and other forms of harassment than do other forums. Vance v. Eastex Packaging, MEOC Case No. 20107 (Comm'n Dec. 8/29/85), Ex. Dec. 5/21/85); Guyton v. Rolfsmeyer, MEOC Case No. 20424 (Comm'n Dec. 7/18/86, Ex. Dec. 4/28/85); Stinson v. Bell Laboratory, MEOC Case No. 20762 (Comm'n. Dec. 12/14/89, Ex. Dec. 3/17/89). As noted in Vance and Guyton, the passage of time and the public awareness of these issues justify holding employers and supervisors to a higher standard of conduct than that approved of shortly after the recognition of claims of sexual harassment. Meritor Savings Bank v. Vinson, 477 U.S. 57, 40 FEP Cases 1822 (1986). Given this higher degree of scrutiny, the Hearing Examiner concludes that the Respondent's motion with respect to this allegation must be denied pursuant to the dictates of Rhone.

With respect to the Complainant's claim of constructive termination resulting from the Respondent's alleged sexual harassment of her, the Respondent asserts that the Complainant's claim is barred because she failed to utilize the sexual harassment policy that was adopted shortly before her leaving the employment of the Respondent. In support of his position, the Complainant cites to Marten Transport Ltd. v DILHR, 176 Wis. 2d 1012 (1993). He asserts that the Marten case requires as a prerequisite to pursuit of an action for constructive discharge that a complainant follow all internal procedures for resolving such a claim.

There appears to be no requirement of exhaustion of internal procedures recognized in the law of sexual harassment litigation. At best, the Marten case expresses the Supreme Court's preference for resolution of such complaints at the lowest possible level. While this view is shared by the

Commission, the Hearing Examiner finds no compelling reason to read such a requirement into the law surrounding the ordinance.

The Complainant contends that she did not believe that the sexual harassment policy put into place by the Respondent in this case could have been effective because the only two individuals to whom allegations of harassment were to be reported either were engaged in the harassment or were not employed by the Respondent. The Respondent contends that the Complainant should not have rejected the policy without attempting to utilize it or to obtain an amendment to the policy. This type of dispute can best be resolved at hearing once there has been an adequate factual record established.

The Hearing Examiner believes that whether the Complainant properly rejected use of the Respondent's sexual harassment policy is a factor in determining whether her leaving employment was reasonable under the circumstances. As part of this analysis, the Complainant must be prepared to demonstrate that adherence to the policy would either have been fruitless or that under the circumstances, the policy did not apply to her or that if it applied to her that some other factor mediated against its use. At any rate, the Hearing Examiner believes that the Complainant's claim and the Respondent's defense can best be resolved once an adequate factual record has been presented and that the Respondent's motion in this respect must be denied. Finally, with respect to the Complainant's claim of retaliation on the part of the Respondent, the Respondent asserts that the Complainant may not pursue her claim because at the time of the allegedly retaliatory conduct consisting of threats to sue and keep the Complainant from other employment, the Complainant had not filed a complaint with the Commission. While this is one protected activity, Sec. 8 of the MEOO covers a much wider range of conduct and activity. For example, to the extent that the Complainant can demonstrate that she opposed an allegedly discriminatory practice of the Respondent, discrimination, harassment, intimidation or coercion stemming from such opposition may be pursued under the ordinance. Whether the Respondent's actions constitute discrimination, harassment, intimidation or coercion and whether the Respondent's conduct was instigated as a result of the Complainant's exercise of protected activity are questions of fact that must be resolved at hearing. The record at this stage is entirely too incomplete to determine the causation issue. The Respondent's motion with respect to this issue is also denied.

For the foregoing reasons, the Respondent's several motions to dismiss the complaint are denied. The Hearing Examiner will schedule further proceedings.

Signed and dated this 28th day of April, 1997.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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

Tammy S Meeker 11093 Deer Run Dr. Lodi WI 53555	HEARING EXAMINER'S DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS

Complainant vs. Hovde Realty, Inc/James Hovde 16 N. Carroll St. Madison WI 53703 Respondent	Case No. 22034

BACKGROUND

On January 11, 1994, the Complainant, Tammy S. Meeker, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondents, Hovde Realty, Inc. and James Hovde, discriminated against her on the basis of her sex by permitting or causing her sexual harassment, causing her constructive discharge from employment and by retaliating against her for her exercise of rights protected by the ordinance. The Respondents deny the allegations of the complaint. After an investigation of the allegations of the complaint, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondents had discriminated against the Complainant as alleged. Efforts at conciliation failed.

