EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE
MADISON, WISCONSIN

Pedro Perez 4314 Melody Lane, #108 Madison, Wisconsin 53704 Complainant vs. Theo. Kupfer Iron Works 149 Waubesa Madison, Wisconsin 53715 Respondent	FINAL ORDER Case No. 2700

The Hearing Examiner of the Madison Equal Opportunities Commission (MEOC) issued the Recommended Findings of Fact, Conclusions of Law and Order (hereinafter, "Recommended Decision") on February 8, 1982 in the above-entitled matter. Timely exceptions were filed by the Respondent, written arguments were submitted by both parties, and oral arguments were heard on May 27, 1982 by nine members of the MEOC.

Based upon a review of the record in its entirety, the MEOC issues the following:

ORDER

That the attached Recommended Decision is hereby affirmed in its entirety and shall stand as the FINAL ORDER herein.

Commissioners Abramson, Amato, Cobb, Cox, Goldstein, Hisgen, Mendez, Swamp and Thome all join in affirming the Recommended Decision.

Signed and dated this 10th day of June, 1982.

J. C. Wright
MEOC Executive Director

George Swamp
Acting MEOC President

EQUAL OPPORTUNITIES COMMISSION
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Pedro Perez 4314 Melody Lane, #108 Madison, Wisconsin 53704 Complainant vs.	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 2700

Theo. Kupfer Iron Works 149 Waubesa Madison, Wisconsin 53708 Respondent	

A complaint was received on October 20, 1980 by the Madison Equal Opportunities Commission (MEOC) alleging discrimination on the basis of national origin in regard to employment (specifically, discharge from employment). Said complaint had originally been filed on October 10, 1980 with the Wisconsin Equal Rights Division and was referred to the MEOC. The Complainant subsequently was reinstated and returned to work on October 24, 1980 pursuant to a union grievance process settlement. However, the Complainant continued to pursue the complaint, alleging that the discipline imposed on him (an eight day suspension) was discriminatory on the basis of national origin. On December 16, 1980, the complaint was further amended to allege a violation of Section 3.23(7)(e), Madison General Ordinances (specifically alleging a retaliatory discharge).

An investigation of the complaint as amended was conducted by MEOC Human Relations Investigator Mary Pierce, and an Initial Determination was issued on February 6, 1981 finding probable cause to believe that discrimination (including retaliation) had occurred as alleged.

Conciliation was waived and/or failed. The matter was certified to public hearing and a hearing was held beginning on September 22, 1981. The Complainant appeared in person and by Attorney William Smoler of SMOLER, ALBERT AND ROSTAD, S.C. The Respondent appeared by Ronald M. Trachtenberg of BRYNELSON, HERRICK, GEHL AND BUCAIDA and by employee-representative Terry House. The Complainant withdrew the national origin allegation regarding discipline, leaving only the Section 3.23(7)(e) issue (retaliation) for hearing. Based upon the record of the hearing and after consideration of the posthearing briefs and reply briefs, the Examiner proposes the following RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Pedro Perez, is an adult male of Hispanic nationality residing in the State of Wisconsin.

2. The Respondent, Theo. Kupfer Iron Works, Inc., is an employer doing business in the City of Madison.

3. The Complainant began employment with the Respondent as a welder in May, 1979.

4. On October 9, 1980, a verbal fight occurred between the Complainant and a White co-employee, Terry Harmon. The verbal fight was begun by Harmon who shouted obscenities at the Complainant who had removed a head band from a seldom-used welding helmet assigned to Harmon. At some point, the Complainant picked up a knife-like work tool and took a couple of steps toward Harmon who never saw what the tool looked like because the Complainant held it at his side. After a further exchange of words, the Complainant retreated and set down the tool.

5. Subsequent to the fight, the Complainant was fired. Harmon was not initially disciplined.

6. Perez filed a labor grievance dated October 13, 1980 (see Complainant's Exhibit 7). Subsequent to the processing of the union grievance, the Complainant's termination was modified to an eight-day layoff without pay and he was reinstated. Harmon was laid off for three days without pay.

7. On October 10, 1980, the Complainant filed a discrimination complaint against the Respondent regarding the October 9 termination with the Wisconsin Equal Rights Division. Said complaint was referred to and received by the Madison Equal Opportunities Commission on October 20, 1980. Said complaint was maintained by the Complainant even after his reinstatement in order to contest, as discriminatory, the disparity in the number of days of suspension that he and Harmon received.

