

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

Natalee Cruse  
7890 Dairy Ridge Rd  
Verona WI 53593

Complainant

vs.

Nordic Consulting  
740 Regent St Ste 400  
Madison WI 53715

Respondent

HEARING EXAMINER'S RECOMMENDED  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

CASE NO. 20142065

On October 19, 20, 21, 22, and 23, 2015, the Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, held a public hearing in Room 108 of the City-County Building, 210 Martin Luther King, Jr. Boulevard in Madison, Wisconsin. The Complainant, Natalee Cruse, appeared in person and by her attorneys Michael R. Fox and Mary E. Kennelly. The Respondent, Nordic Consulting, appeared by its representative Drew Madden, and by its attorneys George A. Stohner, Ellen E. Boshkoff, Lindsey M. Hogan and Sarah E. Caldwell Breslin.

Continuation of this hearing took place on December 8, 2015 and December 10, 2015, before the Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, held in a public hearing in Room 103A of the City-County Building, 210 Martin Luther King, Jr. Boulevard in Madison, Wisconsin and on December 9, 2015 and December 11, 2015 in Room 108 of the City-County Building, 210 Martin Luther King, Jr. Boulevard in Madison, Wisconsin. The Complainant, Natalee Cruse, appeared in person and by her attorneys Michael R. Fox and Mary E. Kennelly. The Respondent, Nordic Consulting, appeared by its representative Drew Madden, and by its attorneys George A. Stohner, Ellen E. Boshkoff, Lindsey M. Hogan and Sarah E. Caldwell Breslin.

Further continuation of this hearing took place on January 20, 2016, before the Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, held in a public hearing in Room LL120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard, in Madison, Wisconsin and on January 21 and 22, 2016 in Room 108 of the City-County Building, 210 Martin Luther King, Jr. Boulevard in Madison, Wisconsin. The Complainant, Natalee Cruse, appeared in person and by her attorneys Michael R. Fox and Mary E. Kennelly. The Respondent, Nordic Consulting, appeared by its representative Drew Madden, and by its attorneys George A. Stohner, Ellen E. Boshkoff, and Sarah E. Caldwell Breslin.

Based upon the record of the proceedings, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions of Law and Order.

## RECOMMENDED FINDINGS OF FACT

1. Complainant is a female who was employed with the Respondent, Nordic Consulting, from October 2012 through February 3, 2014.
2. Respondent, Nordic Consulting, is an employer located at 740 Regent Street, Suite 400, in the City of Madison, Dane County, Wisconsin, employing more than 15 employees, and is subject to the Equal Opportunities Ordinance.
3. The Respondent, Nordic Consulting, is a Madison based company providing consulting services to users of Epic Systems Corporation software and was founded in 2010 by Mark Bakken, who acted as the company's Chief Executive Officer (CEO).
4. Respondent's business model focused on "the three C's: Customers, consultants and candidates", and heavily emphasized a culture of 24/7 responsiveness and availability.
5. Drew Madden joined Nordic Consulting in 2010 with the title "EVP", and in early 2011 was named President of the company.
6. In 2012, Complainant reached out to the Respondent about job opportunities with Nordic Consulting.
7. Complainant worked for Epic Systems Corporation for approximately six years, and the Respondent focused on the Complainant's experience and knowledge of Epic as valuable when considering her for employment.
8. The Complainant's role during her employment with Epic was as part of the sales team, and managing a project to design a social networking site for Epic's clients.
9. Prior to her employment with the Respondent, the Complainant worked as a Project Manager on a branding strategy and marketing project with CUNA Mutual for just over a year.
10. In September 2012, Complainant met with Drew Madden, President of Nordic Consulting, and Mark Bakken, CEO, for interviews.
11. During these interviews, the Complainant indicated an interest in being involved in the marketing function of Nordic Consulting.
12. In October 2012, Complainant was hired as a part-time consultant and a part time project manager.
13. In January 2013, Complainant was moved to a full-time account manager position, working out of Nordic's home office in Madison under the supervision of Drew Madden.
14. Early on in the Complainant's employment with Nordic Consulting, she developed a close friendship with Drew Madden.

15. Complainant's relationship with Mr. Madden, who was her supervisor and President of the company, was one of a personal nature, and included communicating during and after business hours, on evenings and weekends.

16. Communication between Mr. Madden and the Complainant would consist of friendly banter, would occasionally include sexually explicit subject matter, and was not limited to professional or business-related topics.

17. At the end of her first year of employment in 2012, Complainant received a \$7,500.00 bonus.

18. On or about February 18, 2013, Complainant was appointed to the position of Director of Technical Marketing with the Respondent, and earned a salary of \$140,000.00 per year.

19. The Respondent's business in 2013 was overseen by a group of executives referred to as "The C-Suite", and included Mark Bakken, CEO; Drew Madden, President; Glenn Cole, Chief Financial Officer (CFO); Eric Sampson, Chief Operating Officer (COO); and Vivek Swaminathan, Chief Consulting Officer (CCO).

20. In February 2013, the marketing department consisted of the Complainant and Peggy Bakken, who was the wife of CEO Mark Bakken.

21. On May 31, 2013, Complainant was promoted to the position of Vice President (VP) of Marketing. Her salary was increased to \$160,000.00 per year.

22. Katherine Sager was the Vice President of Consulting for the Respondent, and considered the Complainant a friend and colleague.

23. Complainant's responsibilities as Vice President of Marketing included conference and event planning, management of a contract with an outside marketing consulting firm called Shine Unlimited (Shine), mentoring and developing the marketing team, and updating and managing the supply of sales collateral and consultant backpacks.

24. As VP of Marketing, Complainant was responsible for coordinating participation in numerous industry conferences and events on behalf of the Respondent, including HIMSS, HStalkapalooza, CHIME, and an open house during the week of Epic System's annual User Group Meeting (UGM).

25. As VP of Marketing, Complainant was responsible for press releases, media contacts, the Respondent's Facebook and Twitter accounts, the Respondent's website, and Nordic's monthly newsletter to employees.

26. As VP of Marketing, Complainant was responsible for managing relationships with outside vendors for the Respondent, including HStalk, a healthcare IT industry blog, and KLAS, a research vendor providing performance information and rankings for the healthcare IT industry.

27. In February or March of 2013, the Respondent was notified that The North Face brand of backpacks they had used as a consultant welcome gift were not permitted to be embroidered with Nordic Consulting's company logo.

28. On March 18, 2013, Complainant emailed Mr. Bakken with alternate options for consultant backpacks. Mr. Bakken rejected the alternatives. Instead, Mr. Bakken suggests the idea of obtaining a knock off The North Face backpack from China.
29. During her time as the VP of marketing, the Complainant held regular marketing meetings with the executive team and prepared status reports and agendas for these meetings.
30. In March of 2013, Complainant attended the HIMSS conference in New Orleans with a number of other Nordic employees.
31. During the HIMSS conference, the Nordic female employees stayed at one location, and the Nordic male employees stayed at a different location.
32. On March 6, 2013, while staying in New Orleans for the HIMSS conference, Mr. Madden excused himself from a group gathering at the women's house and took a nap in the room Complainant occupied in the women's house.
33. During the HIMSS conference in 2013, the Complainant introduced Mr. Madden to Judy Faulkner, founder and CEO of Epic Systems, and secured a booth for Nordic Consulting for the 2014 HIMSS Conference in a highly desirable location near the Epic booth.
34. In April 2013, Complainant attended an industry conference in Illinois with Mr. Madden and Mr. Bakken.
35. On April 21, 2013, the Complainant and Mr. Madden shared a bottle of wine in his room following a conference event.
36. On April 22, 2013, Complainant and Mr. Madden were in the back of Mr. Bakken's Range Rover, traveling to a casino with prospective customers when Mr. Madden took a photo of the Complainant that was later described, and referred to throughout the hearing, as an "upskirt" photo.
37. Mr. Madden and the Complainant agreed to ride in the back trunk area of the Range Rover so that the prospective customers could have the regular seats. Mr. Madden and the Complainant rode facing each other on opposite sides of the back trunk area.
38. During the approximately 20-30 minutes it took to travel to the casino, Mr. Madden took a photo of the Complainant that showed some portion of her underwear, thigh, and skirt.
39. Mr. Madden then texted that photo to the Complainant with the message, "I promise I will NEVER send this to anyone."
40. Complainant immediately deleted the photo from her phone and asked that Mr. Madden delete the photo immediately from his phone. The Complainant then asked for Mr. Madden's phone and deleted the photo from his phone herself.
41. In mid-May 2013, the Complainant requested time off in July to attend a week long executive marketing class at Kellogg Business School at Northwestern University.

42. Mr. Madden asked the Complainant if the request for time off was for a "pole dancing class", a "modeling class", or a "class on how to cross your legs", and insisted that the Respondent pay for the class per a company policy of reimbursing employees for education expenses.

43. In June 2013, the Respondent signed a master services agreement with an outside vendor, Shine, to engage in a major rebranding project.

44. In June 2013, Jon Chait became the Chairman of the Board for Nordic Consulting and spent approximately two days per week in the Nordic home office.

45. On June 19 and 20, 2013, the Complainant attended an industry conference in Denver, Colorado with Mr. Madden and Mr. Bakken.

46. One evening during the conference in June, the Complainant excused herself from a dinner event because she was feeling ill.

47. During that same evening, Mr. Madden had texted the Complainant about running into a former colleague of hers, and was concerned for her welfare when she didn't respond to his text messages.

48. Later that same evening, Mr. Madden stopped by the Complainant's hotel room and knocked on her door. The Complainant did not answer.

49. On June 24, 2013, Mr. Madden sent an email to Nordic employees notifying them of recent promotions, including the Complainant's promotion to Vice President of Marketing. Mr. Swaminathan, whose promotion was also announced in that email, emailed the Complainant to let her know she had been doing a great job, and to congratulate her on the promotion.

50. On June 27, 2013 Mr. Madden emailed the Complainant a list of "pros and cons" of her job, noting, in part, that the person who reported to her (Peggy Bakken), and her boss's boss (Mark Bakken) were often completely insane, that he thought the world of her, and that her team "sucked", but that she had the support of the executive team to change that over time.

51. On July 8, 2013, the Complainant responded to Mr. Madden with a pros/cons list of her own, which included praise for her supervisor, praise for the company in general, praise for her co-workers and working environment, and ended with the statement "I love Nordic". The Complainant's list did not include any cons.

52. On July 11, 2013, Mr. Madden presented the Complainant with an offer letter for her promotion to VP of Marketing, retroactive to June 1, 2013, a portion of which stated "for the agreement to be finalized a picture of [Complainant] in the back of a Range Rover must be texted to" Mr. Madden. The Complainant insisted this bullet point be removed, and signed an unmodified and modified version of the agreement. Mr. Madden sent the modified version of the agreement with the remark, "I think we can just have an unwritten agreement that you'll text me that picture....".

53. On August 12, 2013, the Complainant sent Mr. Madden a message that she was struggling to keep up with the demands of her position, and that she was afraid she was becoming a "bottleneck" for folks.

54. In mid-August 2013, Mr. Madden commented to the Complainant that she shouldn't be wearing a white bra with a white shirt (referred to throughout the hearing as "the bra comment"). There is testimony that the conversation also indicated that men in the office were "looking at her nipples".

55. On August 24, 2013, Mr. Madden sent the Complainant a text message asking if he should wear a suit or sport coat to a meeting in New York, and whether or not a white or nude bra was appropriate in reference to the bra comment he previously made to the Complainant.

56. On August 27, 2013, Vivek Swaminathan included the Complainant on an email from Nordic Consultant Nick Daar about sponsoring a user group in the Chicago area, and asking that Mr. Daar and the Complainant connect to take further action on Mr. Daar's idea.

57. On August 29, 2013, Mr. Madden saw Complainant's boyfriend, and Nordic employee, Brian Matsuura at the Dane County airport. Mr. Matsuura was leaving for a trip that the Complainant had been intending to be a part of as well. Mr. Madden asked where the Complainant was, and Mr. Matsuura indicated she decided not to join him because she had too much on her plate with work and couldn't take the time away.

