COURT OF APPEALS DECISION DATED AND RELEASED

March 24, 1994

NOTICE

No. 93-0657

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

UNION CAB COOPERATIVE,

Petitioner-Respondent,

v.

EQUAL OPPORTUNITIES COMMISSION OF THE CITY OF MADISON,

Respondent,

JOSEPH SCOTT MAXWELL,

Appellant.

APPEAL from orders of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

PER CURIAM. Joseph Scott Maxwell appeals from orders denying his motion to intervene in a certiorari review proceeding. We conclude that the trial court properly denied intervention and we therefore affirm.

Maxwell brought a discrimination complaint against the Union Cab Cooperative before the Madison Equal Opportunities Commission. The Commission substantially ruled in his favor but also ruled against him in part. Union Cab petitioned for certiorari review of the rulings favoring Maxwell, naming the Commission as respondent.

Two weeks later, Maxwell petitioned for joinder as a respondent, under § 803.03, STATS. Seven weeks later, Maxwell moved to intervene under § 803.09, STATS., to challenge a ruling that aggrieved him and to respond to the rulings that favored him. The trial court determined that joinder was not appropriate and Maxwell does not appeal that ruling. The court also determined that Maxwell could not intervene as a respondent because his interests were adequately represented by the Commission and because his intervention would probably unduly delay the proceedings. The trial court did not address Maxwell's motion to intervene as a petitioner.

Section 803.09(1), STATS., provides that intervention is mandatory upon timely motion if the movant claims an interest in the matter and the disposition may

impair the protection of that interest, "unless the movant's interest is adequately represented by existing parties." Section 803.09(2), STATS., provides for intervention in the court's discretion if it will not unduly delay matters or prejudice the original parties.

Maxwell may not intervene to challenge the Commission's decision. A party to a municipal administrative proceeding must petition for certiorari review of the final determination within thirty days after receiving it. Section 68.13(1), STATS. Maxwell's failure to comply with this requirement precludes his challenging the decision. *See* ***Weina v. Atlantic Mut. Ins. Co.***, 177 Wis.2d 341, 347, 501 N.W.2d 465, 468 (Ct. App. 1993) (jurisdictional time limits cannot be circumvented by intervention).

The trial court properly denied intervention as a respondent under § 803.09(1), STATS. A party's representation of a proposed intervenor's interest is deemed adequate "if there is no showing of collusion between the representative and the opposing party; if the representative does not represent an interest adverse to that of the movant; and if the representative does not fail in the fulfillment of its duty." ***Sewerage Comm'n of Milwaukee v. DNR***, 104 Wis.2d 182, 189, 311 N.W.2d 677, 681 (Ct. App. 1981). Maxwell offered no facts that would dispute the Commission's ability to represent his interests under this standard.

The court properly denied permissive intervention under § 803.09(2), STATS. The record of the administrative proceeding shows that Maxwell's litigation tactics substantially delayed the proceeding. The trial court therefore reasonably concluded that Maxwell's participation would probably unduly delay the judicial review proceeding as well. Because the court reached a reasonable, articulated conclusion based on facts of record, it properly exercised its discretion in the matter. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981).

By the Court.--Orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

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

Joseph Scott Maxwell Post Office Box 9201 Madison, WI 53704 Complainant vs. Union Cab Cooperative 2450 Pennsylvania Avenue Madison, WI 53704 Respondent	DECISION AND ORDER Case No. 21028

On December 31, 1991, the Hearing Examiner of the Madison Equal Opportunities Commission issued Recommended Findings of Fact, Conclusions of Law and Order in this matter. The Hearing Examiner determined that the Respondents had not discriminated against the Complainant in regard to employment based on sex, sexual orientation and physical appearance. The Hearing Examiner determined that the Respondent had retaliated against the Complainant for filing a complaint with the MEOC. Both parties filed timely appeals and the parties were afforded the opportunity to file arguments on appeal.

The Commission finds evidence to believe that the Complainant was discriminated against by the Respondent based on the Complainant's physical appearance. Specifically, the Commission finds that statements by Benson, as published in the Daily Cardinal, a letter by Ruff, and statements by

Patzke and the general questioning of the Complainant at the Workers Council Meeting demonstrate that the Complainant was treated differently from other employees based on upon his physical appearance. These items were cited in the Hearing Examiner's Recommended Findings of Fact.

The Commission finds that the Hearing Examiner's failure to make an award of attorney's fees to the Complainant related to consultation and representation at earlier stages of this complaint constitutes error. Further, the Commission finds that emotional damages are not awardable in this instance but declines to specifically adopt the reasoning of the Hearing Examiner on this issue.

Based on a review of the record, the Commission enters the following:

ORDER

IT IS HEREBY ORDERED that the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order are affirmed except that Conclusion of Law #6 is reversed and a finding of discrimination on the basis of the Complainant's physical appearance is entered. Further this matter is remanded to the Hearing Examiner for determination of an award of appropriate attorney's fees for representation and consultation in this matter.

Commissioners De La Torre, Gardner, Houlihan, Johnson, Sowatzke, Szwaja, and Washington-Spruill all joined in entering this order.

Dated at Madison this 10 day of July, 1992.

EQUAL OPPORTUNITIES COMMISSION

Booker Gardner
President

BG:237

cc: Wisconsin Equal Rights Division

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

Joseph Scott Maxwell, Complainant, vs. Union Cab Cooperative, Respondent.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED DECISION Case No. 21028

PARTIES

The parties in this matter under sec. 227.44, Wis. Stats. and sec. 5.13, Mad. Gen. Ord., and for purposes of review under sec. 227.53, Wis. Stats. are:

Joseph Scott Maxwell
P.O. Box 9201
Madison, WI 53704

Union Cab Cooperative
1321 East Mifflin Street
Madison, WI 53703

POSTURE OF CASE

A. This case was initiated when the Complainant, Joseph Scott Maxwell (Mr. Maxwell), filed a complaint with the Madison Equal Opportunities Commission (MEOC) on September 1, 1988 alleging a violation of sec. 3.23, Mad. Gen. Ord. as follows: "I believe I was discriminated against because of my sex (male), retaliation (MEOC #20834), sexual orientation (perceived homosexuality), and physical appearance (makeup, earrings, and nail polish) when I was falsely accused on June 16, 1988 of violating the terms of the Conciliation Agreement of MEOC case #20834, and assessed six points for violating the Respondent's shop rules regarding disobeying supervisory directions."