8. The Complainant returned to work on October 22, 1980. Harmon returned to work on October 24, 1980.

9. On the day of Harmon's return, he (Harmon) requested a transfer because he was apprehensive about working with the Complainant. The transfer request was denied by Harmon's supervisor. Harmon then apologized to Perez and explained that he (Harmon) was partially at fault for the October 9th incident.

10. On December 4, 1980, Perez attended an MEOC Fact Finding Conference as part of the investigation of his complaint by the MEOC. Perez refused to withdraw his complaint alleging national origin discrimination in regard to the October 9 incident and the resulting discipline.

11. After returning to work, Harmon and Perez discussed the MEOC complaint. Perez expressed to Harmon that he felt he would be successful with his complaint.

12. Between December 4 and December 10, 1980, the Complainant and Harmon engaged in at least five conversations, all of which took place in Perez's work area.

13. The first conversation is that referred to in Finding of Fact 11. Subsequent to the first conversation, Harmon wrote a note regarding it which he submitted to the Respondent (See Respondent's Exhibit 9). During this conversation, the Complainant suggested that he and Harmon work together. Money was not discussed. No attempt was made to bribe Harmon during this conversation. Specifically, no attempt was made to induce Harmon to make any false statements on the Complainant's behalf.

14. The second conversation occurred on December 5, 1980. Harmon again submitted to the Respondent a written note regarding the conversation (Respondent's Exhibit 10). The Complainant told Harmon that if his MEOC complaint was successful, he would receive five days pay (the difference between the Complainant's and Harmon's suspension). Harmon then suggested that if the Complainant were successful, Harmon would try to pursue some remedy for his three-day suspension. The Complainant stated that he believed that if Harmon were successful in removing his three-day suspension, the Complainant should have all eight days removed. Subsequently, the Complainant struck up a deal with Harmon where the Complainant would give Harmon one-third of any money he received if his MEOC discrimination complaint were successful in exchange for Harmon's testimony on the Complainant's behalf. Harmon led the Complainant to believe that he (Harmon) had truthful and favorable testimony to give for the Complainant, but would only give such testimony if compensated.

The Complainant was not represented by an attorney in his MEOC matter at the time of this conversation.

15. The third conversation occurred on December 8, 1980. Harmon presented a note to the Complainant to sign. The note stated that the Complainant would pay Harmon fifty dollars if Harmon affirmed there was prejudice involved in relation to the Complainant's discrimination complaint. The Complainant refused to sign the note.

16. The fourth conversation occurred on December 10, 1980. The Respondent had provided Harmon with a tape recorder and a cassette, helped attach it to Harmon's body, and gave him instructions on when and how to operate the machine. Because the batteries in the recorder were dead, the tape recording was unsuccessful.

17. The Respondent provided Harmon with different batteries. Respondent's Exhibit 4, as amended at the hearing in this matter, is hereby incorporated as a factual statement of what was said at this particular December 10, 1980 conversation between the Complainant and Harmon which Harmon tape recorded and provided to the Respondent (the fifth conversation).

18. The Complainant was discharged on December 16, 1980.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class of national origin within the meaning of Section 3.23, Madison General Ordinances.

2. The Respondent is an employer doing business in the City of Madison within the meaning of Section 3.23, Madison General Ordinances.

3. The Complainant had filed a complaint and had in good-faith opposed discriminatory practices which he in good-faith believed to be a violation of Section 3.23, Madison General Ordinances.

4. The Complainant had filed a complaint and opposed discriminatory practices within the meaning of Section 3.23(7)(e), Madison General Ordinances.

5. The Complainant was discriminated against by the Respondent as a result of his opposition to discriminatory practices under Section 3.23 of the Madison General Ordinances within the meaning of Section 3.23, Madison General Ordinances.

RECOMMENDED ORDER

1. That the Respondent shall cease and desist from discriminating against the Complainant in violation of Section 3.23, Madison General Ordinances.

2. That the Respondent shall immediately reinstate the Complainant with all seniority, rights, benefits, and perquisites of employment that he would have received had he not been unlawfully discharged on December 16, 1980.