58. On August 30, 2013, the Complainant texted Mr. Madden a series of emojis or emoticons. Mr. Madden responded to that text saying "Let me translate, if Brian hits the sweet spot (twice), you will turn your cell phone off and be okay with not walking as long as you can write down what turns you on and makes your triangle go through the roof. Then you'll settle down in a nice house and love your dogs and love your home." Mr. Madden's use of the word "triangle" was in reference to the Complainant's vagina. The Complainant responds to that, and a subsequent text message, with an emoticon of a woman's face with brown hair and her arms crossed in front of her body in an effort to indicate she did not like his comments. Mr. Madden asked the Complainant if that was the "safeword."

59. In September 2013, Mark Bakken signed a contract with Shine committing to a \$400,000.00 agreement for services. Mr. Bakken told the Complainant he would share this information with the rest of the C-Suite members, and that she should not tell them about the agreement.

60. On September 16, 2013, the Respondent hosted an open house at their corporate office in Madison as part of the week long Epic User Group Meeting (UGM). This event was largely organized by the Complainant and the marketing team.

61. On September 17, 2013, Mr. Swaminathan sent an email to the Nordic Corporate group thanking everyone for their part in the open house effort the day prior, and praising it as a successful event.

62. On September 19, 2013, Mr. Madden asked the Complainant to invite Amy Rettler, Director of Client Relations for Nordic, to a branding meeting with Shine the next day. The Complainant indicated to Mr. Madden that she "would rather not." Mr. Madden invited Ms. Rettler to attend the branding meeting, and expressed to the Complainant his disappointment in her handling of that request. Complainant told Mr. Madden she felt blatantly disrespected and manipulated in that situation and others.

63. On September 20, 2013, there was a branding meeting between the Respondent and Shine, attended by several Nordic executive level and C-Suite level employees.

64. On September 20, 2013, the Complainant sent a text message to Mr. Madden asking if they were still buddies, and telling him that she cared for him, believed in the strength of their relationship, and that she was comfortable speaking her mind, believing that he would hear it and land in a better place. The Complainant also stated she saw being frustrated and upset at that time as an opportunity to grow, and not a threat to their ability to work together or have a friendship.

65. On September 20, 2013, the Complainant sent an email to Mr. Swaminathan recapping the open house attendee numbers, which had nearly doubled from the previous year.

66. On September 23, 2013, Mr. Bakken emailed the Complainant and marketing department about registration for a CHIME event of which Nordic Consulting was a sponsor. The Complainant emailed Mr. Bakken back confirming event registration details.

67. On September 24, 2013, Complainant received 65,000 stock options from the Respondent. All executive level employees at that time were also granted stock options.

68. On September 25, 2013, Complainant reported to Peggy Bakken that Mr. Madden made a comment about the color of her bra ("the bra comment"), and that it was upsetting to her. Peggy Bakken told the Complainant that she (Peggy Bakken) needed to report the comment to her husband, Mark Bakken, and that the comment "is sexual harassment."

69. The only incident Complainant reported to Peggy Bakken was the "bra comment."

70. On September 25, 2013, the Complainant and Mr. Madden met at the Echo Tap to talk. Following that meeting, the Complainant sent Mr. Madden a text message recalling that one year ago that day, she and Mr. Madden and Mr. Bakken had all met and discussed her potential to be the VP of Marketing. The Complainant also told Mr. Madden how much she appreciated his support. Mr. Madden responded saying he remembered where she sat, what she wore and what purse she was carrying.

71. During that text conversation on September 25, 2013, Mr. Madden also invited the Complainant and her boyfriend, Brian Matsuura, to join Mr. Madden and his wife for dinner and a concert. The Complainant declined, and the text conversation turned to the Jackson Browne song "Rosie" and a reference to masturbation.

72. Complainant experienced no sexual harassment while employed with the Respondent after September 25, 2013.

73. On September 27, 2013, Mark Bakken met with the Complainant to discuss the "bra comment" made by Mr. Madden. Mr. Bakken stated that Mr. Madden couldn't do things like that and that there had been other similar issues in the past. The Complainant requested he not make a big deal over the comment or to inform Mr. Madden of its origin as she feared retaliation on the part of Mr. Madden.

74. On October 8, 2013, Mr. Bakken texted the Complainant asking why the Nordic Consulting logo did not appear on the CHIME event brochure, despite Nordic having paid to be

a sponsor. The Complainant responded that the sponsorship came after the materials had been prepared. Mr. Bakken indicated his understanding of the situation.

75. On October 21, 2013, despite his promise of anonymity to the Complainant, Mark Bakken informed Mr. Madden that the Complainant had reported the "bra comment." Mr. Madden and Mr. Bakken were in a car on the way to the airport after a business trip when this conversation happened.

76. On October 23, 2013, the Respondent's executive team and C-Suite met for an off-site strategy meeting at HotelRed. The Complainant had been previously excused from this meeting by Mr. Bakken and Mr. Madden for a previously planned vacation.

77. The Complainant did not go on the previously planned vacation, but ended up staying in the Madison area due to one of her dogs being ill.

78. Despite being previously excused from the meeting, members of the C-Suite testified they did not know the Complainant would be absent from the off-site meeting. Mr. Madden texted the Complainant telling her to have a great "staycation." No member of the C-Suite directly expressed to the Complainant their concern over her lack of attendance at that meeting.

79. Sometime during the last week of October, Complainant met with Mr. Madden. During this meeting, Mr. Madden imparted to the Complainant that he was upset and that he was done "shielding" her.

80. In late October or early November 2013, Complainant's supervisor was changed from Drew Madden to Eric Sampson.

81. At the end of October or early November 2013, Nordic's Chairman of the Board, Jon Chait, had a conversation with Mr. Madden about the inappropriateness of the reported "bra comment." Mr. Chait had recommended sexual harassment training for Mr. Madden in particular, and the C-Suite as a whole, along with transfer of the supervision of the Complainant from Mr. Madden and possibly a financial penalty for Mr. Madden's comment.

82. In November 2013, Mr. Swaminathan asked the Complainant to obtain information from KLAS about how they gathered information and used that criteria to rate companies. Mr. Swaminathan also wanted to know if the ratings could be used in connection with promotional materials. Mr. Swaminathan would follow up on this request to the Complainant several times between this time and her termination, and would not receive the information requested.

83. On November 4, 2013, Complainant met with Mr. Bakken offsite. This was the first time Mr. Bakken had alerted the Complainant to any performance concerns. Mr. Bakken also told the Complainant that Mr. Madden was a mess, was drinking heavily, and that the Complainant had to do something to fix the situation.

84. On November 6, 2013, Mr. Daar emailed Colin Madden, an employee of Nordic Consulting and brother of Drew Madden, to follow up on his numerous emails about a user group in the Chicago area, noting he had received no response from the Complainant. Colin Madden forwarded Mr. Daar's email to Mr. Swaminathan. Mr. Swaminathan expressed that if there were a disciplinary policy, he would utilize that policy for this incident with the Complainant. This was the subject of part of the conversation with Mr. Sampson referred to in

Finding of Fact Number 90 below. The Respondent did have a disciplinary policy that Mr. Swaminathan might have used if he'd wished.

85. In early November 2013, Complainant met with Mr. Sampson to discuss current marketing projects and the status of the emails from Nick Daar. The Complainant contacted Mr. Daar, and Mr. Sampson indicated that it should not have been her responsibility in the first place.

86. On November 8, 2013, the Complainant had a telephone conversation with Mr. Daar about his previous emails.

87. On November 8, 2013, John Pollard contacted Drew Madden at the referral of Curt Chester, a Nordic employee, about available job openings in marketing.

88. On November 12, 2013, Mr. Madden and Mr. Bakken met with John Pollard at the Respondent's home office.

89. On November 12, 2013, Mr. Swaminathan emailed the Complainant and Peggy Bakken to follow up on the continued shortage of the welcome gift, Nordic The North Face backpacks.

90. On November 15, 2013, the Complainant tendered her resignation to Mr. Sampson over concerns about her ability to manage the workload being placed on the marketing department and concerns about her relationship with Mr. Madden. Mr. Sampson asked her to reconsider, and she returned to work the next business day.

91. Mr. Bakken learned of the Complainant's resignation, and asked her to reconsider as well.

92. By November 21, 2013, Mr. Madden had heard of the Complainant's resignation, and let her know that his "door would always be open if/when you [the Complainant] wanted to talk from a personal or professional standpoint."

93. At the end of November 2013, the Complainant and Mr. Sampson met to discuss the marketing budget and the Complainant's ongoing prioritization of projects.

94. During budget discussions in November or December 2013, Mr. Sampson learned that Mark Bakken signed a \$400,000.00 contract with Shine without obtaining approval from the Board or C-Suite. Mr. Sampson, the Complainant, and Mr. Bakken worked to restructure the Shine contract into smaller contracts to avoid Mr. Bakken's lack of authorization to sign the larger contract.

95. On December 3, 2013, Mr. Madden notified Mr. Pollard that they did not have the budget for a new marketing hire at that time, and offered to connect him with other potential employers.

96. On December 5, 2013, Complainant emailed Shine invoices to the accounting group and copied Mr. Sampson. Mr. Sampson requested the Complainant obtain more detailed invoices from Shine.

97. On December 9, 2013, Shine provided first drafts of marketing materials and sales collateral to the Respondent. Mr. Madden gave the first drafts mixed reviews noting some good aspects and some bad.

98. On December 10, 2013, Ms. Sager emailed the Complainant to obtain access to KLAS data. At that time, the Complainant had not yet gotten the information from KLAS requested by Mr. Swaminathan in November.

99. On December 17, 2013, Mr. Swaminathan emailed the Complainant to follow up on his request for KLAS information. The Complainant responded that she hoped to speak with the KLAS representative by the end of that week, and told Mr. Swaminathan she wouldn't "Nick Daar" him. The KLAS representative for Nordic Consulting had been difficult for the Complainant to reach due to the holidays and a family emergency. The next update the Complainant provided to Mr. Swaminathan on this matter was January 6, 2014.

100. On December 27, 2013, Mr. Sampson emailed the Complainant asking for information on the Respondent's 2014 monetary commitment per the Shine Contract.

101. On December 30, 2013, the Complainant responded to Mr. Sampson's request for the aggregate 2014 monetary commitment to the Shine contract by stating the commitment would depend on the amounts of any year end invoices from Shine, and gave Mr. Sampson a "best guess" on the dollar amount.

102. On January 2, 2014, Mr. Sampson sent the Complainant an email asking that she keep a closer eye on invoices from Shine and that she get a better handle or clearer understanding on that commitment.

103. On January 6, 2014, there was an email conversation between Mr. Swaminathan, the Complainant, and Ms. Sager about nominations for HISsy awards, an award associated with the HIsstalk blog and presented at HIsstalkapalooza, and whether an email notice should go out letting people know nominations were open. On January 7, 2014, Mr. Swaminathan asked the Complainant to send an email letting people know that the nominations for the HISsy awards were open at that time. The Complainant never sent an email, and Nordic was not nominated for any awards.

104. On January 11, 2014, Complainant emailed drafts of the Shine marketing materials and HIMSS sales collateral to Mr. Madden, Mr. Dial, and Mark and Peggy Bakken for their review. These materials were substantially the same as the drafts presented by Shine in December 2013 with few or no requested changes having been made.

105. On January 13, 2014, the marketing materials and sales collateral were reviewed with Shine. The Complainant attended this meeting and took notes on the changes and edits discussed. Following that meeting, Complainant emailed drafts of the Shine marketing materials to Mr. Swaminathan and Mr. Sampson for their review, indicating that they were under a tight deadline for revisions to have the materials available for the 2014 HIMSS conference.

106. On January 14, 2014, the Complainant left the office early feeling ill. This leave would extend through February 3, 2014.

107. At the time Complainant went on leave, the Respondent had a performance-based leave policy that did not outline any set number of days available to an employee for leave.

108. During the time the Complainant was on leave, she would communicate with the Respondent via email.

109. On January 14, 2014, an offsite planning and strategy meeting was held. The Complainant was not in attendance, having left the office ill earlier that day.

110. At the January 14, 2014, offsite planning and strategy meeting, the ongoing consultant welcome gift, The North Face backpack, shortage was discussed. After a quick internet search, Mr. Swaminathan ordered a number of The North Face backpacks that he directed the marketing team have embroidered with the Nordic logo despite the understanding that The North Face prohibited this type of use.

111. On January 15, 2014, Mr. Bakken emailed the Complainant about Nordic not being listed as a sponsor of HlStalkapalooza despite having paid for sponsorship.

112. On January 15, 2014, Mr. Swaminathan emailed Mr. Bakken, Mr. Madden and Mr. Sampson expressing frustration that no email was ever sent by the Complainant regarding the HlSsy nominations.