B. On September 7, 1988 the General Manager of Respondent Union Cab Cooperative (Union Cab), Perry Benson, filed a denial of the complaint and informed the MEOC that Attorney Scott Herrick of Reynolds, Gruber, Herrick, Flesch and Kasdorf would represent Union Cab.

C. On September 19, 1988 Attorney Ruth Robarts on behalf of Mr. Maxwell alleged that a conflict of interest in Attorney Herrick's firm should prevent him from representing Union Cab.

D. On October 11, 1988 the MEOC informed Attorney Robarts and Mr. Maxwell that the conflict-of-interest issue might be raised only after the case was certified to a public hearing.

E. A fact-finding conference was scheduled for October 26, 1988. Union Cab informed the MEOC that it wished the complaint to be certified to an immediate public hearing and would not appear for the fact-finding conference.

F. On November 1, 1988 the MEOC issued an Initial Determination that there was probable cause to believe that Union Cab discriminated against Mr. Maxwell because of his sex, sexual orientation, and physical appearance and in retaliation in violation of section 3.23, Mad. Gen. Ord.

G. On November 1, 1988 the MEOC issued an invitation to both parties to participate in conciliation. Union Cab declined the invitation to conciliate and requested a public hearing.

H. On November 23, 1988 the MEOC scheduled a prehearing conference for January 17, 1989. On January 20, 1989 the MEOC issued a Scheduling Order for prehearing procedures and tentatively scheduled a hearing for July 5, 6, and 7, 1989.

I. On January 30, 1989, Attorney Robarts for Mr. Maxwell filed a Motion to Disqualify the firm of Reynolds, Gruber, Herrick, Flesch and Kasdorf as attorneys for Union Cab.

J. On April 4, 1989 the MEOC issued a Decision and Order reserving a decision pending submission of factual proofs by Union Cab and the Reynolds firm, and written argument by both parties.

K. On July 5, 1989 the MEOC issued a Decision and Order denying the Motion to Disqualify, and scheduling a hearing for December 12, 13, and 14, 1989.

L. On July 28, 1989, Attorney Robarts notified the MEOC that she was withdrawing from further representation of Mr. Maxwell in the case.

M. On August 26, 1989, Attorney Richard Claus notified the MEOC that he would be representing Mr. Maxwell in the case.

N. On September 6, 1989, the MEOC issued an Order continuing the scheduled hearing indefinitely, as a result of staff changes.

O. On August 22, 1990, Attorney Herrick for Union Cab filed a Motion to Dismiss the case for mootness, alleging that the effect of the discipline on Mr. Maxwell's employment record had been removed by the passage of time.

P. On September 10, 1990, Mr. Maxwell filed a complaint with the MEOC (which the MEOC captioned an "Amended Complaint of Discrimination") alleging that he was discriminated against by Union Cab in retaliation for his earlier complaint, in that he was denied due process in regard to an internal grievance process between September 1988 and January 1989.

Q. On January 26, 1991, Attorney Claus notified the MEOC that he had been discharged by Mr. Maxwell.

R. On June 5, 1991, Mr. Maxwell acting pro se filed a Motion to Temporarily Permit Complainant to Contact Nancy T. Homes.

S. On July 10, 1991, Mr. Maxwell filed an Amended Complaint of Discrimination with the MEOC adding the categories of sex, sexual orientation, and physical appearance to his Amended Complaint of September 10, 1990.

T. On October 10, 1991, a scheduling conference was conducted by the undersigned hearing examiner for the MEOC and a Scheduling Order was issued to permit the parties to brief the various pending motions.

U. On October 10, 1991, Mr. Maxwell filed a document entitled "Complaint of Discrimination" alleging discrimination by Union Cab in an internal grievance hearing on December 13, 1990.

V. On October 27, an Order was issued denying Union Cab's Motion to Dismiss, denying Mr. Maxwell's Motion to Temporarily Permit Complainant to Contact Nancy T. Homes, and disallowing the purported amendments to the complaint dated September 10, 1990 and July 10, 1991.

W. On November 4, 1991, Mr. Maxwell filed a Motion to Amend Complaint, to incorporate the Complaint of Discrimination filed on October 10, 1991.

X. On November 8, 1991, a prehearing conference was held, resulting in a Memorandum of Prehearing Conference, Order, Scheduling Order, and Notice of Hearing which denied Mr. Maxwell's Motion to Amend Complaint, set forth the issues to be addressed in the public hearing, and scheduled the hearing for December 12th and 13th, 1991.

Y. On December 2, 1991, Mr. Maxwell filed a Request to Order Mediation, a Motion to Compel Answers, and a Motion for Sanctions.

Z. On December 5, 1991, a prehearing conference was held. No written order was issued.

AA. On December 10, 1991, Mr. Maxwell filed a Motion to Permit Evidence and Testimony Regarding Verification Procedure of Respondent's Appearance Policy.

BB. The hearing was held as scheduled on December 12th and 13th, 1991, and completed on December 19th, 1991. Complainant Joseph Scott Maxwell appeared in person, pro se. Respondent Union Cab appeared by Attorney Scott Herrick of Reynolds, Herrick, Flesch, Kasdorf & Dymzarov, P.O. Box 169, Madison, WI 53701. The testimony and exhibits presented in that hearing form the basis for this proposed decision.

FINDINGS OF FACT

1. Respondent Union Cab Cooperative (Union Cab) is a cooperative organization of cab drivers.

2. Joseph Scott Maxwell (Mr. Maxwell) has been employed by Union Cab, beginning on September 25, 1985 and continuing through the hearing in this case.

3. Mr. Maxwell is a heterosexual male.

4. Mr. Maxwell filed a complaint (MEOC #20834) against Union Cab on August 12, 1987, alleging employment discrimination on the basis of sex, sexual orientation and physical appearance.