3. That the Respondent shall, within thirty (30) days of the date of this Order becomes final, pay to the Complainant all wages that he would have received and would receive (less ordinance setoffs) had he not been unlawfully discharged from December 16, 1980 to such time as he is reinstated. This provision is intended to include "backpay" and "front pay."

MEMORANDUM OPINION

Section 3.23(7)(e) of the Madison General Ordinances (MGO) makes unlawful the discharge by an employer of any person "because he or she has opposed any discriminatory practices under this section or because he or she has made a complaint . . . under this section."[1]

Said protection against retaliation is not absolute.[2] The rights conferred by Section 3.23(7)(e) must be balanced against the traditional rights of management.[3] Section 3.23(7)(e) does not afford an employee unlimited license to complain at any and all times and places.[4] The employer's right to run her or his business must be balanced against the rights of the employee to express his grievances and promote his own welfare.[5]

An individual's informal opposition to discriminatory practices usually is entitled to the same protection as formal opposition.[6]

The solicitation of witnesses to testify on one's behalf in a Madison Equal Opportunities Commission (MEOC) proceeding is clearly an integral part of opposing discriminatory practices under Section 3.23, Madison General Ordinances. It is, therefore, an integral part of formal opposition to discriminatory practices. The fact that an employer's practices may ultimately be found to be non-discriminatory does not shield the employer from liability for proscribed retaliation where the employee opposed the practices in good faith and had a good faith belief that the practices were discriminatory.

An individual's unlawful activity engaged in as part of opposing an employer's alleged discriminatory practices is generally not protected,[7] however.

The key issue in this case is whether or not the Complainant has shown by a preponderance of the evidence that the Respondent's articulated reason for his discharge, his alleged attempted inducement of Harmon to give false information to an EOC investigator, was pretextual or unworthy of credence.

I. Prima Facie Case

The Complainant established a prima facie case of discrimination as follows:

a. He filed a formal complaint of discrimination with the MEOC;

b. He was discharged for activity directly associated with the pursuit of that complaint, i.e., for opposing allegedly discriminatory practices; and

c. He had a good faith belief that the practices he was opposing were discriminatory under Section 3.23, Madison General Ordinances.

In this case, Perez had filed a formal complaint of discrimination regarding the discipline he received subsequent to the October incident with Harmon. His discharge was clearly predicated upon his solicitation of Harmon as a witness to present information to the MEOC investigator. The fact that the investigator ultimately issued a probable cause determination regarding the Complainant's allegations is in and of itself sufficient to establish that the Complainant initially had a good faith belief in filing the complaint, notwithstanding the later withdrawal of the original complaint allegations prior to the hearing on the retaliation issue.

Consequently, at the time the Complainant was soliciting Harmon to testify on his behalf, the Complainant was engaging in activity that can be characterized as opposition to practices which he in good faith believed were discriminatory under Section 3.23, Madison General Ordinances. Such a showing is sufficient to require the Respondent to explain its discharge of the Complainant for his solicitation of Harmon.

II. Respondent's Reason for the Complainant's Discharge

The Respondent articulated that the Complainant was not merely soliciting Harmon to testify, but had in fact engaged in the (attempted) bribery of Harmon.

III. Has the Complainant Shown by a Preponderance of the Evidence that the Respondent's Articulated Reason for his Discharge was a Pretext for Unlawful Retaliation?

Bribery requires corruption. The issue is whether or not the Complainant was engaged in inducing or soliciting false or improper testimony from Harmon. Harmon stated under oath that no bribery had taken place during either of the first two conversations between he and Perez (See Findings of Fact 13 and 14). Rather, the co-employees discussed Perez's case.

Perez was optimistic about winning and wanted Harmon to testify on his behalf. Harmon felt that if Perez won, effectively reducing his ultimate discipline from an eight day to a three day suspension, that he (Harmon) should have his three day suspension eliminated. Perez felt that ultimately he and Harmon should have the same discipline.

The two struck an agreement. If Harmon testified for Perez and Perez won, Perez would share one third of his winnings with Harmon. There is no evidence to indicate that Perez at anytime asked Harmon to testify falsely for him. Again, Harmon's own statement is that no bribery attempt occurred during each of the first two conversations, and the later tape recorded conversation was an elaboration on the agreement made during the second conversation. It was based primarily on the tape recorded conversation that the Complainant was terminated.