113. On January 15, 2014, Complainant emailed Dane County Humane Society notifying them of her illness. The Complainant was involved as a sponsor and organizer of an event called "Ruby's Gala" which was a black-tie fundraiser gala to benefit the Dane County Humane Society.

114. On January 16, 2014, Mr. Madden texted the Complainant requesting the notes that were taken during the meeting with Shine on January 13, 2014. Mr. Madden received no response or notes.

115. On January 16, 2014, the Complainant emailed the Dane County Humane Society indicating she had mono, and requested they reschedule a meeting.

116. On January 16, 2014, Mr. Madden contacted Mr. Pollard about a potential full time marketing need.

117. On January 17, 2014, Brian Matsuura emailed the marketing and executive teams that the Complainant had been to the doctor, and she had mono. The Complainant replied to everyone on that email indicating that she would return to the office on Monday.

118. Though absent for an additional two or so weeks, the Complainant maintained email contact with various members of the Respondent's marketing department.

119. On January 20, 2014, Mr. Madden again reached out to the Complainant requesting the notes that were taken during the meeting with Shine on January 13, 2014. Mr. Madden received no response or notes.

120. On January 22, 2014, the C-Suite and Mr. Dial met with John Pollard for a lunch interview.

121. On January 22, 2014, the Complainant emailed the Respondent indicating that she was still ill, and still would not be able to make it in to work.
122. On January 23, 2014, Mr. Madden emailed the Complainant stating he hoped she was feeling better, and again requested the notes from the Shine meeting and a summary of her conversation with the KLAS representative regarding the information requested by Mr. Swaminathan in November. The Complainant did not respond.
123. On January 24 and 25, 2014, the C-Suite discussed the hiring of Mr. Pollard, all agreeing to do so only if there was also agreement on terminating the Complainant.
124. On January 25, 2014, Mr. Bakken texted the Complainant indicating he needed to sync with her on a number of business-related matters.
125. On January 26, 2014, Complainant texted Mr. Bakken back suggesting they meet the next day.
126. On January 27, 2014, the Complainant texted Mr. Bakken saying she was still ill and unable to meet that day, and asked to reschedule their appointment to the following day. Mr. Bakken agreed to reschedule.
127. On January 27, 2014, John Pollard signed an employment contract with the Respondent. Mr. Pollard would be paid \$105,000.00 per year, and would have the title of Director of Marketing.
128. On January 28, 2014, Mr. Bakken texted the Complainant and asked if they could meet at the office instead of off-site. The Complainant responded that she was still ill, and Mr. Bakken asked her to provide a date she would reasonably expect to return to the office.
129. On January 30, 2014, Teri Sandiford, head of the Human Resources department for the Respondent, emailed the Complainant information on short-term disability and FMLA.
130. On January 30, 2014, the Complainant is informed that Mr. Sampson has asked that she not worry about short-term disability, to stay home and rest, and not to plan on being back in the office until February 3, 2014 at the earliest.
131. On February 3, 2014, the Complainant returned to work following her leave, and her employment with the Respondent was terminated. Mr. Bakken and Mr. Sampson were present at the termination meeting. The explanation given for the Complainant's termination initially was that "it wasn't working out." After the Complainant pressed for more information about her termination, she was told that the backpack issue was not part of the reason, but that a social media plan and the delay in responding to Nick Daar were the reasons.
132. On February 6, 2014, the Complainant received an email from Respondent's attorney, Irina Brault, with the termination agreement and release presented to her by Mr. Bakken and Mr. Sampson on February 3, 2014. Complainant refused to sign the agreement or release.

133. On February 8, 2014, Mr. Sampson emailed the Complainant, copying Attorney Brault and Teri Sandiford, asking whether she had any thoughts on how she would like her departure communicated to the rest of the company.

134. On February 8, 2014, the Complainant responded stating that she wanted the "truth" communicated, and that the Respondent should begin "...with the photo Drew took unbeknownst to me up my skirt, up between my legs, and then explain how things sort of unraveled from there..."

135. On February 11, 2014, Jon Chait sent an email to the Complainant requesting a meeting. The Complainant did not respond.

136. The Respondent does have a policy that defines unlawful harassment to include "Unwelcome comments, jokes, pictures or remarks, questions, whether oral, in writing, or sent via email, that are sexual in nature or content[.]", and states that when a report of sexual harassment is received, there will be a prompt and careful investigation.

137. Despite their policy and the report made by the Complainant, the Respondent did not conduct any investigation.

138. The Complainant never received any written disciplinary action or feedback on her job performance, nor did her personnel file contain any documentation of performance issues or disciplinary actions. The Respondent does have a progressive discipline policy that was never used in connection with the Complainant during her employment.

139. On April 23, 2014, the Respondent's executive team participated in human resources and harassment training conducted by attorneys from the law firm, Morgan Lewis Bockius.

140. On August 21, 2014, Mr. Madden received individualized training in discrimination and harassment in the workplace conducted by attorneys from the law firm, Morgan Lewis Bockius.

#### CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class sex (sexual harassment) and is entitled to the protections of the City of Madison Equal Opportunities Ordinance 39.03.

2. The Complainant is protected from retaliation (termination) due to her exercise of a right protected by the City of Madison Equal Opportunities Ordinance 39.03; i.e., the opposition to discrimination/sexual harassment.

3. The Respondent is an employer within the meaning of the City of Madison Equal Opportunities Ordinance 39.03 and is subject to its terms and conditions.

4. The Complainant did not experience sexual harassment as that term is specifically used in the Equal Opportunities Ordinance Sec. 39.03(8)(k).

5. The Respondent retaliated against the Complainant for the Complainant's objection to discriminatory behavior protected by the Equal Opportunities Ordinance when it terminated the Complainant's employment in violation of the Equal Opportunities Ordinance.

6. The Complainant may have experienced economic loss as a result of her retaliatory termination of employment with the Respondent.

7. The Complainant may have experienced a compensable loss for humiliation, embarrassment and emotional distress due to the Respondent's retaliatory termination of her employment.

#### ORDER

1. The parties shall within 45 days meet and agree upon economic and noneconomic damages to place the Complainant in the position she would have been had the Respondent not terminated her employment for her exercise of a right protected by the Ordinance. Should the parties not be able to reach an agreement, they shall inform the Hearing Examiner of this fact and further proceedings will be scheduled.

2. The Complainant is entitled to her costs and fees including a reasonable attorney's fees for her pursuit of this complaint. The Hearing Examiner will schedule further proceedings to set the amount of the Complainant's costs and fees once economic and noneconomic damages have been set.

#### MEMORANDUM DECISION

The Complainant alleges that the Respondent discriminated against her on the basis of her sex (sexual harassment), and in retaliation for making a complaint when the Respondent terminated her employment in violation of MGO 39.03. The Initial Determination by the City of Madison Department of Civil Rights found that there was probable cause to believe that discrimination occurred in regard to the terms and conditions of employment (sexual harassment) because of the Complainant's sex, and discharge (termination) in retaliation for making a complaint.

Cases of discrimination can be proven by either the direct or indirect method. In the direct method, the parties present their cases and the Hearing Examiner examines the facts and, without reliance on inference, reaches a determination of liability or not. Cases utilizing the direct method usually have convincing testimony of discriminatory language or conduct. In a case presented by the indirect method, the parties present their facts and apply those facts, be they inferential or direct, to the respective burdens of proof and production that the law places on the parties. The indirect method of demonstrating discrimination is also known as the burden shifting approach and derives from the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and the cases that follow those decisions.

This case was tried during a lengthy hearing, and presented a number of complexities and nuances. Given the many subtleties and complexities presented at hearing, the Hearing Examiner finds that the proof in this matter is best analyzed using the indirect method. When analyzing a case using the indirect method, the Hearing Examiner first must determine for each allegation of discrimination if the Complainant has established a *prima facie* claim of discrimination. A complaint of discrimination on the basis of sex in the form of sexual harassment must meet the *prima facie* standard which is codified in the Equal Opportunities Ordinance Sec. 39.03(8)(k).

Sexual harassment generally falls into one of two categories: hostile work environment and quid pro quo harassment. Quid pro quo, loosely translated, means "this for that." In the case of sexual harassment in the workplace, this may mean that a Complainant reasonably believed that a tangible aspect of their employment would be affected by their acceptance or rejection of the harassment to which they were subjected.

In a situation of hostile work environment harassment, an individual could be subjected to situations which involved speech or conduct which must be severe or pervasive enough to create an intimidating or demeaning environment which negatively affected the individual's ability to perform his or her job.

It is important to note that in either type of harassment, conduct that was once consensual may still be considered harassment if that conduct was later rejected, but continued. The Complainant must prove each element of the *prima facie* claim by a preponderance or greater weight of the credible evidence. The burden to prove a claim of discrimination lies with the Complainant.

Presuming the Complainant meets this burden of proof, the burden shifts to the Respondent to present a legitimate, nondiscriminatory explanation for its actions. This is a burden of production and not one of proof.

If the Respondent carries its burden of production, the Complainant might still prevail if she can point to evidence in the record demonstrating that the Respondent's proffered explanation is either not credible, or represents a pretext for an otherwise discriminatory motive.

First, the Hearing Examiner will examine whether the Complainant has demonstrated that she has met the elements of the *prima facie* claim of sexual harassment. Sexual harassment is defined in MGO Sec. 39.03(2) as "unwelcome sexual advances; unwelcome requests for sexual favors; unwelcome physical contact of a sexual nature; or unwelcome verbal or physical conduct of a sexual nature which shall include, but not be limited to, deliberate or repeated unsolicited gestures, verbal or written comments, or display of sexually graphic materials which is not necessary for business purposes."

To establish a *prima facie* claim of sexual harassment under MGO Sec. 39.03(8)(k), the Complainant must demonstrate that 1) her acquiescence in or submission to the sexual harassment is made either explicitly or implicitly a term or condition of her employment, 2) an employee's acquiescence in or submission to sexual harassment is used as the basis or any part of the basis for employment decisions affecting the employee [...] or 3) sexual harassment has the purpose or effect of substantially interfering with an employee's work performance or creating an intimidating, hostile or offensive work environment.

The testimony in this case is rife with content that could be considered "verbal ... conduct of a sexual nature" including, "... verbal or written comments, [...] which [are] not necessary for business purposes." The question for the Hearing Examiner in considering sexual harassment is whether or not these verbal and written comments were a) unwelcome or unwanted, and b) so severe or pervasive as to create an intimidating or demeaning environment that negatively impacted an individual's ability to perform their job or c) believed to be the basis or any part of the basis for employment decisions affecting the Complainant.

In the matter before the Hearing Examiner, the Complainant, Natalee Cruse, was employed by the Respondent, Nordic Consulting. Ms. Cruse joined Nordic Consulting in October 2012. Prior to her hire, Ms. Cruse met with Drew Madden, the President of Nordic Consulting, and Mark Bakken, its Chief Executive Officer. In the fall of 2012, Nordic Consulting was a small, start-up health care information technology consulting company, providing support to, primarily, health care systems using the Epic Systems software. Ms. Cruse was initially hired as a half-time senior consultant and account manager for the sales team, with the ultimate goal of moving to an "in-house" position within the Nordic Consulting home office. Ms. Cruse's prior employment experience included six years as a part of the Epic Systems sales team. Ms. Cruse had also managed a project to design a social networking site for Epic Systems and its clients, and had worked directly with the company's founder, Judy Faulkner. Ms. Cruse's "deep knowledge of the vast enterprise of Epic" was considered to be valuable to Nordic Consulting.

Early on in Ms. Cruse's employment with Nordic Consulting there is testimony to suggest that Ms. Cruse and Mr. Madden had what was described as a close and familiar friendship. As early as December 2012, the two shared text messages during business and non-business hours about what were certainly not business-related topics. Ms. Cruse, in her Complaint of discrimination, alleged an incident on December 14, 2012, wherein while attending the Nordic holiday party, Mr. Madden suggested the group go around the table and name the person in the office that they would like to sleep with. Ms. Cruse stated in her Complaint that she excused herself from the party and went home. The testimony at hearing, however, indicated that Ms. Cruse was out at various bars with other Nordic employees, including Mr. Madden, until the early hours of December 15, 2012. After leaving the festivities and into the following day, Mr. Madden and Ms. Cruse continued to exchange text message that included sexually explicit language.