5. In a letter dated September 21, 1987 to Ms. Mary M. Pierce at the Madison Equal Opportunities Commission (exhibit #33), Union Cab's General Manager Perry Benson stated:

> In answer to #4 and #5: I did indeed ask Mr. Maxwell to agree to refrain from wearing makeup prior to 6PM. Although I do not recall specifically the words I used, I did express displeasure with the type of earrings he had been wearing. I believe that I implied in this that if Mr. Maxwell were to wear something less feminine, I would have no problems with them. .... I did state that if he was unwilling to accept this agreement and if his appearance were to lose us another business account, I would then discipline him under Category I, class B (6) of our shop rules, "Misconduct which results in significant loss of business for the Cooperative". If there were no complaints and no loss of business, there would be no discipline. Enclosed are a copy of our shop rules and a copy of the letter we received from Anaquest, Inc. referring to Mr. Maxwell's conduct and appearance. I should note that Mr. Maxwell could easily have been disciplined for the Anaquest incident, but I preferred a compromise that would allow him some freedom of expression. I was willing to accept the occasional passenger during the evening hours who might be upset by Mr. Maxwell's appearance. It was the business account, the people who spent hundreds or thousands of dollars with us every month, whom I was unwilling to offend. Hence, I picked 6PM, a time at which our business accounts are finished for the day. ....

6. On May 11, 1988, Mr. Maxwell and Union Cab signed a Compromise and Settlement Agreement (exhibit #13), as a result of which MEOC case #20834 was dismissed. The most relevant portion of that agreement is as follows:

> 1. Respondent agrees to pay attorney fees incurred by Claimant in regard to his discrimination claims through May 2, 1988 in the following manner: Respondent

will issue a check to the law firm of Borns, MacCaulay and Jacobson for the balance of Claimant's bill and a check to the law firm of Cullen, Weston, Pines & Bach for $1,900.00, an amount which pays Claimant's bill at that firm and repays Claimant's out-of-pocket expenses at Borns, MacCaulay and Jacobson.

2. Defendant agrees not to require claimant to resign his position with defendant. Defendant agrees not to terminate claimant at this time and to treat the question of his continued employment as it would treat the question for any employee.

3. Claimant agrees to never again wear cosmetics, earrings or nail polish while on the job at Respondent's business.

4. Claimant agrees to refrain from talking to passengers in the course of business about the events which gave rise to his claim against defendant or about the resolution of his claim, acknowledging that defendant reserves the right to treat such conduct as a violation of its code of conduct for employees.

7. Union Cab expended a total of approximately $5,000 for Mr. Maxwell's and its own attorneys' fees and costs as a result of the complaint and the settlement (exhibits #2, #3, and #25).

8. Sometime shortly after the Compromise and Settlement Agreement was signed, Perry Benson posted a document entitled "The Maxwell Settlement: An Explanation" (exhibit #3) on Union Cab's "democracy wall". This bulletin board is accessible to all employees, and responsive graffiti are common. After describing the settlement, Perry Benson stated in the document: "I want to remind everyone that Scott had the absolute right to take the actions that he did against the Cooperative. Any harassment of Scott over this matter is illegal and against Cooperative policy. I will deal as severely as the shop rules allow with any violation of this policy."

9. On June 12, 1988, sometime between 9:10 P.M. and 9:20 P.M., Max Winkels, an employee of Union Cab as well as President of its Board of Directors, observed Mr. Maxwell on the premises of Union Cab wearing cosmetics and earrings. Mr. Maxwell "punched out" at approximately 9:15 P.M. that evening, and at the time that Max Winkels observed Mr. Maxwell, Mr. Maxwell was off-duty. Max Winkels thought the condition of the makeup indicated it had been applied earlier, while Mr. Maxwell was on-duty. Max Winkels reported this to Perry Benson, who, as General Manager, was primarily responsible for disciplinary matters.

10. On June 12th or 13th, 1988, Perry Benson called Mr. Maxwell and directed him to attend a meeting in his office on June 14, 1988. The meeting was held and was attended by Mr. Maxwell, Perry Benson, Max Winkels, and a Union Cab union steward, Juan Villareal.

11. On June 15, 1988, Max Winkels sent a memorandum to Perry Benson describing the incident (exhibit #24).

12. Perry Benson consulted with Union Cab's legal counsel at the time, Robert Gruber, regarding the proper course of action. Perry Benson raised the question of whether Mr. Maxwell could be in violation of the agreement if he was off-duty but on company premises. Mr. Gruber informed him that the distinction was unimportant. Perry Benson later received corroborating information from another Union Cab employee, Karl Armstrong, indicating that Mr. Maxwell was wearing makeup while on duty on June 12th.

13. Options available to Perry Benson in response to the apparent breach of the Compromise and Settlement Agreement included (1) ignoring the incident, (2) investigating the incident yet finding that Mr. Maxwell had violated neither the agreement nor any shop rule, (3) attempting to initiate some action in Circuit Court (exhibit #25), or treating it as a violation of established shop rules, such as (4) assessing two points for a violation of Union Cab's Appearance Policy (exhibit #23), (5) assessing six points for "willful or deliberate failure to follow or obey proper supervisory direction" (exhibits #25 and #26), or (6) assessing twelve points for "gross insubordination" (exhibit #14). Union Cab's disciplinary policy at the time consisted of a point system with two categories (category 1 for disciplinary incidents and category 2 for driving incidents) whereby accumulation of 12 points in any one category in a year, or 16 points in any one category in two years, or 16 points in both categories in one year, or 20 points in both categories in two years was grounds for termination.

14. On June 16, 1988, after consultation with Union Cab's legal counsel, Perry Benson assessed six category 1 points against Mr. Maxwell's record, for willful or deliberate failure to follow or obey proper supervisory direction, and informed Mr. Maxwell of this in a letter (exhibit #25).

15. At the time the six disciplinary points were assessed, Mr. Maxwell had four category 1 points and five category 2 points on his record.

16. Mr. Maxwell requested a review of this disciplinary action by the Workers' Council, a Union Cab internal review committee.

17. In comments which were reported in *The Daily Cardinal* on June 23, 1988 (exhibit #28), Perry Benson stated that Union Cab had received complaints about Mr. Maxwell's appearance, and said "I don't think he was too skillful in his application of makeup," and "he would wear orange lipstick and green eyeshadow and rouge."

18. In May and June of 1988, following the signing of the Compromise and Settlement Agreement, several individuals in Union Cab felt and/or expressed resentment at the settlement. These

individuals included Brian Howard, Brad Verhelst, and Allen Ruff (exhibit #8). The nub of their resentment was the cost to Union Cab of the suit and settlement.

19. On June 29, the Workers' Council met to review the disciplinary decision. The Council listened to Perry Benson, Max Winkels, Karl Armstrong and Mr. Maxwell, and reviewed a letter from Marsha Rummel (exhibit #6). At one point, Perry Benson asked whether Mr. Maxwell had been wearing "brightly-colored barrettes in the shape of bows" in his hair. The Workers' Council upheld the disciplinary decision, adding a recommendation that Mr. Maxwell seek counseling "in the spirit of the cooperative, and in the spirit of caring for a co-op member", and informed Mr. Maxwell of this in a letter (exhibit #7).