The evidence supports the finding that Perez agreed to reimburse Harmon on a contingency basis, i.e., Perez would give Harmon one-third of his winnings if Harmon gave favorable information to the MEOC investigator (and the Respondent's AA Officer House) and Perez ultimately won some money. The Examiner must presume, in the absence of evidence to the contrary, that Perez's offer to Harmon was predicated upon Perez's good faith belief (based on what Harmon told him) that Harmon had some truthful testimony to give that would aid Perez, but that Harmon would not give it unless compensated.[8]

The compensation of an individual for giving favorable testimony is not in and of itself an unlawful or suspicious activity. In fact, it is a common practice. Witnesses who are subpoenaed to hearings must, by statute, be compensated. Expert witnesses are often compensated beyond the statutorily required amounts by the parties in whose favor they testify. Employers sometimes pay employees their regular work salaries for the time they testify at MEOC hearings.

The evidence supports the finding that Harmon led Perez to believe that he (Harmon) would testify favorably for Perez, but that he would not do so unless compensated. Perez believed Harmon had favorable and truthful testimony to give, and agreed to compensate the reluctant witness-Harmon-on a contingency basis. There is no evidence that Perez attempted to induce Harmon to give false or fabricated testimony.

The Respondent's conclusion that Perez was attempting to bribe Harmon had no basis in fact. Rather, Perez was unlawfully discharged for engaging in a protected activity, the lawful solicitation of a witness to give information on his behalf during the processing of Perez's discrimination complaint filed with the MEOC. Probative evidence regarding Harmon's and the Respondent's motives in wanting to get rid of Perez is discussed in the footnote below.[9] Respondent does not argue that Perez's work performance was substandard or that Perez's conversations with Harmon in any way interfered with his work performance.

An appropriate remedial order has been entered.

Signed and dated this 8th day of February, 1982.

Allen T. Lawent
Hearing Examiner

FOOTNOTES

1. Section 3.23(7)(e), Madison General Ordinances, reads in its entirety:

> (7) Employment Practices
>
> It shall be an unfair discrimination practice and unlawful and hereby prohibited:
>
> (e) For any person or employer, employment agency or labor organization, individually or in concert with others to discharge, harass, intimidate, or otherwise discriminate against any person because he or she has opposed any discriminatory practices under this section or because he or she had made a complaint, testified or assisted in any proceeding under this section.

2. EEOC v. Kansas City Power and Light Company, 27 EPD par. 32,144 (1981); Hochstadt v. Worcester Foundation, 12 EPD par. 11,220, 545 F.2d 222 (1st Circuit, 1976).

3. EEOC v. Kansas City Power and Light Company, supra; and Hochstadt, supra.

4. Ibid.

5. Ibid.

6. Herslof Optical Company v. DILHR, Case No. 153-123 (Dane County Circuit Court, Honorable Michael B. Torphy, March 28, 1978).

7. Northport Apartments v. EOC, et al, No. 80CV2680 (Dane County Circuit Court, Honorable P. Charles Jones, March 20, 1981).

8. Any later denial by Harmon that he would have given truthful testimony is not at issue. The issue is what Harmon represented to the Complainant during their conversations. Harmon claims that neither conversation involved an attempted bribe. Consequently, there is no evidence to support a finding that Harmon was induced by the Complainant to make a false statement; rather, Harmon's own testimony supports a finding that Perez had a good faith belief that Harmon had something truthful to say on the Complainant's behalf. However, Harmon indicated to the Complainant that he would not testify for free. His concern was "What am I gonna end up with?" (Page 3, Respondent's Exhibit 4).

9. Upon Harmon's return to work after his suspension, he requested a transfer so he would not have to work with Perez. Although Harmon later apologized to Perez, his aggressiveness in trying to catch Perez in an

alleged bribery attempt is suspect. If no bribe, according to Harmon's own testimony, had occurred during either of his first two conversations with Perez, I find suspect Harmon's behavior in prevailing on the Respondent to provide him (Harmon) with a tape recorder to catch Perez in a bribery attempt (subsequent to Harmon's failure to persuade Perez to sign a written statement regarding their "agreement").

It is further suspect that Harmon was in Perez's work area and admittedly approached Perez to tape record their agreement.

Further, the Respondent's Secretary-Treasurer, Steven N. Gierhardt, who with his brother Lee, made the final decision to terminate Perez, testified that he still believed termination would have been a fair discipline for Perez arising out of the fight incident.