Pursuant to a Scheduling Order issued by the Hearing Examiner after a Pre-Hearing Conference, the Respondents filed multiple motions to dismiss the complaint. During the pendency of the motions, the Complainant and the Respondent, Hovde Realty, Inc., reached a settlement of the claim against Hovde Realty, Inc. The settlement agreement was signed on April 5, 1997 and Hovde Realty, Inc. was dismissed from the action. Pursuant to the terms of the settlement agreement, as the Hearing Examiner then understood them, the complaint against Respondent, James Hovde, was continued.

On April 28, 1997, the Hearing Examiner ruled on the various motions to dismiss as if they had all been filed by Respondent, James Hovde. At the time of filing, the Respondents both incorporated by reference each other's motions. The Hearing Examiner denied all of the motions.

On May 13, 1997, the Respondent filed yet another motion to dismiss. This motion stated reasons for dismissal that, at least in one aspect, could have and should have been filed with his original motion. Briefing on this motion did not follow the schedule established by the Hearing Examiner. One extension was granted by the Hearing Examiner to permit further settlement discussions. Subsequent to that extension, the Complainant unilaterally extended the period for filing her brief. The Respondent replied to the Complainant's response and objected to the Complainant's unilateral adjustment of the briefing schedule.

DECISION

First, the Respondent asks that the Hearing Examiner strike the Complainant's responsive brief as being untimely. The Respondent's motion to strike is based upon the Complainant's presumptuous decision to self-extend the period for submission of her brief. The Respondent asserts that for the Hearing Examiner's orders to have any effect, they must be complied with and enforced.

The Hearing Examiner declines to strike the Complainant's brief. First, the Respondent fails to establish any harm or disadvantage from the Complainant's late filing. While the reason for the delay is less than compelling, the Respondent has not suffered as a result of the delay.

Second, the Respondent is hardly in a position to take the high road in this dispute. The Respondent's filing of a new jurisdictional motion, approximately 2 weeks after a decision on his earlier motions, demonstrates a lack of good faith. This is particularly true in light of the fact that one of the two grounds put forth by the Respondent for his motion could and should have been filed with the original motion. Such filings give the impression of litigation by ambush. The Respondent has caused additional expense to the Complainant and the Commission, as well as to himself, that could have been avoided.

The Respondent's actions in filing the motion that is the subject of this Decision and Order combined with a lack of prejudice resulting from the Complainant's unilateral decision to extend the briefing schedule fail to establish sufficient grounds for striking the Complainant's brief. While the Hearing Examiner is concerned about the effect on compliance with other orders, it seems unlikely that the conduct of either party will have any permanent adverse effect on the Commission's authority.

The Respondent states two grounds for dismissal of the complaint. First, the Respondent contends that the settlement agreement between Hovde Realty, Inc. and the Complainant operates to preclude further action against him. Second, the Respondent asserts that the ordinance does not contemplate a claim for sexual harassment against an individual supervisor. While these grounds are independent of each other, there are aspects in which they complement each other too.

With respect to the Respondent's first claim, the Respondent argues that because the Settlement Agreement between Hovde Realty, Inc. and the Complainant covers all actions of all of Hovde Realty's employees, supervisors and agents acting in their official capacities, the Respondent's actions must be included. It is the Respondent's contention that all of the actions attributed to the Respondent by the Complainant were taken in his official capacity and not as an individual.

The Respondent apparently did not take an active part in the negotiations leading up to the settlement between Hovde Realty, Inc. and the Complainant. Despite this lack of participation, the Respondent asserts that he is to benefit from a settlement to which he was not a party.

The Settlement Agreement at paragraph 4 explicitly provides that the Complainant may continue her complaint against the Respondent in his individual capacity. The Respondent's attempts to claim that this provision is essentially a nullity because of the effect of other provisions is not convincing. In attempting to give effect to the Settlement Agreement as a whole, the Hearing Examiner must attempt to harmonize the various provisions. It is clear that Hovde Realty, Inc. and the Complainant agreed that the Complainant could continue to pursue whatever action she believed she had against the Respondent. That provision alone is sufficient for the Hearing Examiner to conclude that the complaint should not be dismissed as to the Respondent because of the Settlement Agreement.