CONCLUSIONS OF LAW

I. The Madison Equal Opportunities Commission has personal jurisdiction over the Complainant, Joseph Scott Maxwell, who filed the complaint to initiate this case.

II. The Madison Equal Opportunity Commission has personal jurisdiction over the Respondent, Union Cab Cooperative, who is an employer operating in the City of Madison.

III. The Madison Equal Opportunity Commission has subject-matter jurisdiction over this complaint which alleges discrimination in employment based on sex, sexual orientation, and physical appearance, and in retaliation for filing an earlier complaint.

IV. The Complainant failed to prove that the Respondent discriminated against him on the basis of his sex.

V. The Complainant failed to prove that Respondent discriminated against him on the basis of his sexual orientation.

VI. The Complainant failed to prove that Respondent discriminated against him on the basis of his physical appearance.

VII. The Complainant proved by a preponderance of the evidence that in its disciplinary action, Respondent was motivated at least in part by retaliation for his filing an earlier complaint with the MEOC, thereby discriminating against him in violation of sec. 3.23(8), Mad. Gen. Ord.

ORDER

THEREFORE, IT IS ORDERED that

I. Respondent shall rescind the Disciplinary Letter issued by Perry Benson on June 16, 1988, and without destroying existing records shall include a copy of this order in any file containing evidence of such discipline, including Complainant's personnel file.

II. Respondent shall not discriminate against Complainant in retaliation for filing any complaint with the Madison Equal Opportunities Commission, and shall treat his continued employment as it would that of any other employee.

III. Respondent shall provide a photocopy of any document posted on Respondent's premises to any employee upon request.

OPINION

This is an employment discrimination case. The issue is whether the employer, Union Cab Cooperative, treated its employee, Joseph Scott Maxwell, less favorably than it would have treated another in the same situation, and if it did so, whether the disparate treatment was based on one of the categories which is protected by the Madison Equal Opportunities Ordinance, sec. 3.23, Mad. Gen. Ord. Among its categories the ordinance prohibits discrimination based on an employee's sex, sexual orientation, or physical appearance,[1] and prohibits discrimination in retaliation for filing a discrimination complaint.[2]

The Standard for Analysis

Mr. Maxwell bears the burden of proving, by a preponderance of the evidence, that the Respondent's disciplinary action against him on June 16, 1988 was based on his sex, his sexual orientation, or his physical appearance, or was motivated by retaliation for his earlier complaint to the EOC. This is a mixed-motive case,[3] in which the employer is alleged to have taken action against the

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[1] (7) Employment Practices. It shall be unfair discrimination practice and unlawful and hereby prohibited:

(a) For any person or employer individually or in concert with others to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's sex, race, religion, color, national origin or ancestry, age, handicap, marital status, source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, political beliefs or the fact that such person is a student as defined herein. ....

[2] (8) No person shall aid, abet, incite, compel or coerce the doing of any act which violates this ordinance or obstructs or prevents any person from complying with the provisions of this ordinance; and no person or employer, employment agency or labor organization, whether individually or in concert with others, shall discharge, harass, intimidate, or otherwise discriminate against any person because he or she has opposed any discriminatory practices under this ordinance or because he or she has made a complaint, testified or assisted in any proceeding under this ordinance.

[3] If this decision is reviewed, and a determination is made that the case should be analyzed as a single-motive case subject to traditional Title VII analysis, see Appendix I for such an analysis.

employee for both permissable and impermissable reasons, and in such cases the complainant's burden is eased somewhat by the fact that the MEOC adheres to the test enunciated in Muskego-Norway Consolidated Joint School District No. 9 v. W.E.R.B., 35 Wis.2d 540, 556-7, 151 N.W.2d 617, 625 (1967). Under that test the complainant need prove only that an action was based in part on an improper motive, regardless of whether other valid bases existed.[4]

Issues Which Are Not Addressed in This Decision

First, however, there are a number of questions which are not addressed in this opinion. These include the following:

1. This is not a forum which can decide the question which would have been raised by Mr. Maxwell's earlier case, i.e. whether his use of makeup, earrings, and nail polish would be protected under the MEOC ordinance. Mr. Maxwell's interpretation of the language of that portion of the ordinance covering personal appearance is in fact reasonable. However, in a letter to the MEOC, Perry Benson articulated a strong case for a reasonable business purpose exception, and the conflict of those issues was not addressed in a form which allows a decision on the issue here. (See Appendix I for the relevant text of the ordinance and a further discussion.) Furthermore, the issue was altered and effectively foreclosed in this forum by the Compromise and Settlement Agreement.

2. This is not a forum for review of the Workers Council decision. The MEOC ordinance does not reach the Workers Council, as it creates the authority to prohibit discrimination only by employers. The Workers Council decision could be reviewed only if the Workers Council were viewed as a creature of management, and despite some confusion over the distinction between employer and employed in Union Cab, as discussed in the next section, the evidence showed that the Workers Council acts as a check on management, even if, as alleged by Mr. Maxwell, it did so imperfectly. Any evidence of imperfect procedure, such as lack of prescribed training, is not relevant as long as the Workers Council is not part of management, and even if it were, it would be relevant only if it were shown that the Workers Council departed from its normal procedure, whatever that was, when it handled Mr. Maxwell's case. The only evidence that the Workers Council meeting was conducted differently on this occasion than on others was that a person was allowed to testify whose employment status was questionable, having been on extended leave. However, the evidence was that non-members were not barred as witnesses

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[4] Another test, somewhat more favorable to respondents, was set forth in Price Waterhouse v. Hopkins, 490 U.S. ___, 109 S. Ct. 1775 (1989). If this case is reviewed, and it is determined that Price Waterhouse is the proper test, see Appendix II for that analysis.

anyway, as Mr. Maxwell had thought. No grounds exist for this tribunal to review the Workers Council decision.

3. This is not a forum for evaluating Union Cab's commendable internal policies which mandate extraordinary measures to avoid discrimination against its own employees, especially the two-page "Equal Opportunity and the Maintenance of an Harassment Free Environment at Union Cab" (exhibit #9). However unenforced Mr. Maxwell alleges those policies to have been, they have force only as given effect within Union Cab, and the MEOC has no power to review or enforce them.