In January 2013, Ms. Cruse was promoted to full-time account manager. Ms. Cruse and Mr. Madden's familiar friendship would continue, with Ms. Cruse texting Mr. Madden during that month to say "thanks for being awesome", and "having leaders who are interested in growing others rather than completing with them is refreshing"... "I think you're great!".

The nature of Ms. Cruse's employment with the Respondent was such that she would travel often to various client sites, conferences or trade shows. Often, this travel would be with Mr. Madden. Prior to her promotion, and during the month of December 2012, Ms. Cruse, Mr. Madden and Katherine Sager, who at the time was involved in Consulting Services for Nordic, went on a sales trip to North Carolina which Ms. Sager described as going very well.

In February 2013, Ms. Cruse was promoted to Director of Technical Marketing, and was working full time in the home office. Ms. Cruse and Ms. Sager developed a friendship during this time. Mr. Madden and Ms. Cruse's friendship continued to develop, with Mr. Madden inviting Ms. Cruse to spend time outside of the office with him, his wife and family.

In March 2013, Ms. Cruse attended what was testified to as arguably one of the biggest industry events of the year, the HIMSS Conference. In 2013, this conference was held in New Orleans. A group of Nordic employees traveled to New Orleans for this conference, and Ms. Cruse had arranged lodging for the group as part of her function within the marketing department. During this conference, the male employees of Nordic lodged at one location, and the female employees at another. Several of the C-Suite members and members of the sales and consultant teams from Nordic attended the conference. This conference was something Nordic put great emphasis on as one of the most important events of the year for networking

and brand visibility. In addition to the conference trade events and seminars, there were several social events as well, and on the first night of the New Orleans HIMSS conference, Ms. Cruse was able to introduce Mr. Madden to Judy Faulkner, CEO and founder of Epic Systems. Ms. Cruse was also able to secure a booth for the 2014 conference next to or near the Epic booth. Ms. Cruse documented the trip in a scrapbook following the event.

In her Complaint of discrimination, Ms. Cruse detailed an encounter during this conference where she found Mr. Madden sleeping in her bed at the house the ladies were staying in. Mr. Madden testified that a group of Nordic employees were at the ladies house to meet before leaving for a group dinner near the end of the conference. Mr. Madden excused himself from the group to take a quick nap before dinner and laid, fully clothed, on top of the Complainant's bed. When Ms. Cruse entered the room and saw him there, Mr. Madden woke up and left the room. The Complainant testified that this behavior was unwelcomed and unwanted. Mr. Madden testified that Ms. Cruse told him that he could stay, but that she wanted him to turn away while she changed clothes. There was no testimony that Ms. Cruse asked Mr. Madden to leave the room, and Mr. Madden did so voluntarily when Ms. Cruse entered the room.

A few weeks after the HIMSS conference and the bedroom incident described in Ms. Cruse's Complaint, Ms. Cruse and Mr. Madden exchange text messages that are friendly and complimentary of each other. On March 20, 2013, Mr. Madden texts Ms. Cruse, "Thanks for everything you bring to Nordic, and for your friendship. I very much appreciate it.", to which Ms. Cruse replies, "It's my pleasure. Thank YOU for being a good leader, listener and buddy." This congenial friendship continued and the two would see each other outside of work for dinners with their significant other/spouse, and talk and text about buying cowboy boots for Mr. Madden's daughter, and Ms. Cruse's desire to open a doggie daycare.

On April 21, 2013, Mark Bakken, Mr. Madden and Ms. Cruse attended an industry conference in the Chicago area. On the first night of the conference, during an event, Mr. Madden and Ms. Cruse texted each other expressing their boredom at the conference, and made plans to share a bottle of wine in Mr. Madden's hotel room that night. Mr. Madden texted Ms. Cruse the following day and asked, "Why am I so thirsty? And who drank my two waters? :)" On the second day of the conference, April 22, 2013, after attending a casino night event that was part of the conference, Mr. Bakken, Mr. Madden and Ms. Cruse decided to go to an actual casino with some potential clients and conference staff. Mr. Bakken offered to drive the group in his Range Rover. Mr. Madden and Ms. Cruse offered to sit in the back "trunk" area of the vehicle, so the non-Nordic passengers could have the actual seats in the vehicle. The casino the group was traveling to was about 20-30 minutes away from the hotel, and the group left the hotel shortly after 11:00 p.m. During the trip from the hotel to the casino, Mr. Madden took a picture of Ms. Cruse with his phone in the back of the Range Rover. Mr. Madden and Ms. Cruse were seated in the back trunk area of Mr. Bakken's Range Rover, facing each other, with their backs against their respective walls of the vehicle. Mr. Madden took a photograph of Ms. Cruse which was purported to show Ms. Cruse's inner thigh, underwear and skirt. Mr. Madden texted the photo to Ms. Cruse with a message saying "I promise I will NEVER send this to anyone". Ms. Cruse testified she was horrified, and immediately deleted the photo from her phone. Ms. Cruse then asked Mr. Madden for his phone so that she could delete the photo from his phone as well. This photo would come to be known throughout the hearing as the "upskirt" photo. The group spent a few hours at the casino, and the testimony at hearing was conflicted as to whether or not Ms. Cruse and Mr. Madden shared a cab back to the hotel. Around 1:30 a.m. a text conversation occurred between Mr. Madden and Ms. Cruse in which she shared photographs of her family, and Mr. Madden asked, "What did you do with my picture of you?!!!",

to which Ms. Cruse responded, "...". Following Ms. Cruse's response, several additional messages were sent from Mr. Madden referring to Ms. Cruse's legs and the "upskirt" photo. The next morning, Ms. Cruse sent Mr. Madden a text saying, "I really wish we had a video of last night... Mark driving to the casino with Brendan, John, some conference staff, and you and me contorted in the trunk with Macklemore cranked on repeat. Wow."

Following the initial occurrence of the "upskirt" photo, Mr. Madden would periodically bring the photo back into his conversations with Ms. Cruse. In the days immediately following the conference, Mr. Madden texted Ms. Cruse following a dinner the two of them attended with a potential client saying, "If only I could have shared that pic of you at the conference with Tom!", to which Ms. Cruse replied, "You are the worst!" Mr. Madden responded with, "I would argue I'm the best. I LET you delete it from my phone after all... If I were the worst I would have saved it to box before I handed you my phone." Ms. Cruse then texted what was described at hearing as a "compromise photo" of her eating an onion ring, with a text that said, "Okay, I agree: you're the best. :-)". Mr. Madden then told her the photo she texted to him was the "worst compromise in the world", to which Ms. Cruse responded by sending him a photo of her smelling her armpit.

During that time, the Nordic marketing department, which consisted of Ms. Cruse and Peggy Bakken, was experiencing some difficulties with the organizational structure of the department. Mr. Madden and Ms. Cruse spent time at the end of April discussing their concerns with the image of the marketing department and the difficulties created by having two "leaders" of the department. On May 1, 2013, Ms. Cruse and Mr. Madden had a text conversation about a change in marketing structure in which Ms. Cruse said to Mr. Madden, "Drew, thank you again for all of your support and for just being you. I appreciate it more than I can say." And on May 2, 2013, Mr. Madden sent Ms. Cruse a text about possibly obtaining more marketing space at the Dane County Airport, and referred to "... that seductive pic of you in the back of the Rover, etc.)." To which Ms. Cruse replied with a comment that "The only '-ductive' that describes that picture is the one that begins with 're-' and ends in 'surgical procedure'." Mr. Madden's responded "[insert response that can't be typed based on inappropriateness]", to which Ms. Cruse replied, " 'The sooner the better.' :-)". Mr. Madden also made reference to the "upskirt" photo in an email to Ms. Cruse saying if she grabbed him some of the tomatoes brought in to the office by Vivek Swaminathan, that he would delete the "upskirt" photo.

It still seemed at that point that Ms. Cruse's relationship with Mr. Madden was one of a close, personal nature. Despite having taken the "upskirt" photo, it still did not seem that any of Mr. Madden's behavior was a) unwelcome or unwanted, and b) so severe or pervasive as to create an intimidating or demeaning environment that negatively impacted Ms. Cruse's ability to perform her job. In fact, on May 7, 2013, Mr. Madden texted Ms. Cruse, "I just want you to know [sic] 1000% back you and would do whatever you want me to in order to make you succeed." Ms. Cruse responded, "Thanks. I appreciate it. You're pretty great." And later that same conversation, Ms. Cruse texted Mr. Madden, "Working with someone of your caliber, with your integrity and passion and charisma and kindness – that makes me happy."

Mid-May 2013, Ms. Cruse asked Mr. Madden if she could take a week of vacation at the end of July to attend a marketing class at Kellogg Business School at Northwestern University. Mr. Madden approved the vacation, insisted that Nordic pay for her attendance, and made several comments about it being a "modeling class", "pole dancing class" or a "class on how to walk to your desk and cross your legs". In June, during a discussion about Ms. Cruse's boyfriend, Brian Matsuura's, interview with Mark Bakken and Eric Sampson, Mr. Madden texted

that "I bet if you and I lived in the same house we could stay up til 3 am discussing this." to which Ms. Cruse responded, "4am [sic]. That'd be better." Ms. Cruse frequently referred to Mr. Madden as "Buddy" and "Drewbert".

Though Ms. Cruse and Mr. Madden's relationship at that point still appeared to be close and friendly, Katherine Sager testified that in mid-June 2013, she and her husband were having dinner with Ms. Cruse and Mr. Matsuura, when the conversation turned toward Ms. Cruse's criticisms of Mr. Madden and his suitability for the role of president. Ms. Sager testified that this conversation made her uncomfortable.

At the beginning of June 2013, Ms. Cruse was promoted to the Vice President of Marketing role for Nordic Consulting. This promotion was not announced to all of Nordic until the end of June 2013. Ms. Cruse's team consisted of Peggy Bakken, Katie Bakken and an intern, Katie Eldred. The marketing department faced several challenges at that time. Prior to Ms. Cruse's promotion, Nordic had been informed that the particular shade of green North Face backpack that they used as a new consultant welcome gift was no longer available. Ms. Cruse, during a marketing meeting, presented a number of alternate options for consultant welcome gift backpacks. One such alternative from brand Timbuk2 would include embroidery of the Nordic logo at no extra charge. Ms. Cruse's alternate suggestions were shot down by the members of the C-Suite, and Mr. Bakken suggested trying to obtain knockoff North Face backpacks from China.

Nordic Consulting was also undergoing a major rebranding during that time. In June 2013, Mr. Bakken signed a contract committing Nordic Consulting to a \$400,000.00 agreement with outside vendor, Shine United, to take on the rebranding project. The expectation was that Ms. Cruse would manage Nordic Consulting's relationship with Shine, and that the rebranding, marketing and sales collateral materials to be reworked would be ready in time for the 2014 HIMSS conference.

On June 19 and 20, 2013, Ms. Cruse attended a conference in Denver with Mr. Bakken and Mr. Madden. One of the purposes of the conference was to give consulting firms such as Nordic a chance to speak directly to potential clients. Ms. Cruse testified that she was asked by Mr. Madden to sit across the table from the potential clients so that they could look at her, and thereby maximize the chance of a sale. Mr. Madden testified that Ms. Cruse sat on the same side of the four person table as the potential client, so that the client would be seated across from Mr. Madden and Mr. Bakken for ease of conversation with the potential client. At that same conference, Ms. Cruse would later excuse herself from a dinner event saying she was feeling ill. That evening, Mr. Madden connected with a conference goer that he thought would be of professional interest to Ms. Cruse and sent her a text regarding the same. Ms. Cruse did not answer that text message, and Mr. Madden later knocked on Ms. Cruse's hotel room door to see if she was ok. Ms. Cruse stated in her Complaint that Mr. Madden's visit was "very intimidating", and that she never opened the door. The next day, Ms. Cruse would hand Mr. Madden an envelope as they were leaving the conference, surprising him with an anniversary getaway Ms. Cruse had helped Mr. Madden's wife plan. While Mr. Madden was on the anniversary trip with his wife, Ms. Cruse would text him that she "wished they had more time", but that she was "...happy that [they] were able to spend weeks together..." like that.

