

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

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| <p>Sandy Mosley 6521 Raymond Rd., # 7 Madison, WI 53711</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Gantos 54 West Towne Mall Madison, WI 53719</p> <p>Gantos P.O. Box 875 Grand Rapids, MI 49588</p> <p style="text-align: center;">Respondent</p> | <p>HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p>Case No. 22247</p> |
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This matter came on for a public hearing on August 20 and 21, 1996 before Hearing Examiner Clifford E. Blackwell III. The Complainant, Sandy Mosley, appeared in person and by her attorney, Richard Rice of the law firm of Fox and Fox of Madison, Wisconsin. The Respondent, Gantos, Inc., appeared by Andrew George, an employee of the Respondent's Employment Relations Department, and by its attorneys, Irene Savanis and Michael Gray of the law firm of Jones, Day, Reavis and Pogue of Chicago, Illinois. Based upon the record in this matter, the Hearing Examiner makes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant is a Black African American woman.
2. The Respondent is a retailer of women's clothes with 114 stores throughout the United States. The Respondent's corporate headquarters are located in Grand Rapids, Michigan. The Respondent has a store located in the West Towne Mall within the City of Madison. That store is designated as Store 188. A District Manager having responsibility for the Madison store is located in Minneapolis, Minnesota.
3. The store in Madison, at the times relevant herein, had a Store Manager and two (2) Assistant Store Managers.
4. During the period of time relevant to this complaint, Walter "Sam" Wunschel, Caroline DeKeyser and Gretchen Ducklow were Assistant Store Managers; Rebecca Ziehli and DeKeyser were Store Managers; Marsha or Marcia Hemmesch was the District Manager. Gretchen Robinson was the Director of the Respondent's Employee Relations Department and Andrew George was an Assistant in the Respondent's Employee Relations Department. All of these employees are White.
5. The Complainant began her employment with the Respondent in the Madison store in late August of 1994. She held the position of part-time Sales Associate at the rate of \$5.00 per hour plus commission. Her employment terminated in late December of 1994.

6. At the time that the Complainant was hired, Wunschel was the only Assistant Store Manager and Ziehli was the Store Manager. DeKeyser was hired as an Assistant Store Manager in late September of 1994. Ziehli was terminated as the Store Manager in February of 1995 and DeKeyser was promoted to Ziehli's position. Ducklow was promoted from the position of Sales Associate to Assistant Store Manager after DeKeyser was promoted to the position of Store Manager.
7. Wunschel, who was hired as Assistant Store Manager at approximately the same time as the Complainant began her employment, was terminated from employment in June of 1995 for a violation of the Respondent's security procedures. Prior to becoming an Assistant Store Manager, Wunschel had been employed by the Respondent as a Cashier from January 1994 to May 1994. Wunschel left his Cashier position voluntarily to work at another store in West Towne Mall. He returned to work with the Respondent when an Assistant Store Manager position became available in August of 1994.
8. During the period of the Complainant's employment, she was the only Black African American employed at Store 188 except for Diane "Roxy" Owens. Owens began her employment with the Respondent in September of 1994 as a Sales Associate and terminated her employment in February of 1995.
9. Wunschel was a problem employee throughout his period as an Assistant Store Manager and probably while he was employed as a Cashier. He and Ziehli bickered and fought frequently and visibly. Wunschel was critical of and rude to several of the Sales Associates including, but not limited to, the Complainant, Ducklow, Nicole Brendel and Kari Bader.
10. Wunschel is a professional female impersonator. Because of his professional interests, Wunschel found employment with the Respondent to be desirable because of the access to women's clothes at a discount and the access to information about women's fashion. Wunschel asked numerous other employees at Store 188 about fashion, clothes and hair styles.
11. Wunschel first asked the Complainant about her hair and hair style in October of 1994. The Complainant took Wunschel's inquiry as a genuine expression of interest by Wunschel. She did not find this initial inquiry offensive or objectionable.
12. Wunschel continued to ask the Complainant about her hair and hair styles. He at one time seemed particularly interested in the subject of hair weaves. The Complainant found Wunschel's continued interest to be increasingly annoying and irritating. At some unspecified time, the Complainant began to feel harassed by Wunschel's questions.
13. The Complainant asked Wunschel to stop asking her about her hair. The Complainant did not indicate to Wunschel that she believed his questions were racially motivated. The Complainant did not know of Wunschel's professional interest in women's clothing and fashion. Wunschel did stop asking the Complainant about her hair for an unspecified period of time. After this period of time, Wunschel once again began to ask the Complainant about her hair.
14. As an Assistant Store Manager, Wunschel had supervisory authority over Sales Associates such as the Complainant.
15. The Complainant complained to Diane "Roxy" Owens about Wunschel's questions. At most, the Complainant complained to Owens twice. On these occasions, Owens advised the Complainant to make her complaints known to the other managers of Store 188. Owens does not believe that the Complainant ever notified the other managers of her concerns or complaints on her own.
16. In November of 1994, the Complainant and another Sales Associate had questions about a sales promotion being conducted by the Respondent. They decided to call the District Manager, Marsha Hemmesch, for clarification. They located Hemmesch at another of Respondent's stores. Hemmesch advised them to check with their local store managers about the details of the promotion. The Complainant took the opportunity to advise Hemmesch about the poisonous