4. This is not a forum for deciding a question which is of academic interest only at this point, whether or not Mr. Maxwell was wearing makeup while on-duty on June 12, 1988. The decision made by Perry Benson was based on legal advice that wearing makeup while "at Respondent's business" was in itself a violation of the Compromise and Settlement Agreement, and Mr. Maxwell does not dispute that Max Winkels saw him leaving work wearing makeup. But Perry Benson also received information from Max Winkels and Karl Armstrong indicating that the makeup had been worn while on-duty, and Mr. Maxwell seems to have assumed that that was the sole basis for the discipline. Before this hearing, Mr. Maxwell seems never to realized that Union Cab interpreted the agreement to prohibit his use of makeup while "at Respondent's business", and he seems to have repeatedly focused his case on the proof of facts which would show he hadn't applied the makeup until he was off-duty. Mr. Maxwell's attitude toward Perry Benson, the Workers Council, and the membership of Union Cab in general has been based on his own interpretation of the agreement as applying only "while on the job", and his righteous indignation at being disciplined for something he didn't do. Mr. Maxwell's passionate outrage is so intense that he maintains that no person uninfected by bigotry could possibly believe Max Winkels (President of Union Cab at the time) and Karl Armstrong (another employee, albeit on leave status), when confronted with the conflicting testimony of Marsha Rummel, a worker at the Mifflin Street Co-op who saw him for 30 seconds in the middle of the afternoon. Mr. Maxwell has pursued his complaint over three and one-half years with undimmed fervor, and this dedication reinforces his basically credible testimony that he did not wear cosmetics on June 12, 1988 until after he was off-duty. (One other motive for single-mindedly pursuing the case was contained in his statement that "others" thought he had sold out and given up too easily in the earlier case.) Nevertheless, the opinion of this Hearing Examiner is that Mr. Maxwell did not wear makeup while on duty, although without an opportunity to examine Max Winkels and Karl Armstrong, no finding is appropriate. Neither witness was available for the hearing, and the nature of Karl Armstrong's allegations does not appear at all. However, a finding is not necessary to the outcome of this case. The language of the agreement contains sufficient ambiguity to be subject to interpretation, and the intensity of Complainant's belief that he was wronged is not sufficient to say that Perry Benson's interpretation was patently wrong. In fact, Perry Benson

testified that he considered the ambiguity and discussed it with Union Cab's legal counsel.

Mr. Maxwell has understandably tried to use this process to solve what he perceives as a problem at Union Cab, and perhaps in society at large, a theme which will be mentioned again in the discussion of remedies below. However, this case focuses on a single incident, and the only question to be determined in this decision is whether the disciplinary action taken was based on impermissable factors.

The Organization of Union Cab

A comment is also in order regarding the organization of Union Cab. The analysis of Union Cab's treatment of Mr. Maxwell is complicated by the company's organization. Respondent is a co-operative organization of taxicab drivers, which is an employer under the Equal Opportunities Ordinance, Russ v. City Veteran Cab Co., (LIRC, 12/04/87), but in such an organization the distinction between management and employees is less clear than in non-cooperative businesses. The Co-op's day-to-day operations are conducted by a management team headed by a General Manager, who at the time of this complaint was Perry Benson. The management team is answerable to the Board of Directors, which is elected from among the membership of the Co-op. At the time of this complaint, Max Winkels was the President of the Board of Directors, and Allen Ruff was Vice-President.

Allen Ruff presents a prime example of the confusing dual role of individuals in the Co-op. At various times he was a cab driver, a phone answerer and a dispatcher, and he continued in one or more of those roles at the same time that he was Vice-President. He began his "An Open Letter to Scott Maxwell" (exhibit #8) by saying "Let me state first off that the following thoughts and opinions are my own and do not reflect the opinion or sentiment of the Board of Directors, the Management Team, or the Membership at Union Cab as a body." Unfortunately, his disclaimer is not totally effective, for the Board of Directors is nothing more than a collection of individuals like Allen Ruff, and as in much of this case, the line between management and membership is indistinct. This is a factor in the conclusion that a retaliatory motive infected the disciplinary decision.

The Alleged Discrimination: Sex and Sexual Orientation

Mr. Maxwell, a heterosexual male, presented no evidence that anyone in Union Cab treated him differently than anyone else, in this or any other instance, because of his sex or his sexual orientation. Although heterosexual, Mr. Maxwell argued that he was the target of discrimination because his personal appearance caused him to be perceived as homosexual. However, no evidence was presented that anyone in Union Cab perceived him as homosexual. The only evidence remotely on point was that others viewed his personal appearance as "feminine", not gay.

Specifically, Perry Benson said "if Mr. Maxwell were to wear something [i.e. earrings] less feminine, I would have no problems with them", and in the Workers Council meeting he asked if Mr. Maxwell had been wearing "brightly-colored barrettes in the shape of bows"; also, Rob Patzke may have said "we can't have some guy driving for us that looks like a woman." Far from proving that homophobia existed in Union Cab, the testimony of its employees, especially Laurel Schimming and Allen Ruff, established that Union Cab has a working environment that tolerates a wide diversity of life styles, including homosexuality. Mr. Maxwell failed to prove that Union Cab discriminated against him on the basis of sex or sexual orientation, and Respondent's Motion to Dismiss at the end of Complainant's case was granted to the extent of removing those two bases for the complaint.

The Alleged Discrimination: Physical Appearance

Mr. Maxwell failed to prove that Union Cab's attitude toward his personal appearance apart from any reasonable business purpose was a factor in the decision to discipline him. Some evidence was presented that individuals considered his appearance to be feminine (see the previous paragraph). In addition, Perry Benson also said "he would wear orange lipstick and green eyeshadow and rouge; I don't think he was too skillful in his application of makeup," and Mr. Maxwell presented credible testimony that one Union Cab employee, Brad Verhelst, confronted and physically assualted him while off duty, and that the incident started with Brad Verhelst commenting on Mr. Maxwell's appearance. Although the latter incident is troubling, the only item which raises a concern over discrimination at Union Cab is Perry Benson's question regarding Mr. Maxwell in the Workers Council meeting. This question was clearly inappropriate, especially in the context of the Workers Council meeting, but most of what Mr. Maxwell perceived as "bigotry" at Union Cab was resentment toward the cost of his previous suit, as described in the next section.