The arguments of the parties as to whether the Respondent's alleged actions were taken in an official capacity or individually are interesting, but in light of the Hearing Examiner's conclusions with respect to the Respondent's other grounds for dismissal, are moot. The fact that the Complainant and Hovde Realty, Inc. agreed that the Complainant could continue her action against the Respondent does not act as a stipulation of the Commission's jurisdiction or as a bar to the Respondent's defense of a lack of jurisdiction.

For the Hearing Examiner, the more difficult question is whether the ordinance supports a claim of sexual harassment against an individual as opposed to only the employer. The Respondent contends that Section 3.23(7)(k) of the ordinance represents the exclusive remedy for claims of sexual harassment and that section preempts the more general anti-discrimination provision contained in Section 7(a). Section 7(k) establishes strict liability for employers with respect to sexual harassment committed by an employer's managers, supervisors and agents. It also sets forth the terms for an employer's liability for sexual harassment committed by non-supervisory employees and others. Section 7(a) does not explicitly address sexual harassment.

The Respondent argues that Section 7(k) because of its more specific focus is intended to preempt the more broadly stated Section 7(a) and thereby preclude actions for sexual harassment against anyone other than employers. The Complainant contends that while Section 7(k) is more restrictive, it was intended to address the special case of liability of employers and is not intended to limit claims against individuals which are not specifically addressed in Section 7(k).

The ordinance lacks most of the typical sources of legislative history. In order to interpret the provisions of the ordinance, the Hearing Examiner must looked at the purposes of the ordinance, the specific language to be interpreted and examine how other similar laws have been interpreted. The Hearing Examiner must also consider application of general rules of statutory interpretation.

Section 1 of the ordinance sets forth the general purpose and policy of the ordinance. The ordinance was intended to eliminate and prevent discrimination in employment, housing, credit, public accommodations and the use of City facilities and services. The section speaks of the effect of employment discrimination on earnings and the ability to attain one's highest level of employment commensurate with one's abilities. In general, these concerns are ones best addressed by an employer rather than an individual supervisor.

As noted above, the only specific reference or provision dealing with sexual harassment appears in Section 7(k). Section 7(a) states the same kind of general prohibition of discrimination found in Title VII of the Civil Rights act of 1964, 42 U.S.C. 2000(e) (Title VII). It should be noted, however, that under Title VII claims for sexual harassment stemmed from court interpretation of Title VII's "terms and conditions" language which is mirrored in Section 7(a). Meritor Savings Bank v. Vinson, 477 U.S. 57, 40 FEP Cases 1822 (1986). Title VII contains no specific prohibition of sexual harassment.

Unlike Title VII, the Wisconsin Fair Employment Act (FEA), Wis. Stats. 111.31 et seq. at 111.36, specifically prohibits sexual harassment. The language in Section 7(k) closely mirrors that of the FEA. Cases brought under the FEA have concluded that claims against individual supervisors are not cognizable under the FEA. Olson v. Servpro, (LIRC,08/04/95), Sinclair v. Mike's Towne and Country, (LIRC, 10/15/93), Nelson v. Waybridge Manor, (LIRC, 04/06/90).

The ordinance is closely modeled after both Title VII and the FEA. Despite the close connection among these three laws, the ordinance was adopted to respond to the specific circumstances and problems found in Madison, Wisconsin. Though decisions under Title VII and the FEA may help guide the Hearing Examiner in reaching decisions about how to interpret the ordinance, the Hearing Examiner is not necessarily bound to follow those other decisions. The Hearing Examiner must make an independent determination based upon the purposes of the ordinance. McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W.2d 830 (Ct. App. 1988).

Cases interpreting Title VII have come to the conclusion that Title VII was not intended to permit claims against individual supervisors, and limits claims to employers. Williams v. Banning, 72 F.3d

552 (7th Cir. 1995), Lendhardt v. Basic Institute of Technology, 55 F.3d 377 (8th Cir. 1995), Miller v. Maxwell's International, Inc., 991 F.2d 583 (9th Cir. 1994). Courts have looked at the specific language and limitations of Title VII to reach this conclusion. Title VII's jurisdiction requiring at least 15 employees is considered the leading reason for not permitting individual claims. Williams, supra. Miller supra. The courts reason that if Congress had wished to permit claims against individuals, it would not have limited its jurisdiction by eliminating claims against small employers. Courts have also found that Title VII's original limitation of damages to back pay expressed an intent to limit claims to employers because individual supervisors are not responsible for payment of wages. EEOC v. AIC Security Investigations Ltd., 55 F.3d 1276 (7th Cir. 1995).