work atmosphere at Store 188. The Complainant did not indicate that she felt she was being racially harassed. The Complainant's complaints centered around the poor working relationship between Ziehli and Wunschel.

17. In late November or early December of 1994, DeKeyser approached the Complainant because she (DeKeyser) had heard of problems between the Complainant and Wunschel. The Complainant told DeKeyser that she (the Complainant) was having problems but that she could handle them. The Complainant did not indicate that she believed that Wunschel was racially harassing her.
18. In early to mid December, DeKeyser once again approached the Complainant to determine if there were problems between the Complainant and Wunschel. On this occasion, the Complainant indicated that there were problems about Wunschel asking her unwelcome questions about the Complainant's hair and that she wished it to stop. DeKeyser set up a meeting among the Complainant, DeKeyser and Ziehli. The Complainant explained her concerns and complaints about Wunschel including an incident where Wunschel falsely accused the Complainant of hiding while at work in order to try on clothes. The Complainant told DeKeyser and Ziehli that she wanted Wunschel to stop bothering her. The Complainant did not indicate that she believed that Wunschel's conduct was racially motivated.
19. DeKeyser and Ziehli spoke to Wunschel about his conduct towards the Complainant. Wunschel stopped harassing the Complainant. The Complainant did not complain further.
20. Wunschel's interest in the Complainant's hair and how she wore it was a matter of professional interest to Wunschel. The Complainant believed that Wunschel's conduct was intended to racially harass her.
21. In December of 1994, Store 188 placed everyone's work schedules on a clipboard kept at the back of the store. This clipboard or another similar clipboard were used to communicate information between staff and management. Work schedules were not always posted significantly in advance of an employee's work shift.
22. On December 23, 1994, the Complainant became aware that she was scheduled to work the next day. The few days before Christmas are the busiest of the year for the Respondent. The Complainant had unrealistically made plans to be out of town on December 24, 1994. Rather than speaking to a manager about the scheduling problem, the Complainant left a note on the clipboard indicating that she would not be in to work the next day because of the conflict. On December 24, 1994, Ziehli called the Complainant at home and insisted that she come to work as scheduled. The Complainant complied with Ziehli's directive and appeared for work.
23. While at work on December 24, 1994, the Complainant spoke with DeKeyser and told DeKeyser that she was giving her notice effective December 31, 1994. As reason for her notice, the Complainant told DeKeyser that it was no longer fun working at the store. The Complainant also placed a note on the clipboard giving her notice for December 31, 1994. Because of the crush of Christmas shopping, the Complainant's note was not found until the following week.
24. On December 26, 1994, the Complainant called the store to see when she was next scheduled to work. She spoke to another Sales Associate, Stacey Gentry. Gentry was unable to ascertain when the Complainant was next scheduled to work. The Complainant did not come to the store on December 26, 1994 to determine her schedule. In fact, the Complainant had been scheduled to work on December 26, 1994. The Respondent terminated the Complainant for failing to appear for work on December 26, 1994.
25. The Complainant came to the store on December 28, 1994 to determine when she was scheduled to work and to buy some clothes. Wunschel told her she had been terminated for her failure to appear on December 26 and that December 24 was her last day of work. The Complainant did not work at the store again.