The evidence is weak that a discriminatory attitude toward Mr. Maxwell's personal appearance was a factor in the decision to issue a disciplinary letter, and the allegation is further weakened by the fact that an exception exists in the MEOC ordinance for a reasonable business purpose.[5] Perry Benson was obviously aware of this, as detailed in his letter to Mary Pierce at the MEOC:

> In answer to #4 and #5: I did indeed ask Mr. Maxwell to agree to refrain from wearing makeup prior to 6PM. Although I do not recall specifically the words I used, I did express displeasure with the type of earrings he had been wearing. I believe that I implied in this that if Mr. Maxwell were to wear something less feminine, I

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[5] See Appendix I for the text of the ordinance and further discussion of this issue.

> would have no problems with them. .... I did state that if he was unwilling to accept this agreement and if his appearance were to lose us another business account, I would then discipline him under Category I, class B (6) of our shop rules, "Misconduct which results in significant loss of business for the Cooperative". If there were no complaints and no loss of business, there would be no discipline. Enclosed are a copy of our shop rules and a copy of the letter we received from Anaquest, Inc. referring to Mr. Maxwell's conduct and appearance. I should note that Mr. Maxwell could easily have been disciplined for the Anaquest incident, but I preferred a compromise that would allow him some freedom of expression. I was willing to accept the occasional passenger during the evening hours who might be upset by Mr. Maxwell's appearance. It was the business account, the people who spent hundreds or thousands of dollars with us every month, whom I was unwilling to offend. Hence, I picked 6PM, a time at which our business accounts are finished for the day. ....

Just as it was appropriate for Mr. Maxwell to be concerned about Perry Benson's question regarding barrettes in the Workers Council meeting, it was appropriate for Perry Benson to be concerned about the effect Mr. Maxwell's personal appearance would have on Union Cab customers. The question of whether Mr. Maxwell or Perry Benson would have prevailed in the first suit is not before us. Mr. Maxwell did not succeed in showing by a preponderance of the evidence that an impermissable discriminatory attitude toward his personal appearance was a factor in the disciplinary decision.

The Alleged Discrimination: Retaliation

Mr. Maxwell did present sufficient evidence to prove that a retaliatory motive was present in the disciplinary decision. That motive was weak, and probably represented no more than 10% of the decision, which was largely based upon the apparent violation of the Compromise and Settlement Agreement, and upon prior incidents involving Mr. Maxwell which were sufficient in themselves to justify a six-point disciplinary letter,[6] but the retaliatory motive was present in some degree. The evidence was not direct. The evidence consisted of testimony and documents that showed that an attitude of resentment toward Mr. Maxwell for his earlier discrimination complaint was present at both the employee and management levels in Union Cab, and it is the opinion of this hearing examiner that this attitude more likely than not contributed to Perry Benson's decision.

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[6] Thus, even though discrimination is found using the Muskego-Norway test, it would not be found using the Price Waterhouse test. See Appendix II.

Strangely, this attitude of resentment was probably even stronger than Mr. Maxwell understood, because he confused it with another motive: most of what Mr. Maxwell perceived as "bigotry", i.e. discrimination based upon his personal appearance, was really resentment toward the cost of his previous suit. Brian Howard and Brad Verhelst testified to this, and Allen Ruff's "An Open Letter to Scott Maxwell" describes this attitude well. Perhaps even more eloquent than any of this evidence, though, is exhibit #21, pages 3 and 4 of which are unattributed as to source. The author of those comments stated "in the beginning of your campaign I and I believe many others were willing to support you but I believe that your methods have alienated even the few of us that did support you;" the writer goes on to say "you will fight & fight and fight about whatever you can untill you bring this coop down with you."

The resentment which existed should not be confused with harassment as alleged by Mr. Maxwell. One action, the confrontation with Brad Verhelst at the Willy Bear, would clearly qualify as harassment. However, the question is whether the management of Union Cab tolerated harassment, specifically on the "democracy wall." Mr. Maxwell alleged that the management of Union Cab should have done more to stifle what he perceived as harassment, especially on the bulletin boards. The evidence is that Union Cab is a uniquely democratic organization, and one symbol of that ethos is the "democracy wall", on which members are allowed to post items, and then to write comments on the postings. Allen Ruff expressed the opinion that Mr. Maxwell fueled the fires of his own harassment by his postings, an opinion which is at least partly supported by the record in this case. For example, Brian Howard wrote on one of Mr. Maxwell's postings (exhibit #2): "the fact is, Scott, you are a spore from a slime mold", but Mr. Maxwell's posting was a photocopy of an article on his settlement, and his own hand-written comment on the article began with "This statement is a LIE!!!" It is difficult to say whether Brian Howard's reaction was based more on the facts of the case than on his reaction to Mr. Maxwell's red flag, whether it was influenced by an officially-tolerated atmosphere of discrimination against Mr. Maxwell or whether he was responding in appropriate first-amendment terms to Mr. Maxwell's provocative annotation.

While it is true that Mr. Maxwell has endured comments directed at him in the workplace, another question to be answered alongside the question of free speech is whether these have occurred because of Mr. Maxwell's membership in a protected category, or because of Mr. Maxwell's individual actions and personality, for there is a difference between retaliation for filing a suit and antipathy toward a trouble-maker. An employment decision based on an individual's membership in a protected category is prohibited; a decision based on the individual's behavior is not prohibited. Rose v. Kippcast, MEOC #20851, 9-29-89. Similarly with harassment: comments directed at an individual because of the individual's personality are not prohibited.

A finding that management should be faulted for tolerating an

atmosphere of discrimination would require a decision that stifling potentially discriminatory speech is more important than maintaining a commitment to the free expression of ideas and opinions. It would also require a clearer record that management neglected its responsibility to quell discrimination. The record actually provides extensive evidence that Union Cab went to great lengths to guarantee rights belonging to Mr. Maxwell and all other employees, as illustrated by the final two pages of exhibit #9, "The Maintenance of an Harassment Free Environment at Union Cab," and the final paragraph of exhibit #3, "The Maxwell Settlement: An Explanation":

> I want to remind everyone that Scott had an absolute right to take the actions that he did against the Cooperative. Any harassment of Scott over this matter is illegal and against Cooperative policy. I will deal as severely as the shop rules allow with any violation of this policy.

Nevertheless, it is true that those policies did not prevent many individuals in Union Cab from expressing in various terms their open resentment of the cost of Mr. Maxwell's earlier case on the democracy wall. And the real problem is that even though those individuals probably distinguished betweeen the principle of Mr. Maxwell's case and its cost, perhaps supporting the one while resenting the other, as a practical matter for the enforcement of an ordinance such as the MEOC's, no such distinction can be countenanced. Saying that an organization tolerates the filing of a discrimination complaint but will harbor bad feelings against the complainant because of the cost provides an empty guarantee.