Neither the FEA nor the ordinance have the size limitation found in Title VII. Even employers with one employee are covered by the ordinance and the FEA. Courts have applied a similar limitation on damages awardable under the FEA. Bachand v. Connecticut General Life Ins. Co., 120 Wis. 2d 617, 305 N.W.2D 149 (Ct. App. 1991). No court has ruled on the ordinance's damage provision in the context of an employment discrimination action. However, the Commission has issued several decisions concluding that the ordinance supports claims for damages other than back pay, front pay and attorney's fees. Nelson v. Weight Loss Clinic of America, Inc. et al., MEOC Case No. 20684 (Ex. Dec. 09/29/89), Leatherberry v. GTE Directories Sales Corp., MEOC Case No. 21124 (MEOC 04/14/93, Ex. Dec. 01/05/93), Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. 2/6/93, Ex. Dec. on fees 7/29/93, Ex. Dec. on fees 9/23/93), Balch v. Snapshots, Inc. of Madison, MEOC Case No. 21730 (Ex. Dec. on Lia. 10/14/93, Ex. Dec. on Dam. 12/09/93).

The Respondent resurrects his contention from his original motion to dismiss that the ordinance may be no more strict than the FEA or run afoul of the holding in Anchor Savings and Loan v. MEOC, 120 Wis. 2d 391, 355 N.W.2d 234 (1984). For the reasons previously stated in his April 28, 1997 Decision and Order, the Hearing Examiner concludes that the decision in Anchor does not compel the result urged by the Respondent. Simply because the ordinance may be more restrictive than the FEA does not place the ordinance in conflict with the FEA or the intent of the state legislature.

Despite the above discussion, the Hearing Examiner concludes that the ordinance does not contemplate an action against an individual for sexual harassment. The Common Council appears to have taken pains to outline what actions may be brought for sexual harassment when it adopted Section 7(k). That section limits liability to employers, but establishes strict liability for sexual harassment committed by an employer's managers, supervisors or agents. The section sets forth another standard for liability of non-supervisory employees and even for the conduct of customers. Had the Common Council wished to preserve an action against individuals, it could have and should have provided for such liability.

Customarily where a law contains a more specific provision and a more general provision, the more specific one preempts or controls the more general. The Complainant argues that Section 7(k) is not inconsistent with individual liability premised on the general language of Section 7(a) and that Section 7(k) should be viewed as a special case applying only to employers. While there is great appeal in the Complainant's position, it fails to recognize the fact that sexual harassment is only discussed in Section 7(k). The Common Council could have clarified its intent to treat employers differently from individuals, but it did not. The Hearing Examiner is convinced that the limitation of any discussion of claims of sexual harassment to Section 7(k) indicates the Common Council's intent that actions for sexual harassment be limited to employers and not permit actions against individuals.

Such a position is consistent with state and federal law and decisions. It also is consistent with the ordinance's purposes as set forth in Section 1 of the ordinance. Even though remedial enactments such

as the ordinance must be liberally interpreted to accomplish their intended goals, the Hearing Examiner is not given carte blanche to extend the ordinance beyond the Common Council's grant of authority.

The Complainant argues that her claim is not limited to conduct that is considered to be sexual harassment. She seems to contend that her complaint should be read to include a claim of sex discrimination in her terms and conditions of employment not rising to the level of sexual harassment. Giving the Complainant the most charitable reading of her complaint, the Hearing Examiner finds no such allegation. The complaint limits itself to allegations of sexual harassment and retaliation. Had the Complainant presented a claim of differential treatment along the lines of the duties assigned and the treatment afforded her, the Hearing Examiner might be able to find a claim under Section 7(a) though it remains an open question whether it could be brought in that case against an individual instead of the employer.

It is not clear whether the Respondent intended his motion to address the claim of retaliation. The arguments of the parties discuss the motion exclusively in the context of the sexual harassment claim. The Hearing Examiner will independently address the retaliation claim instead of presuming that the Respondent did not intend that his motion address that claim too.