At the end of June 2013, Mr. Madden announced to the Nordic staff the promotions of Ms. Cruse to Vice President of Marketing, and Vivek Swaminathan to Chief Consulting Officer. Mr. Swaminathan emailed Ms. Cruse and congratulated her on her promotion and stated he had

enjoyed getting to know her and looked forward to working with her in the future. Ms. Cruse seemed to have doubts about this promotion, as on June 27, 2013, Mr. Madden emailed Ms. Cruse and encouraged her to compile a "pros and cons" list regarding the Vice President of Marketing position.

On July 6, 2013, Ms. Sager and her husband were again having dinner with Ms. Cruse and Mr. Matsuura. On the way to dinner, Ms. Sager expressed concern to her husband about what to do if the conversation again turned to Ms. Cruse's criticisms of Mr. Madden. The conversation did again turn to Ms. Cruse's criticisms of Mr. Madden, and Ms. Sager attempted to shut down the conversation. Two days later, on July 8, 2013, Ms. Cruse sends Mr. Madden her "pros and cons" list with an extensive "pros" list, with the first "pro" being "Work with Drew" and ending in "I love Nordic". There was no "cons" list.

The very next day, July 9, 2013, Ms. Cruse and Mr. Madden had a text conversation about a disagreement that had happened earlier. In the text messages, Ms. Cruse referred to Mr. Madden as "Drewbert" and told him that she thought it was important that they talk before things had time to fester, and that she felt disrespected by him at a marketing meeting. The disagreement had occurred over a sell sheet requested by a Nordic employee to help secure a \$5,000,000.00 project, that Mr. Madden felt had not been getting any attention from Ms. Cruse or the marketing department. Ms. Cruse testified that this was the first time she had given Mr. Madden any negative feedback and that it had not gone well.

On July 11, 2013, Ms. Cruse signed a compensation agreement for her promotion to Vice President of Marketing. Mr. Madden presented Ms. Cruse with an initial agreement that listed three bullet points, those being: "All current benefits will be continued, Eligible for Annual Executive Bonus Plan, and In order for the terms of this agreement to be finalized, a picture of you in the back of a Range Rover must be texted to the signed representative from Nordic Consulting Partners, Inc.". Though Ms. Cruse signed this agreement, she protested the third bullet point, and was provided a compensation agreement without that stipulation. Mr. Madden emailed Ms. Cruse a copy of the revised signed compensation agreement with the message, "Here is a copy for your records. I think we can just have an unwritten agreement that you'll text me that picture...".

On August 12, 2013, approximately one month after signing the compensation agreement for her promotion to Vice President of Marketing, Ms. Cruse sent a text message to Mr. Madden saying that she was "drowning" with all that was coming at the marketing department and was afraid she was becoming a "bottleneck" for people.

In mid-August, Ms. Cruse was called into Mr. Madden's office, when during the meeting, Mr. Madden said to Ms. Cruse, "Hey, didn't anyone ever tell you you shouldn't wear a white bra with a white shirt?" Ms. Cruse also testified that Mr. Madden made a comment during that conversation that all of the guys in the office were looking at her nipples. Mr. Madden, for his part, admitted the "bra comment" was made, but denied any comment about Ms. Cruse's nipples.

A few weeks later, on August 24, 2013, Ms. Cruse and Ms. Sager were out for drinks together, and after several drinks, Ms. Sager noticed that Ms. Cruse seemed uncomfortable about her relationship with Mr. Madden. Ms. Cruse mentioned the "bra comment" to Ms. Sager, but since they had had a number of drinks, Ms. Sager was not sure how upset Ms. Cruse

actually was by the comment. Ms. Sager testified that Ms. Cruse did not describe any other incidents of harassment via text, email, or otherwise, nor did she mention the "upskirt" photo.

On August 29, 2013, Mr. Madden ran into Mr. Matsuura at the Dane County Regional Airport. Mr. Matsuura was leaving town for an out-of-state wedding, and Mr. Madden asked where Ms. Cruse was. Mr. Matsuura told Mr. Madden that she felt that she had too much on her plate right now with work, and had decided she could not join him on the trip. Mr. Madden then texted Ms. Cruse saying he saw Mr. Matsuura at the airport and asked how she was doing. Ms. Cruse responded a few minutes later saying she was good, and asked Mr. Madden how he was. The next day, Mr. Madden texted back and asked Ms. Cruse if she wanted to stop by for a cocktail to get her weekend started off with a "bang." Ms. Cruse did not respond to that message and a few hours later, Mr. Madden suggested they come up with an emoticon "safe word" so that he would know she was ok, and just did not feel like responding. Ms. Cruse did eventually respond, and apologized for not doing so sooner. She would go on to text Mr. Madden a series of emoticons, which Mr. Madden responded to by texting, "Let me translate: If Brian [Matsuura] hits the sweet spot (twice) you will turn your cell phone off and be okay with not walking as long as you can write down what turns you on and makes your triangle go thru [sic] the roof. Then you'll settle down in a nice house and love your dogs and love your home. (You have to admit, I pretty much nailed that and must have made you smile...)." Mr. Madden testified at hearing that the word "triangle" was a reference to Ms. Cruse's vagina. Ms. Cruse responded with one of the emoticons Mr. Madden had previously suggested be the "safe word", which was what appeared to be a lady with brown hair and her arms crossed in front of her chest. Mr. Madden responded with "Uh Oh... is that the safe word sign?" Ms. Cruse replied with an emoticon that appeared to be a face with one eye closed, one eye open and its tongue sticking out. Mr. Madden responded, "Ok. I from this day forth I [sic] will be nothing but a professional business appropriate friend."

In late August or early September, Ms. Cruse and Mr. Madden had a one-on-one meeting off-site at Flemings Steakhouse. Ms. Cruse gave Mr. Madden feedback about playing favorites, and indicated herself and Amy Rettler as his clear favorites in the office.

On September 19, 2013, prior to a branding meeting with Shine the next day, Mr. Madden emailed Ms. Cruse telling her he would like to invite Amy Rettler to the branding meeting, and asked Ms. Cruse if that was "cool". Ms. Cruse responded that she was uncomfortable and would rather not. Mr. Madden, not believing that this could be her response, replied, "Are you serious", to which Ms. Cruse responded, "yes". Ms. Cruse's response was at almost 7:00 p.m. Mr. Madden followed up with another email at approximately 9:40 p.m. that stated, in part, "Wanted to let you know that I have invited Amy to the meeting tomorrow, and I am not going to uninvite her on short notice. I'm disappointed that you didn't call me back and that you didn't give me a heads up that you were disregarding my request to invite her." and "I also am darn certain you saw my email and/or saw my missed call one minute after you responded to my email and would have appreciated a response in one fashion or another." Ms. Cruse responded to Mr. Madden's email at approximately 10:30 p.m. saying, in part, "I'm sorry I haven't called you back yet." ... "If it seemed like I was blowing you off, I'm sorry – that wasn't the case."..."I'm frustrated by how often you seem to ignore what I say and think, and I feel blatantly disrespected and manipulated – in this situation and in others. That's hard for me to say to you because the implications make me discouraged and uneasy, but I do want you to know how distressing this has been for me."

On September 20, 2013, a group from Nordic attended a branding workshop with Shine United. At approximately 5:00 p.m. that day, Ms. Cruse sent Mr. Madden a text message asking if they were still "buddies." Mr. Madden responded that he thought and hoped so, but that, "It's been really really hard for me. Like my worst 24 hours in years. I feel really unsettled, hurt and confused." Ms. Cruse responded saying, "Drew! The answer to that questions was Yes! [sic] Unequivocally! It's because I care about you and believe in the strength of our relationship that I feel not only comfortable speaking my mind but also confident you'll hear it and we'll ultimately land in a better place. I want us to be able to be completely honest with each other and unafraid to push a bit. I think we'll take turns being wrong and could benefit from each other's candidness. We're a lot alike – both competitive, maybe a pinch stubborn, but we also care deeply about things, people, the business and, well, I just want you to know that while I am frustrated and upset right now, I see it as an opportunity to grow – not a threat to our friendship or ability to work together." Ms. Cruse also spoke to Ms. Sager about her disagreement with Mr. Madden and did seem to be upset.

On September 24, 2013, Ms. Cruse and other executive and C-Suite level employees were granted shares of common stock.

On September 25, 2013, Ms. Cruse and Mr. Madden met to discuss their recent disagreement. Ms. Cruse testified that at that meeting, Mr. Madden talked about his "favorites" in the office and recalled what she was wearing the first time he met her. Ms. Cruse then stated she returned to her office visibly upset and shared with Ms. Bakken the conversation she just had with Mr. Madden and shared with her the "bra comment" as typifying her interactions with Mr. Madden. Ms. Bakken told Ms. Cruse that she had to report the incident to her husband, and that they couldn't have Mr. Madden harassing employees like that.

Despite Ms. Cruse's testimony, the record reflects that text messages were exchanged after this meeting that reflect part of what Ms. Cruse said she described to Peggy Bakken. In text messages after their meeting, Ms. Cruse told Mr. Madden that she was "glad we talked too.", and that she meant to tell him that "one year ago today you, Mark and I had lunch together at the Echo"... "That was when you first said that I should be your VP of Marketing." She also went on to text that "I know how much you've supported and promoted me – it's one of the things I love most about you – your kindness and generosity and genuine compassion for people." The text conversation at that point digressed into a discussion about favorite bands, Jackson Browne, and the masturbation reference in the song "Rosie." It was at that point that Mr. Madden texted Ms. Cruse that "I'll never forget the first time I met you. I know what chair you sat in. I know what purse you wore. I know what skirt you had on. And I know you were wearing cowboy boots."

Two days later, on September 27, 2013, Mr. Bakken met with Ms. Cruse to discuss the "bra comment" made by Drew. Ms. Cruse asked Mr. Bakken not to bring the comment up with Mr. Madden, and brushed the incident off as a non-issue. Ms. Cruse testified that she experienced no further incidents of sexual harassment after September 25, 2013. On October 21, 2013 Mr. Bakken spoke to Mr. Madden about the "bra comment." Following this conversation between Mr. Madden and Mr. Bakken, Mr. Madden met with Ms. Cruse. Ms. Cruse testified that Mr. Madden was visibly upset, and that he spoke about Ms. Cruse "betraying him", "ruining his life" and stated that he was done "shielding" her. Sometime between October 23, 2013 and November 4, 2013, Jon Chait, Chairman of the Board for Nordic Consulting, had a conversation with Mr. Madden about the inappropriateness of the "bra comment" and drawing a line between friendships and his work as President of the company.

Mr. Chait chastised Mr. Madden stating that the comment was an unacceptable interaction with his employees. In early November, Ms. Cruse would begin reporting to Eric Sampson, Chief Operating Officer, as her direct supervisor, instead of Mr. Madden.

In the beginning of November 2013, Ms. Cruse met with Mr. Madden. Ms. Cruse testified that Mr. Bakken had met with her earlier that day to tell her that Mr. Madden was a mess, that he was drinking and not sleeping and that Ms. Cruse needed to "fix things immediately" with Mr. Madden. Mr. Bakken testified that he and Ms. Cruse met that day to discuss his concerns about the marketing department, and the change in reporting for her from Mr. Madden to Mr. Sampson, and that the reporting of the "bra comment" was not discussed. Ms. Cruse testified that, at Mr. Bakken's urging, she and Mr. Madden met. Ms. Cruse followed up the meeting with a text to say, "Hi. I just wanted to say thanks for making time to talk today. I wish we'd had more time, but did really want to say at least those few things before any more time passed. I'm so sorry for this situation we're in and all the awful thoughts that've crossed your mind in the last couple weeks. I want I [sic] repair things. Though it is contrary to how things look from your vantage point right now, I care deeply about you and about Nordic, and my goal has always been to help both be as successful as possible."

When considering whether the Complainant has met the *prima facie* elements of sexual harassment as set forth in the Ordinance, the Hearing Examiner finds that the acts or conduct complained of were based on the Complainant's sex, but that the conduct complained of was, for the most part, not unwelcome or unwanted, that the alleged harassment was not so sufficiently severe or pervasive as to alter the conditions of the Complainant's employment to create an abusive or hostile environment, and that when her employer was put on notice, appropriate corrective action was taken. This Hearing Examiner further finds that the Complainant's acquiescence in or submission to the sexual harassment was not made either explicitly or implicitly a term or condition of her employment, that her acquiescence in or submission to sexual harassment was not used as the basis or any part of the basis for employment decisions affecting the employee.