Remedies

The Rules of the Equal Opportunities Commission provide the authority for a wide range of remedies in cases where discrimination has been shown. Rule 17 says "Compensatory losses, reasonable attorney fees and costs may be ordered along with any other appropriate remedies where the Commmission finds that a Respondent has engaged in discrimination." The spirit in which remedies are to be fashioned is contained in sec. 3.23(9)(c)2.b of the MEOC ordinance, which says

> If, after hearing, the Commission finds that the respondent has engaged in discrimination, it shall make written findings and order such action by the respondent as will redress the injury done to complainant in violation of this ordinance, bring respondent into compliance with its provisions and generally effectuate the purpose of this ordinance. In regard to discrimination in employment, remedies may include, but not be limited to, back pay. ....

On November 21, Complainant submitted the following requests for relief:

1. All attorneys' fees which he has incurred since May 11, 1988 for legal services rendered to him by Attorneys Ruth

Robarts, Richard Claus, Maureen Duffy, and Tammy S. G. Baldwin, and all such fees as shall be incurred by him for any legal services pursuant to the defense of his pleadings in this case, until such time as this case be resolved, and other costs incurred in his defense, including but not limited to service fees, witness fees, and filing fees.

2. Emotional and punitive damages, which Complainant holds are precedented and within the power of the Commission to grant, and which Complainant holds are particularly justifiable in this instance, of five thousand dollars.
3. A program of human relations training and consciousness-raising for all Directors and Managers of Respondent's business who have held these positions since September 1987 and are currently employed at Respondent's business, which program shall be jointly decided upon by Complainant, Respondent, and the Commission, such that these individuals shall confront their own bigotry and learn to overcome it with professional assistance.
4. A Special General Membership Meeting of Respondent's employees held for the expressed (sic) and sole purpose of a free and open discussion of "Maxwell I", "Maxwell II", and "Maxwell III", wherein no attorneys who are not currently employed by Respondent shall be present, and no other former employees shall be present without the expressed (sic) permission of both Plaintiff and Defendant, and no one present shall be held responsible for statements made at such meeting.
5. Respondent shall take affirmative action to protect Complainant from further acts of harassment, discrimination and retaliation, and to guarantee his right of freedom of expression not specifically restricted by the May 11, 1988 Compromise and Settlement Agreement between the parties.
6. Respondent shall, by appropriate means, grant Complainant a grace period of two years from the restrictions upon his appearance mandated by the May 11, 1988 agreement, and during this period shall guarantee that it shall enforce its Appearance Policy with regard to his physical appearance in an objective and equitable manner.
7. Complainant shall not be asked to resign at this time by the Respondent, and Respondent shall treat the question of Complainant's continued employment at its business as it would that of any other employee.
8. Respondent shall rescind disciplinary letter of June 16, 1988 written and issued to Complainant.
9. Respondent shall grant requested discipline stated in pertinent internal grievance proceedings by Complainant for Allen Ruff, Mark "Max" Winkels, Herb Brodsky, and Perry Benson.

On December 10, Complainant added the following request:

(10.) Complainant shall be permitted by Respondent, either acting alone or with the assistance of Respondent, to

temporarily remove from bulletin boards, walls, windows, or any other place where a document can or may be affixed, with the intent of making a photocopy, any documents which pertain or refer to himself, and to be permitted to retain such photocopy for his records.

With regard to request #1, this decision specifically rejects Mr. Maxwell's request for attorneys' fees. Such an award is discretionary under MEOC Rule 17, which says attorneys fees *may* be awarded. The decision not to award Mr. Maxwell attorneys' fees represents a balancing between the need (mentioned earlier) to remedy the narrow issue before the Commission, that of the discipline imposed by Perry Benson, and the broader issue of discrimination in Union Cab against Mr. Maxwell in retaliation for his suit(s), which is precisely the issue which Mr. Maxwell fought so persistently and with some success to inject into the hearing. Testimony established fairly clearly that Union Cab tolerates, or rather enjoys, great diversity in its workforce. Testimony further clarified that animosity in Union Cab toward Mr. Maxwell has been based far more on the money his suits have cost the Co-op than upon his personal appearance crusade. Therefore, in an effort to grant Mr. Maxwell the very remedy he seeks, an atmosphere in Union Cab which tolerates or even welcomes his efforts, no attorneys' fees are granted.

If the MEOC is unable to agree with this approach, I recommend the following additional order, which grants fees for attorneys who represented Mr. Maxwell in this case, but does not grant fees for attorneys who merely advised him without appearing for him. Mr. Maxwell was granted generous latitude in the preparation and conduct of the hearing because he appeared pro se, and granting attorneys' fees for Tammy S. G. Baldwin and Maureen Duffy would be unfair to Respondent:

> III. Respondent shall pay the attorneys fees incurred by Complainant in prosecuting this action, specifically fees paid to Attorney Ruth Robarts from September 1, 1988 to July 28, 1989, and fees paid to Attorney Richard Claus from August 26, 1989 to January 26, 1991. Complainant shall file a petition for the attorneys' fees awarded herein, along with any supporting documents, within thirty days of the date this order is affirmed and signed on behalf of the MEOC. Respondent shall file any response within twenty days after receiving a copy of Complainant's petition.

With regard to request #2, punitive damages are not appropriate where the main reason for Union Cab's disciplinary action was legitimate and based on a reasonable interpretation of the Compromise and Settlement Agreement, and only based in small part on a discriminatory motive. Emotional damages were not proved to a degree sufficient to permit recovery.

With regard to request #3, Mr. Maxwell has made a proposal

which might have some merit in the proper circumstances. However, the word "bigotry" goes too far. Regardless of the decision in this case, Union Cab does not deserve to be so labeled. All the evidence showed that Mr. Maxwell has been working for a business with a rare and exemplary concern for issues of discrimination, and it is unfortunate that the members of Union Cab have had to face the fact that they must not only tolerate Mr. Maxwell's personal appearance crusade, they must fund it also. (See discussion of requested remedy #1 above.)

With respect to request #4, Mr. Maxwell has proposed another action with some merit, and Union Cab should consider this seriously, but it will not be ordered.

Request #5 is sufficiently covered by the second paragraph of the order.