The language of Section 8 of the ordinance is much more broadly stated than Section 7. It is clearly intended to apply to an individual who takes actions intended to limit one's exercise of rights protected by the ordinance. It is stated so broadly because attacks upon one exercising rights under the ordinance are not limited to employers, or supervisors. The intent of the ordinance with respect to Section 8 is to afford the greatest protection to the greatest extent possible in order to encourage individuals to exercise rights under the ordinance and to encourage others to come to the aid and assistance of those exercising rights protected by the ordinance.

The language of Section 8 specifically indicates that no person or employer, individually or in concert, may engage in retaliatory conduct or attempt to limit any person's rights under the ordinance. This language is strikingly different from that in Section 7 and indicates an intent to make individuals, as well as employers, liable for actions that violate the Section.

DECISION

For the above reasons, the Hearing Examiner dismisses the Complainant's allegations of sexual harassment. The Hearing Examiner will schedule further proceedings with respect to the Complainant's retaliation claim.

Signed and dated this 10th day of August, 1999.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

Tammy S Meeker 11093 Deer Run Dr. Lodi WI 53555 Complainant vs. James Hovde 1314 Manassas Trl Madison WI 53718 Respondent	COMMISSION'S DECISION AND FINAL ORDER ON RESPONDENT'S MOTION TO DISMISS Case No. 22034

BACKGROUND

On January 11, 1994, the Complainant, Tammy S. Meeker, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondents, Hovde Realty, Inc. and James Hovde, discriminated against her on the basis of her sex by permitting or causing her sexual harassment, causing her constructive discharge from employment and by retaliating against her for her exercise of rights protected by the ordinance. The Respondents deny the allegations of the complaint. After an investigation of the allegations of the complaint, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondents had discriminated against the Complainant as alleged. Efforts at conciliation failed.

Pursuant to a Scheduling Order issued by the Hearing Examiner after a Pre-Hearing Conference, the Respondents filed multiple motions to dismiss the complaint. During the pendency of the motions, the Complainant and the Respondent Hovde Realty, Inc. reached a settlement of the claim against Hovde Realty, Inc. The settlement agreement was signed on April 5, 1997, and Hovde Realty, Inc. was dismissed from the action. Pursuant to the terms of the settlement agreement, as the Hearing Examiner then understood them, the complaint against Respondent James Hovde was continued.

On April 28, 1997, the Hearing Examiner ruled on the various motions to dismiss as if they had all been filed by Respondent James Hovde. At the time of filing, the Respondents both incorporated by reference each others motions. The Hearing Examiner denied all of the motions.

On May 13, 1997, the Respondent filed yet another motion to dismiss. This motion stated reasons for dismissal that, at least in one aspect, could have and should have been filed with his original motion. After stays for discussion of settlement possibilities and after other delays, the Hearing Examiner issued his Decision and Order on the Respondent's motion to dismiss on August 10, 1999. The Hearing Examiner concluded that the Commission was without jurisdiction to proceed on the Complainant's allegation of sexual harassment because the ordinance did not contemplate such an action against an individual. The Hearing Examiner did determine that the Commission did have jurisdiction over the Complainant's allegation of retaliation because of the wording of the ordinance.

The Respondent timely appealed the Hearing Examiner's Decision and Order. After giving the parties the opportunity to brief the issues, the Commission met on January 13, 2000, to address the Respondent's appeal. Participating in the Commission's deliberations were Commissioners Hicks, Morrison, Poulson, Rahman, Sentmanat, Tomlinson and Zipperer.

DECISION

The Commission adopts and incorporates by reference as if fully set forth herein, the Hearing Examiner's Decision and Order dated August 10, 1999. The Commission finds that the Hearing Examiner's findings and conclusions are fully supported in the record.

The Commission notes that this appeal was addressed despite the fact that the Commission's rules now prohibit interlocutory appeals of findings of jurisdiction until there has been a hearing on the merits of a complaint. Rule 4.54. This appeal was properly before the Commission because the date of filing pre-dated the amendment to the Commission's rules proscribing such interlocutory appeals.

ORDER

The Respondent's appeal is dismissed. The remaining allegation of the complaint is remanded to the Hearing Examiner for further proceedings.

Concurring in the Commission's decision are Commissioners Hicks, Morrison, Poulson, Rahman, Sentmanat, Tomlinson and Zipperer. No Commissioners dissented from the decision and no Commissioners abstained.

Signed and dated this 24th day of January, 2000.

EQUAL OPPORTUNITIES COMMISSION

Bert G. Zipperer
President