Clearly many of the comments made by Mr. Madden to his subordinate, Ms. Cruse, were of a boorish, immature, or inappropriate nature for an employer/employee relationship. As a small start-up company, it was reiterated over and over again at hearing the "collegial" and collaborative nature of Nordic Consulting as a business. Ms. Cruse and Mr. Madden clearly had, at one time, a close and personal relationship, sharing phone calls, emails and text messages at hours far removed from normal business hours on topics in no way related to the business of Nordic. Ms. Cruse would spend time with Mr. Madden and his family, and she and her significant other, Brian Matsuura would "double date" with Mr. Madden and his wife. Ms. Cruse outlined a number of incidents in her Complaint that, when taken individually and out of context could appear to be unwelcome sexual advances or unwelcome verbal or physical conduct of a sexual nature which included verbal or written comments, or display of sexually graphic materials which were not necessary for business purposes, however, when taken as a whole and in the context of the close and personal relationship of the Complainant and Mr. Madden, it is more difficult to construe the emails, text messages, phone calls and comments and unwelcome or unsolicited. It is even more difficult to construe these events as demonstrably severe or pervasive so as to create an intimidating or demeaning environment that negatively impacted Ms. Cruse's ability to perform her job. At some point, there is a shift in the relationship between Ms. Cruse and Mr. Madden, and is noticed by Ms. Sager while she and Ms. Cruse are out for drinks in August. To comment at all on the cause of the change in relationship would be merely speculative.

The Hearing Examiner finds Mr. Madden's continued reference to the upskirt photo, the reported "bra" comment, especially as recollected by Ms. Cruse, and Mr. Madden's interpretation of Ms. Cruse's emoticon filled email/text message of August 30, 2013, to be particularly offensive and juvenile. However, the context in which these incidents occurred, and Ms. Cruse's tepid reaction to them, indicate to the Hearing Examiner that Mr. Madden's conduct was part of a wider personal relationship that blunts the impact of these incidents.

The record as a whole demonstrates that from the beginning of the Complainant's employment until sometime in the late summer of 2013, Mr. Madden and the Complainant enjoyed a close personal relationship that included discussions and language that was of a mild sexual nature and seemed to be engaged in willingly on the part of both parties. That something in this relationship changed in the summer of 2013 for the Complainant is clear from the record of the Complainant's texts and email to Mr. Madden as well in her conversation with Ms. Sager. However, what is missing in the record is an explanation for this shift in the relationship between Mr. Madden and the Complainant. It is certainly possible that the Complainant had grown weary of Mr. Madden's innuendo and less than professional relationship. It is equally possible that the Complainant was beginning to feel that Mr. Madden did not value her professional opinion or the work she was doing for the Respondent. Unfortunately, the Hearing Examiner cannot speculate in the absence of facts that would illuminate the cause for the apparent divide between the Complainant and Mr. Madden.

The Complainant's failure to be explicit with Mr. Madden or any coworkers about how she felt about Mr. Madden's conduct or his supervision hampers the Hearing Examiner in concluding that Mr. Madden's sexualized conduct was the cause of the Complainant's movement away from her personal relationship with Mr. Madden. One of the cornerstones of sexual harassment is the exercise of power by the harasser over the harassed. While Mr. Madden had the requisite power as the Complainant's supervisor, the record does not demonstrate that he used that power in his relationship with the Complainant until, at the earliest, late September around the Shine Unlimited meeting, and more clearly after the Complainant's complaint to Mr. Bakken about Mr. Madden's behavior.

That the Complainant at various points in the summer of 2013 expressed frustration and being "disrespected" by Mr. Madden, the record does not permit the Hearing Examiner to determine whether that sense of frustration was over a lack of professional support or due to Mr. Madden's conduct of a sexual or personal nature towards the Complainant. Presumably, the Complainant would have the Hearing Examiner infer from the circumstances of her employment and Mr. Madden's documented conduct that the Complainant's growing frustration was a result of Mr. Madden's personal conduct and relationship with the Complainant. However, given the history of the interplay between Mr. Madden and the Complainant, there are competing inferences that might be drawn, and the Hearing Examiner lacks a reason to choose between the competing inferences.

Even if the Hearing Examiner were to find that Mr. Madden's conduct was unwelcome and that he knew that it was unwelcome, the Hearing Examiner, on this record, cannot find that Mr. Madden's conduct interfered with the Complainant's ability to perform her job or to accomplish her duties. It's clear that the Complainant had a complicated schedule with many different responsibilities. In an email/text to Mr. Madden, she expressed frustration at the amount of work facing her and her department, and her fear that she was becoming a "bottleneck" for the work of the Respondent. There is nothing in the record indicating that other

members of the C-Suite were concerned about the work of the department during the summer of 2013. There is certainly no documentation of warnings or other disciplinary action being flagged for the Complainant during this period. Were the Complainant having difficulty maintaining her level of work or meeting her responsibilities due to Mr. Madden's flirting and unprofessional conduct, one would expect to have had testimony from someone from the Respondent to point out developing problems. Even the Complainant's testimony pointed to frustrations with the quantity of work and Mr. Madden's decisions rather than his conduct being the source of any performance-related difficulties.

The Complainant's testimony itself, is the source of confusion for the Hearing Examiner with respect to the claim of sexual harassment. For example, in her complaint, the Complainant indicates that Mr. Madden's visit to check on her during the Denver meeting in June of 2013 was extremely intimidating for her. However, on the very next day, the Complainant gives Mr. Madden an envelope containing tickets for the anniversary trip the Complainant helped plan and she wishes him "bon voyage." There is no indication that she mentioned to Mr. Madden in any form, even by the favored text message, that she was uncomfortable with his late night check-up. It is this type of ambiguous characterization and testimony that limits the Hearing Examiner's ability to conclude that the Complainant experienced a hostile workplace due to sexual harassment that was unwelcomed and severe and pervasive enough to adversely affect the Complainant's ability to perform her job.

Given the record as a whole, the Hearing Examiner concludes that the Complainant failed to demonstrate that she experienced sexual harassment as that concept is defined in MGO Sec. 39.03(8)(k). That is not to say that Mr. Madden's conduct was acceptable in any professional setting. After exhaustively reviewing the testimony and exhibits in the record, the Hearing Examiner is left feeling that mistakes were made on both sides of this case and that the conduct now complained of by the Complainant resulted from a long history of mixed signals on the part of both Mr. Madden and the Complainant and the Complainant's failure to make her objections to Mr. Madden's overly familiar style clearly known. In this regard, the Hearing Examiner is troubled by the apparent concept that while Mr. Madden's conduct was not welcomed, it was not entirely unwelcome either. Regardless of how the Complainant viewed Mr. Madden's conduct, it does not appear to have adversely affected the Complainant's ability to perform the duties of her job. That there may have been difficulties from time to time as exemplified by the electronic conversations presented at hearing, they appear related to the work conditions and professional differences rather than as a result of unwanted sexual conduct on the part of Madden.

In addition to the Complainant's claim of discrimination in the form of sexual harassment, she sets forth a claim of retaliation for her exercise of a right protected by the Equal Opportunities Ordinance Sec. 39.03(9)(a) and (b). As with a claim of discrimination, a claim of retaliation may be demonstrated through either the direct or the indirect method. Miller v. CUNA, MEOC Case No. 20042175 (Ex. Dec. 5/16/08). While the Complainant asserts that there is direct evidence of retaliation, the Hearing Examiner finds that proof in this matter is better addressed through application of the indirect method.

In the proof by the indirect method, the Hearing Examiner will review all the evidence in the record and by assessing that evidence, along with the reasonable inferences to be drawn from that evidence, reach a conclusion as to whether a given action was caused, at least in part, by a retaliatory motive. See Miller, supra.

Proof in such a case follows the McDonnell Douglas/Burdine paradigm set forth earlier in this memorandum. Essentially, the Complainant must establish a *prima facie* claim of retaliation by demonstrating that she exercised a right protected by the ordinance, she experienced an adverse employment action, and that there is some causal connection between the Complainant's exercise of an oppositional right and the adverse action of which she complains.

Presuming that the Complainant establishes her *prima facie* case, it falls to the Respondent to present a legitimate, nondiscriminatory explanation for its actions. Should the Respondent meet this burden, the Complainant may rebut the Respondent's demonstration by putting forth evidence demonstrating that the Respondent's explanation is either not credible or represents a pretext for an otherwise discriminatory or retaliatory motive.

Turning first to the elements of the Complainant's *prima facie* claim, there seems to be little doubt that the Complainant exercised a right opposing her sexual harassment when she complained to Peggy Bakken on or about September 25, 2013 about Drew Madden's comments toward the Complainant. While the primary incident that triggered this complaint involved comments relating to the appropriate color brassiere she should wear with a white blouse, the Hearing Examiner understands that the Complainant's feelings of unhappiness about Mr. Madden's treatment of her in other incidents and in other contexts were part of the complaint expressed to Mrs. Bakken. Some of these additional contexts may or may not have concerned treatment that may have been harassing on the basis of the Complainant's sex or not.

The fact that on later occasions the Complainant may have wished to "walk back" this complaint, or to minimize her concerns, are overshadowed by Peggy Bakken's belief that the complaint represented a report of sexual harassment on the part of Drew Madden; a view that was apparently shared by Mark Bakken, the Respondent's CEO and Peggy Bakken's husband. Mark Bakken's decision to treat the Complainant's report to be one of sexual harassment, and his subsequent actions along with those of John Chait, adequately demonstrate that the Complainant has established the first element of the *prima facie* claim of retaliation.

Whether the Complainant experienced an adverse action is not truly in question. At a minimum, it is agreed that the Complainant's employment was terminated in later January of 2014, and that she was informed of this termination upon her return to the office on February 3, 2014. While the Respondent argues that the termination had nothing to do with the Complainant's statements to Peggy Bakken, that is not part and parcel of the analysis of whether there was or was not an adverse action. Termination of employment is adverse to the individual being terminated.

There are also indications that between the end of September 2013 and her termination, the Complainant experienced greater scrutiny of her work and activities. To the extent that the Complainant asserts this higher level of review and critique represented an adverse action, it can be seen as conduct that was intended to chill the Complainant's exercise of her rights to oppose discrimination at the Respondent's office. Burlington Northern & Santa Fe (BNSF) Railway Co. v. White, 548 U.S. 53 (2006).

The deterioration in the relationship between the Complainant and Mr. Swaminathan from the summer of 2013 to November and December of 2013 demonstrates the type of conduct to which the Hearing Examiner refers. In the summer of 2013, Mr. Swaminathan was cordial and supportive of the Complainant, but by the late fall, Mr. Swaminathan was openly

hostile to the Complainant, going so far as to express that if the Respondent had a disciplinary policy, he would have issued a reprimand to the Complainant over her work performance.

Whether one considers the higher level of scrutiny and criticism of the Complainant, or her termination, there is no doubt in the mind of the Hearing Examiner that the Complainant demonstrated the second element of her *prima facie* claim.

As is often the case, the real battleground in this matter comes over whether there exists a causal connection between the exercise of a protected right and the adverse action experienced by the Complainant. The record in this matter is sufficiently unique that the Hearing Examiner, in addressing this element of the *prima facie* claim, will fold into the discussion the Respondent's need to present a legitimate, business explanation for its actions, and the Complainant's efforts to rebut that explanation. This compression of the usual burden shifting is warranted due to the application of many of the facts in several different contexts. Also, such a compression of the analysis is supported by the Supreme Court's decision in U.S. Postal Service Bd. Of Governors v. Aikens, 460 U.S. 711 (1983).

After extensive review of the record, and based upon the evidence produced at hearing and the reasonable inferences derived from that evidence, the Hearing Examiner finds that the Complainant's termination by the Respondent was motivated, at least in part, by the Complainant's exercise of a right protected by the ordinance; i.e., her report of Mr. Madden's sexually harassing conduct. The record is extensive and contains much evidence that can be marshalled to support either side of the complaint. However, the Hearing Examiner finds that the greater weight of that credible evidence supports the conclusion that but for the Complainant's report to Peggy Bakken on September 25, 2013, she would likely not have been terminated in February of 2014.

The Hearing Examiner starts from the perspective of examining the general terms and conditions of the Complainant's employment both before and after the complaint of harassment. Generally speaking, the record demonstrates that, with minor exceptions, the Complainant was respected and seen to be performing adequately, if not even much better than that, prior to September 25, 2013. The record does not contain any indication of performance difficulties or any documentation of deficiencies or a need for improvement. The Respondent, at the time, had a progressive disciplinary policy, and had there been problems with the Complainant's performance, one would expect that such problems would be noted pursuant to the Respondent's own policies. Flowers v. The Charlton Group, MEOC Case No. 20002129 (Ex. Dec. 9/17/02).