Request #6 is without merit. During the hearing, Mr. Maxwell indicated that he was unhappy with the agreement, but there is no basis for this tribunal to release either party from it. The only appropriate action would be to reform the ambiguous phrase which led to this case, "while on the job at Respondent's business." This will not be ordered, but both parties should consider doing so, and if the parties are unable to agree on replacement language, the following language should be considered: "while on the job, or while on the premises of Union Cab immediately before or after working. This section does not prevent Claimant from wearing makeup, earrings or fingernail polish while on Union Cab premises at other times."

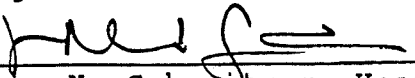
Request #7 is incorporated into paragraph #2 of the order.

With regard to request #8, the recommended remedy includes rescission of the disciplinary letter. This is based on the likelihood that Mr. Maxwell interpreted the Compromise and Settlement Agreement as prohibiting his use of makeup, earrings and nail polish only while on-duty, and that he did not therefore wilfully or deliberately violate the agreement.

Request #9 is not appropriately within the MEOC's power to grant, regardless of its merit.

Request #10 is incorporated in paragraph III of the order, but made to apply generally to all Union Cab employees. This is not intended to have a chilling effect on the free speech expressed on the democracy wall, but if it causes both employees and management to read the comments with a potential discrimination suit in mind, the purpose of the MEOC ordinance may be furthered.

Signed and dated this 31st day of December, 1991.



John N. Schweitzer, Hearing Examiner

APPENDIX I

If this case were analyzed using a traditional Title VII framework, Mr. Maxwell's case would fail, and the complaint would have to be dismissed.

The analysis of a single-motive employment discrimination case involves a three-step process, as set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). The first step involves an examination of the evidence to determine whether the Complainant has made out a prima facie case of discrimination, that is if the Complainant has presented facts which raise an inference of discrimination on their face, prior to any consideration of the Respondent's evidence or explanation. Such a prima facie case raises a rebuttable presumption that discrimination occurred. The second step involves a determination of whether the Respondent has presented a legitimate non-discriminatory reason for its actions. Such an explanation serves to rebut the presumption of discrimination unless, in the third step of the process, the Complainant can prove that any such proffered reason was merely a pretext for discrimination. A complainant may prove pretext either "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing the employer's proffered explanation is unworthy of credence." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

A Complainant may establish a prima facie case by showing (1) that the Complainant engaged in a statutorily protected expression, (2) that the Complainant suffered an adverse action by the employer, and (3) that a causal link existed between the protected expression and the adverse action. Acharya v. Carroll, 152 Wis.2d 330, 448 N.W.2d 275 (Ct. App., 1989). In this case, sec. 3.23(2)(k) of the MEOC ordinance says

> "Physical appearance" means the outward appearance of any person, *irrespective of sex*, with regard to hair style, beards, *manner of dress*, weight, height, facial features *or other aspects of appearance* [emphasis added]. ....

and Mr. Maxwell's interpretation of the applicability of that language to his personal appearance was reasonable, although this decision makes no finding as to whether Mr. Maxwell's makeup, earrings and fingernail polish are in fact protected by the ordinance. This is largely because the issue was not before this tribunal and was not thoroughly argued by the parties, just as the parties had no opportunity to address and argue any possible exception for Union Cab based on a "reasonable business purpose", which was implied in Perry Benson's letter to Mary M. Pierce (exhibit #33) and which would be based on the second part of sec. 3.23(2)(k):

> ["Physical appearance"] shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed

attire, if and when such requirement is uniformly applied for admittance to a public accommodation or to *employees in a business establishment for a reasonable business purpose.*

All that is necessary for this analysis is that the complaint in MEOC #20834 was well-founded and was a protected activity.

The second criterion is clearly met, in that Mr. Maxwell was disciplined by his employer. The third criterion is satisfied by evidence presented by Mr. Maxwell which raises a reasonable inference that the discipline was related at least in part to feelings of resentment aroused by his earlier complaint. This evidence was presented through the testimony of Brian Howard, Brad Verhelst, and Allen Ruff, and through Allen Ruff's "An Open Letter to Scott Maxwell" (exhibit #8).

Union Cab carried its burden in the second step of the analysis by presenting Mr. Maxwell's apparent violation of the Compromise and Settlement Agreement as a legitimate non-discriminatory reason for its actions. The evidence regarding an assessment of four disciplinary points for a prior incident, as well as another serious incident for which Mr. Maxwell avoided discipline, is sufficient to qualify the breach of the settlement agreement as a valid reason for imposing six disciplinary points.

The final step in this analysis is to determine whether Mr. Maxwell was able to prove that the apparent violation of the agreement was merely a pretext for an action which was in reality based on discriminatory motives. Although Mr. Maxwell did present enough evidence to show that a retaliatory motive played some part in Perry Benson's decision, thereby satisfying the Muskego-Norway test, the evidence does not show that the incident was merely a pretext. He showed neither that the discriminatory reason more likely motivated Perry Benson nor that Perry Benson's proffered explanation was unworthy of credence, and under this analysis, Mr. Maxwell's claim would fail.

APPENDIX II

The following is provided if this decision is reviewed, and it is determined that this case should be analyzed using the test set forth in Price Waterhouse v. Hopkins, 490 U.S. ___, 109 S. Ct. 1775 (1989). Using that test, Mr. Maxwell's case would fail.

The U.S. Supreme Court in that case ruled that once a complainant proves that a prohibited reason was a motivating factor in an adverse employment action, the respondent may avoid a finding of liability if it can prove by a preponderance of the evidence that it would have made the same decision absent the prohibited reason. However, the MEOC is not bound by federal case law, American Motors Corp. v. ILHR Dept., 101 Wis.2d 337, 305 N.W.2d 62 (1981), and as stated, it follows the test in Muskego-Norway. If the Price Waterhouse test were used here, Mr. Maxwell's case would fail, because the retaliatory motive was a small factor in Perry Benson's decision to discipline Mr. Maxwell in the way he did. The evidence of a prior incident in which four disciplinary points were imposed on Mr. Maxwell, and even more, evidence of what has been referred to as "the Anaquest incident", in which discipline was withheld (exhibit #33) despite what Mr. Maxwell himself admitted was "a flagrant act of misconduct" (exhibit #28), was sufficient to lead to the conclusion that at least a six-point disciplinary action would have followed in this action regardless of any resentment felt in Union Cab toward Mr. Maxwell due to his prior complaint to the MEOC.