In the early summer of 2013, the Complainant was promoted to the position of Vice President of Marketing and, along with the new title and responsibility, came an increase in salary of \$20,000.00. Prior to the promotion, the Complainant had received two substantial bonuses based upon her work. Days before the September 25, 2013 complaint, the Complainant was granted stock options for 65,000 shares of stock.

The Complainant's supervisor, Drew Madden, in late June 2013 expressed his admiration and whole-hearted support for the Complainant. Vivek Swaminathan congratulated the Complainant on her promotion once it was announced in July 2013, indicating that he admired the Complainant, had enjoyed working with her, and looked forward to continuing to do so in the future.

The record does contain discussion of Mark Bakken's displeasure over a failure to sign him up for a golf tournament in advance of the CHIMES conference. The record also indicates that the Complainant eventually did get him signed up for the golf tournament, and Mr. Bakken was able to participate in the manner in which he expected. There is no indication that this incident rose to the level of a failure to perform the Complainant's job adequately. There is no documentation of a verbal or written warning or any other form of discipline.

At hearing, the Respondent made significant note of the failure of the Complainant to refresh its stock of The North Face back packs. It had been a long standing practice of the Respondent to equip new consultants with a particular colored The North Face backpack embroidered with the Respondent's name or logo. The Respondent's executive council, known as the C-Suite, felt that this was an important identifier for its consultants and that it helped the Respondent spread its name and identity.

In March of 2013, Peggy Bakken and the Complainant became aware that this secondary market use of The North Face product was not permitted by The North Face. Though the C-Suite wished to continue its practice in violation of The North Face's restrictions, the Complainant sought to provide the Respondent with alternatives that did not place the Respondent in legal jeopardy. The C-Suite summarily rejected the Complainant's recommendations.

This factor will be discussed at length later in this memorandum. However, during the period prior to the Complainant's complaint of harassment, there is no documentation of a failure to perform her job over the failure to obtain either additional The North Face back packs or to find an acceptable substitute.

In September of 2013, shortly before her complaint of harassment, the Respondent hosted an open house for vendors attending the annual Epic Users Group conference. The Complainant was responsible for this event, and other than Mark Bakken wanting specific invitations sent to individuals, the event was deemed a success by all involved. There is no documentation of any problems relating to this event.

In general, the record reveals no written indication of discipline or dissatisfaction with the Complainant's employment that might indicate that she was in jeopardy of termination. While this is particularly true for the period prior to the Complainant's complaint to Peggy Bakken, it is equally true for the period of time subsequent to September 25, 2013.

The record indicates that subsequent to September 25, 2013, things changed for the parties. A brief recitation of some of the important dates and incidents that occurred after September 25, 2013 will be helpful.

On September 25, 2013, the Complainant tearfully tells Peggy Bakken of the Complainant's concerns about Drew Madden's conduct. Mrs. Bakken reacts by identifying Mr. Madden's conduct as sexual harassment, and states that she will inform her husband, Mark Bakken, the Respondent's Chief Executive Officer and Mr. Madden's direct supervisor, of the situation. Peggy Bakken also indicates that it is unacceptable for a manager of the Respondent to be harassing other employees.

Apparently, Peggy Bakken informed Mark Bakken of the Complainant's concerns that day, as on September 26, 2013, Mark Bakken asks to meet with the Complainant to discuss the

complaint. While the Complainant is reluctant to escalate the issue, she meets with Mark Bakken on September 27, 2013.

On September 27, 2013, Mr. Bakken tells the Complainant that he will address her concerns and that she will remain anonymous, but that the situation must be remedied. The Complainant does not want Mr. Bakken to raise her concerns with Mr. Madden, as she is afraid that it will interfere with their working relationship, and that she fears retaliation and for her job. Mr. Bakken assures the Complainant that she will be protected.

It's not clear what, if anything, happened until October 21, 2013. At that time, Mr. Bakken discloses to Mr. Madden the complaint and identifies the Complainant as the source of the complaint.

At some point, Mr. Bakken tells Jon Chait, the Chair of the Board of Directors, and a coach/mentor for Mr. Bakken, of the incident. Mr. Chait assumes that there is an investigation ongoing, though the record is devoid of evidence of any investigation conducted by the Respondent into the complaint raised by the Complainant.

Mr. Chait testified that he didn't recall when Mr. Bakken told him of the incident, but believes that within three days of being informed of the incident he spoke with Mr. Madden about the complaint.

Mr. Chait's timeline is somewhat suspect in that it appears he attempted to set up a meeting with the Complainant on October 8, 2013 presumably to discuss her complaint. That meeting did not occur and efforts to reschedule it were unsuccessful.

On October 21, 2013, Mr. Bakken discussed the complaint with Mr. Madden during their return from a conference. At that time, despite Mr. Bakken's assurances to the Complainant, he identified to Mr. Madden the Complainant as the source of the complaint. This might fit with Mr. Chait's timeline if Mr. Chait did not tell Mr. Madden of the source of the complaint.

Mr. Chait, relying on his training as a lawyer, testified that he made several recommendations of how to generally remedy the complaint of sexual harassment. He cautioned that his recommendations were tempered by his assumptions that an investigation was ongoing and that there were no extenuating circumstances. His recommendations included an apology, removal of the Complainant from the supervision of her harasser, and some form of monetary penalty such as a reduction in bonus for Mr. Madden.

Subsequent to the October 21, 2013 conversation between Mr. Bakken and Mr. Madden, Mr. Madden requested a meeting with the Complainant. Again, the timeline is somewhat confused at this point. It appears that Mr. Madden and the Complainant had at least two conversations between October 21 and the beginning of November 2013. The content of these discussions is a matter of dispute on the record.

The Complainant indicated that Mr. Madden was very emotional, that he indicated he was withdrawing his support of the Complainant, and that she would find out how hard her job could be without his support. The Complainant asserts that Mr. Madden accused her of betraying him and ruining his position at the Respondent.

Mr. Madden's recollection of these conversations was significantly different, expressing his sadness that things had come to this point and indicating his hope for a new start.

What is clear from examining the record as a whole, though, is that from this point until the Complainant's termination, the Complainant was subjected to greater criticism and job difficulties, at least as outlined by the Respondent. It is primarily during this period that the Respondent asserts that the Complainant's work performance suffered to such a degree that termination of her employment was required.

Based upon the recommendation of Jon Chait, on or about November 4, 2013, the Complainant's supervision was changed from that of Mr. Madden to Eric Sampson. Mr. Chait had also recommended sexual harassment training for the management team, and specifically Mr. Madden, as well as some form of financial penalty for Mr. Madden. The sexual harassment training did not occur until some point after the Complaint of Discrimination in this matter had been filed. There is no indication that Mr. Madden was ever penalized in any monetary form.

At or about the same time as the transfer of the Complainant's supervision, Mark Bakken met with the Complainant. The substance of this meeting is disputed. At a minimum, this appears the first, and likely only, time that Mr. Bakken indicated to the Complainant any concerns about her job performance or that of her department. It appears that this was worded vaguely, and was never followed by any form of written reprimand, counseling, or other adverse action from the Complainant's supervisors.

The Complainant asserts that Mr. Bakken directed her to do something to repair the fractured relationship with Mr. Madden. Mr. Bakken is alleged to have told the Complainant that Mr. Madden was a mess and was drinking heavily. Mr. Bakken now disputes this version of events, however, subsequent events give the Complainant's version credibility.

By the middle of November 2013, the Complainant indicated to Mr. Sampson that she was contemplating resigning. The Respondent asserts that the Complainant indicated that she felt that things were not working out and it might be better if she were to leave. The Complainant asserts that rather than the general gloss placed on her statements by the Respondent, she had indicated that the situation with Mr. Madden was not working out, and that she was feeling she might need to leave.

The Hearing Examiner observes that much of this discord could have and would have been prevented had Mr. Bakken kept his promise to the Complainant to keep her complaints of Mr. Madden's conduct confidential. Once Mr. Bakken disclosed to Mr. Madden that the Complainant was the source of the complaint against him, the following disruption followed closely on the heels of that disclosure.

In the discussions between the Complainant and Mr. Madden in late October or early November 2013, the Complainant testified that she was apologetic to Mr. Madden because she feared his retaliation for her complaint. This does not seem to have been misplaced. It is consistent with the Complainant's testimony concerning her indication to Mr. Sampson that the reason for her possible resignation was due to the continued friction between her and Mr. Madden, and the general disruption to the workplace.

While the Respondent details what it now asserts were increasing deficiencies in the Complainant's work and management of the Marketing Department, there is no written or other

documentary evidence of those issues. None of the problems identified by the Respondent at the time of hearing were enumerated by Mr. Sampson or Mr. Bakken at the time of the Complainant's termination.

During the February 3, 2014 termination meeting, the Complainant pressed Mr. Sampson and Mr. Bakken for an explanation of how or why things hadn't worked out with her employment. Initially, all Mr. Sampson and Mr. Bakken had offered in the way of explanation was that things just hadn't worked out. Eventually, when pressured by the Complainant, Mr. Bakken indicated that the issue of reordering The North Face backpacks was not a reason for her termination. Mr. Bakken and Mr. Sampson did relate two concerns that had supposedly arisen during the Complainant's absence in January 2014. First, they indicated that the C-Suite was unaware of a social media plan being developed by the Complainant's department. Second, they stated that the Complainant's failure to timely respond to a request by a consultant, Nick Daar, for assistance in creating a User Group in the Chicago area played a role in the decision to terminate the Complainant.

This interaction between the Complainant, Mr. Sampson and Mr. Bakken is problematic for several reasons. First, Mr. Bakken's statement that the Complainant's handling of the backpack issue was not a reason for the Complainant's termination is directly contrary to the position taken by the Respondent at the time of hearing. Such inconsistencies in the stated reasons for termination cast substantial doubt on the credibility of the Respondent. Also, presentation of conflicting explanations at different times casts doubt on the legitimacy of the reason proffered by the Respondent, and helps to form a basis for concluding that retaliation was, at least in part, a motive for the Complainant's termination. See Miller, supra, Flowers, supra.

The other problem raised by the reasons stated by Mr. Sampson and Mr. Bakken is that those explanations appear to be factually false. The record demonstrates that the Complainant had informed the C-Suite of her direction to her staff to prepare a social media plan. The fact that the C-Suite appears to have ignored that information reflects on the C-Suite, and for members of the C-Suite to then attempt to use that information as a basis for the Complainant's termination further casts doubt on the credibility of the Respondent.

The accusation that the situation with Nick Daar supported the Respondent's decision to terminate the Complainant harkens back to the fact that the Complainant, other than being urged to take care of the issue, received no discipline in any form. The issue appears to have been resolved at least three months prior to the Complainant's termination to Mr. Sampson's, the Complainant's supervisor, satisfaction. For the Respondent to, at the late date of the Complainant's termination, claim that the Complainant's conduct was so severe as to constitute a "firing" offense lacks any factual support in the record and is contrary to common sense or sound management practice. Had the Complainant's conduct risen to that level of concern, the Hearing Examiner would expect to have seen documentation of warnings or other written directives, and possible implementation of the Respondent's progressive disciplinary policy. The record is devoid of any such documentation. See Flowers, supra.

The Respondent's failure to provide a reasonable explanation for its decision to terminate the Complainant at the time of termination gives rise to the inference that the Respondent's true reason was an impermissible one. The Respondent did not have to provide the Complainant for an explanation of its decision, but when it chose to do so and when that

explanation does not make rational sense, the Respondent must live with the consequences of its actions.

There is another portion of the timeline in this record that causes the Hearing Examiner to find that retaliation was more likely than not the reason for the Complainant's termination. The Complainant left for what would eventually be two weeks of sick leave on or about January 14, 2014. On January 16, 2014, Drew Madden contacted John Pollard, an individual who in November 2013 had expressed interest in employment with the Respondent. Mr. Madden contacted Mr. Pollard to let him know that a full-time position was coming available. The position to which Mr. Madden referred was the Complainant's. Mr. Madden's call to Mr. Pollard came only two days after the Complainant had left ill for the day, and could not have been caused by the Complainant's longer than expected absence from work due to illness. As Mr. Madden was the person who the Complainant identified as her harasser and the person from whom she feared retaliation, Mr. Madden's contact of Mr. Pollard under the circumstances existing at the time, gives rise to an inference of retaliation.

This inference is enhanced by the fact that Mr. Pollard was hired on January 27, 2014, at a time when the Complainant was prepared to return to work. That Mr. Sampson told the Complainant to rest and not to return to the office until February 3, 2014 is highly suspicious to the Hearing Examiner. That Mr. Pollard was then told not to report to work until March 1, 2014, leaving the Complainant's position unfilled for a month, further strengthens the Hearing Examiner's conviction that the Respondent was not acting in good faith, and that retaliation was the primary motive in the Complainant's termination.

At hearing and in post-hearing argument, the Respondent contends that the true reason for the Complainant's termination was poor performance on the part of the Complainant. In support of this position, the Respondent provides a number of examples which it asserts demonstrate its position. The Hearing Examiner will address several of these examples in no particular order. To the extent that the Hearing Examiner does not address each example identified by the Respondent, it reflects the finding of the Hearing Examiner that individually the example was insufficient to warrant the dismissal of the Complainant, or that even as a group there is insufficient reason to either find the example credible, or that it warranted the termination of the Complainant.

First, the Hearing Examiner will address the issue of The North Face backpacks. As noted above, Mr. Bakken, at the time of termination, stated that this did not form a basis for the Complainant's termination. However, at hearing, the Respondent took the contrary position, and found it a glaring example of the Complainant's deficiencies. The Respondent in 2013 had a practice of giving each new employee a green The North Face backpack with the Respondent's name embroidered on it. It viewed this particular backpack as a visible identifier of its brand and saw it as an important, if not critical, component of its marketing program.

In early 2013, Peggy Bakken, when trying to replenish the Respondent's supply of backpacks, discovered that The North Face was no longer making that particular item, and that the Respondent's embroidering of the backpack violated The North Face's secondary marketing rules. The Respondent was specifically informed that such embroidering of The North Face product was not permitted. Mrs. Bakken and the Complainant, armed with this information, attempted to identify other options that would closely resemble the then used backpacks to retain the "brand" identification that the Respondent deemed so important.

The C-Suite rejected the suggestions made by the Complainant and Mrs. Bakken. Instead, Mark Bakken and Mr. Sampson investigated a source for a Chinese made copy of The North Face backpack. This ultimately failed.

At various points during the Complainant's employment, the C-Suite wanted to know how the Marketing Department was coming on locating a new source of The North Face backpacks despite their knowledge that their intended alteration was not permitted. In January 2014 at a meeting of the C-Suite, while the Complainant was on leave, Vivek Swaminathan, in violation of The North Face license, ordered a quantity of The North Face backpacks for the Respondent's use.

The Respondent holds this situation up as an example of how the Complainant failed to accomplish her duties as the Marketing Department manager. In what seems to be a leap of logic to the Hearing Examiner, the Respondent contends that this, either by itself or in combination with other problems, formed sufficient cause to terminate the Complainant's employment.

The Hearing Examiner finds this to be a particularly enlightening glimpse into the mindset and operational principles of the Respondent. First, the position taken by the Respondent at hearing and in its post-hearing briefs is clearly contrary to the statement of Mark Bakken at the time of the Complainant's termination. The Respondent offers no explanation for this change in position. The failure to provide a basis for this position seems to typify the arrogance of the Respondent's management in setting forth its defense.

The fact that the Complainant identified the legal issue facing the Respondent by its use of The North Face backpacks and offered it legally and economically acceptable alternatives, rather than being an example of how the Complainant failed to perform her duties properly, is an example of how she performed them with a high degree of professionalism.

That the Respondent's management body, the C-Suite, sought on at least two different occasions to skirt if not flaunt the property interests of The North Face illustrate the Respondents lack of concern for the law or rights of another.

The Hearing Examiner notes with interest, but without reliance, that at the time of hearing the Respondent was using the backpack solution suggested by the Complainant in lieu of its preferred The North Face backpack.

The Respondent asserts that the Complainant's failure to disclose the amount of the contract that it entered into with Shine demonstrates a failure to meet the duties of her position. Shine is an advertising and marketing firm based in Madison. In 2013, the Respondent determined that it needed to seek outside help to refresh its branding, create a new website, and refresh its sales brochures and related documents. Shine was the group that the Respondent felt could perform these services for the Respondent. At the time the initial contract with Shine was to be signed, Mark Bakken decided that he should sign the contract on behalf of the Respondent and did so. The amount of the contract was substantially in excess of the amount for which the Respondent had given him authority to bind the Respondent. Mr. Bakken directed the Complainant not to inform the C-Suite of this fact, and that he would do so individually. The Complainant did not disclose this information based upon Mr. Bakken's directive as one of her supervisors.

The existence of this contract became known to Mr. Sampson in November or December 2013. Since acknowledgement of this contract could have resulted in dismissal of Mr. Bakken or other legal action, Mr. Sampson and Mr. Bakken undertook to renegotiate the one large contract into several smaller contracts to avoid the authority issue.

At hearing, the Respondent raised the Complainant's failure to disclose Mr. Bakken's abuse of his authority as an example of the Complainant's poor judgement or performance. The Hearing Examiner sees this as a mischaracterization of the facts and their consequences. The Complainant was following the directive of one who was in her chain of supervision. Since Mr. Sampson appears to have had similar knowledge, and also failed to disclose the situation to the C-Suite despite his membership on the C-Suite, it seems that the Complainant is being inappropriately blamed for conduct that was permitted by someone who had not complained of discrimination.

There is an additional point that this situation raises in the mind of the Hearing Examiner. Both Mr. Bakken and Mr. Sampson knew of the requirement to seek approval for the amount of the contract by the C-Suite. However, both of them took it upon themselves to act contrary to the clear mandate of the C-Suite. This strikes the Hearing Examiner as another instance of the Respondent's willingness to ignore process, procedure and regulation in favor of their own view of their personal interest. This again casts doubt on the credibility of the Respondent and adds to the inference that the Respondent was willing to ignore the requirement that it not retaliate against the Complainant for her exercise of a right protected by the ordinance.

In addition to the issue of disclosure of the amount of the Shine contract, the Respondent contends that the Complainant mismanaged the contract, and by doing so created chaos and a crisis in the Respondent's preparation for the HIMSS conference in 2014. In support of this contention, the Respondent called several witnesses to testify to the fact that some of the documents necessary for the HIMSS conference were not ready as promised at the time the Complainant left ill on January 14, 2014, and that efforts to obtain the working documents and notes from the Complainant were met with silence from the Complainant.

While the witnesses on behalf of the Respondent presented a unified story of problems, the record as a whole indicates that the situation was either not as depicted in the Respondent's presentation, or that the difficulties of which the Respondent complains were not attributable to the Complainant. Rather the issues resulted from managerial overreach and the refusal of the C-Suite to relinquish control of the contract. Shine had warned the Respondent that wordsmithing and micromanagement of the materials would slow down the process and that it knew how to produce the needed materials on a timely basis if the Respondent would not engage in rewriting each and every document.

Representatives of Shine and the Respondent, including the Complainant, met several times in December to hammer out final wording and formatting of the necessary documents. As a result of these meetings, Shine was going to have the documents for final review on or about January 11, 2014. Mr. Sampson testified that he relied upon the Complainant and Shine, and that he saw no need for his active review. Other Respondent representatives "signed off" on the concepts and designs after the December meetings. When the documents were produced as agreed upon in January, Mr. Madden, Mr. Bakken and Mr. Swaminathan all demanded changes that were not contemplated by the agreements in December.

On this record, the Hearing Examiner cannot find that the Complainant mismanaged anything to do with the Shine contract. Rather, the record discloses that the C-Suite was unable to meet the commitments to which it had agreed in December.

The Respondent asserted at hearing that the situation over the Shine documents which it attributes to the Complainant created a crisis in the preparation for the HIMSS conference. The Hearing Examiner finds that to the extent there was a crisis, it was one of the Respondent's own making. However, the Hearing Examiner concludes that the testified to "crisis" was hardly the issue depicted by the Respondent. When the Complainant indicated that she was able and willing to return to work in late January, Mr. Sampson directed her to stay at home and rest until February 3, 2014. Had there truly been a crisis, the Hearing Examiner believes the Respondent would have been pressing the Complainant to return. The fact that the Respondent had already hired John Pollard to replace the Complainant, but then directed him not to come to work until over a month later also demonstrates to the Hearing Examiner that there was no actual crisis.

The Respondent states that the Complainant's failure to appear at an October 2013 planning meeting demonstrates a lack of professionalism and attention to her duties as the Marketing Department manager. However, in pointing to this incident as evidence of the reasons for which the Respondent fired the Complainant, the Respondent ignores more salient facts.

The Complainant was excused from attendance at the planning meeting by both Mark Bakken and Drew Madden. The Complainant had previously scheduled vacation plans for the same time as the planning meeting. Those plans were made when the original date for the planning meeting was on a different date. When the planning meeting was moved to conflict with the Complainant's previously scheduled vacation, she was excused from attendance.

The Respondent asserts that the planning meeting was critical and that without the Complainant, the needs of the Marketing Department were not represented. However, this ignores the fact that Peggy Bakken, a member of the Marketing Department, was present and was able to represent the needs of that department.

The willingness of the Respondent to mischaracterize this incident further erodes the Respondent's credibility and casts doubt on the Respondent's presentation of a legitimate, nondiscriminatory explanation for its decision to terminate the Complainant.

The Respondent points to a problem between the Complainant and Mr. Swaminathan over obtaining information concerning the use and compilation of data by KLAS, a company that provides ratings of health care industry tech companies. Mr. Swaminathan wanted to know if the data could be used in Respondent's promotional materials. The Complainant testified that she had told Mr. Swaminathan several times that KLAS's policies prevented such use. Despite that fact, Mr. Swaminathan repeated his inquiries.

Mr. Swaminathan also wanted to know something about the compilation of the data used by KLAS. The record indicates that the Complainant made reasonable efforts to obtain the information requested by Mr. Swaminathan, but due primarily to problems reaching the Complainant's representative at KLAS, she was unable to do so. The fact that another person in Mr. Swaminathan's work group was able to subsequently obtain the requested information does not minimize the Complainant's efforts to do the same.

Once again, Mr. Swaminathan's repeated request to do that which he had been told he could not do demonstrates an attitude of superiority and entitlement that runs through much of this record. This willingness to go beyond that which is outlined indicates to the Hearing Examiner that the Respondent more likely than not did not feel proscribed from terminating the Complainant when it viewed her as being a hindrance or possible threat to the Respondent for her complaint of sexual harassment.

Given the record as a whole, the Hearing Examiner concludes that the great weight of the credible evidence demonstrates that the Respondent, at least in major part, was motivated to retaliate against the Complainant for her complaint of sexual harassment when it terminated the Complainant's employment. In so finding, the Hearing Examiner does not mean to find that the Complainant was the ideal employee or that she was flawlessly performing her duties. However, the Hearing Examiner is convinced that there was a marked shift in how the Respondent viewed the Complainant once she complained of sexual harassment, and that change in view and attitude, led several months later to her termination. The explanations presented by the Respondent to demonstrate the Complainant's decline in performance lack credibility and are frequently tainted with a sense that the Respondent did not have to follow its own rules, or those established by other authorities, if it found them to be inconvenient. The Complainant feared retaliation from Mr. Madden from the beginning and she expressed that fear to Mr. Bakken. Mr. Bakken falsely held out a promise of anonymity, and from that point forward, the Complainant's work conditions deteriorated and came to an end on January 16, 2014, if not before, when Mr. Madden informed John Pollard that the Respondent had a full-time position for him, and that was finalized on February 3, 2014 in a meeting between Mark Bakken, Eric Sampson and the Complainant. Since that date, the Respondent's efforts have been directed to putting the best light it can on its decision. The record demonstrates to the satisfaction of the Hearing Examiner that those efforts resulted in misstatements, mischaracterizations and a pattern of excuses that simply are not credible.

This matter was tried under a bifurcation on the basis of liability and damages. Having found that the Respondent is liable for the Complainant's retaliatory termination, the Hearing Examiner will give the parties an opportunity to reach an agreement as to damages. If after a reasonable period of time an agreement cannot be reached, the Hearing Examiner will schedule further proceedings on the issue of damages.

Signed and dated this 27th day of June, 2019.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III  
Hearing Examiner

cc: Michael R Fox  
George A Stohner