26. On January 15, 1995, the Complainant wrote to Andrew George in the Respondent's Employee Relations Department to question entries in her personnel file. She was most concerned with her understanding that her file indicated that she had abandoned her job and was therefore on a list preventing her from being re-hired by the Respondent. The Complainant was not concerned about being re-hired but wished to make clear that she left employment because of the work atmosphere.
27. On January 25, George wrote back to the Complainant. George misunderstood the purpose of the Complainant's letter but noted that the Complainant's file indicated that the Complainant left employment with the Respondent because she was dissatisfied with the working conditions.
28. On February 7, 1995, the Complainant once again wrote George clarifying her intent in sending the January 15 letter.
29. On February 15, 1995, George wrote back to the Complainant apologizing for his misunderstanding and assuring the Complainant that her file did not indicate that she had abandoned her job. George also indicated that there would be an investigation of the Complainant's concerns about the atmosphere at Store 188.
30. The Respondent did not perform an investigation as noted in George's letter. The Complainant did not correspond further with George.
31. While both the Complainant and Owens were employed by the Respondent, Wunschel told the Complainant and Owens to particularly watch Black or African American customers in order to deter them from shoplifting. Wunschel may have also told the Complainant and Owens to watch other customers but he apparently made a point to specify that the two (2) Black African American employees watch black or African American customers.
32. Owens left employment with the Respondent in February of 1995. Owens quit because she believed that DeKeyser's vacated Assistant Store Manager position should have been filled through an open hire. DeKeyser was promoted to the position of Store Manager in February of 1995, when Ziehli was terminated for failing to meet the terms of her probationary employment. Ducklow was promoted to fill DeKeyser's vacated Assistant Store Manager position. These decisions were made by the District Manager, Marsha Hemmesch.
33. Subsequent to her termination, Owens complained about a number of matters to several representatives of the Respondent including Hemmesch, George, Robinson and Douglas Gantos. These complaints dealt primarily with benefits that Owens alleged were due her. However, in one or possibly two conversations, Owens indicated that she believed that she had observed racist conduct at Store 188. By this comment, Owens referred to the Complainant's treatment by Wunschel. Owens was told that her concerns would be investigated. The Respondent did not investigate Owens complaints of racism.

RECOMMENDED CONCLUSIONS OF LAW

34. The Complainant is a member of the protected group "race" and is entitled to the protection of Sec. 7 of the Madison Equal Opportunities Ordinance (MEOO) Sec. 3.23 Mad. Gen. Ord.
35. The Respondent is an employer within the meaning of the MEOO and is subject to the requirements of Sec. 3.23(7) Mad. Gen. Ord.
36. The Respondent violated Sec. 7 of the MEOO by affording the Complainant terms and conditions of employment different from those not of her race when a supervisor, Walter "Sam" Wunschel racially harassed her about her hair.
37. The Respondent did not violate Sec. 7 of the MEOO by causing the constructive discharge of the Complainant because of her race. The Complainant voluntarily terminated her employment for reasons other than her treatment by Wunschel.

RECOMMENDED ORDER

38. The Respondent is ordered to cease and desist from racially harassing any employee. Within thirty (30) days of this Recommended Order becoming final, the Respondent shall submit a detailed plan to the Commission outlining how the Respondent intends to comply with this provision.
39. The Respondent is ordered to not retaliate against the Complainant or any witness for the Complainant for their exercise of rights protected by the MEOO.
40. The Respondent is ordered to pay the Complainant's reasonable costs and expenses for bringing this complaint including the Complainant's reasonable attorney's fees.
41. The parties are ordered to confer for the purposes of determining the Complainant's reasonable costs and expenses including attorney's fees. If the parties are unable to stipulate to these costs and expenses within thirty (30) days of this Recommended Order becoming final, the Complainant is ordered to submit a petition for her costs and fees including supporting affidavits no later than forty-five (45) days from the date upon which this Recommended Order becomes final. The Respondent may respond to the Complainant's petition within twenty (20) days. The Complainant may reply to the Respondent's response within ten (10) days of its filing. The Hearing Examiner may determine that further proceedings are necessary.
42. It is ordered that the allegations relating to the Complainant's termination of employment are dismissed.

MEMORANDUM DECISION

The Complainant has pursued two allegations of discrimination with respect to her employment with the Respondent. First, the Complainant asserts that she was racially harassed by Walter "Sam" Wunschel, one of her supervisors and an Assistant Store Manager. This harassment came primarily in the form of unwelcomed questions and inquiries about the Complainant's hair and how her hair was styled. The second claim of discrimination is for the Complainant's constructive discharge from her employment. The Complainant alleges that the racially motivated harassment by Wunschel was so severe that the Complainant, as any reasonable person would, felt compelled to quit her employment rather than endure the harassment.

The Respondent denies both allegations of discrimination. The Respondent sets forth several different bases for its denial. Among these bases are allegations that the conduct of Wunschel was not racial in nature, that Wunschel was equally offensive to other employees not of the Respondent's race, that the Complainant had not followed the Respondent's policies or procedures for reporting Wunschel's conduct and that the Complainant voluntarily quit her employment for reasons other than her treatment by Wunschel.

On this record, there is no contention that the Complainant is not a member of the protected group "race." Equally there is no question that the Respondent is not an "employer" as that term is used in the Madison Equal Opportunities Ordinance (MEOO). At question are other elements of the prima facie case for both claims of discrimination.

For the claim of racially based harassment, the Complainant must demonstrate that she suffered conduct on the part of Wunschel such that it made her job more difficult to perform, that the conduct was unwelcome and that the reason for Wunschel's conduct was at least in part because of her race. It is not necessary for the Complainant to demonstrate that she informed other managers of Wunschel's conduct because as a supervisor, knowledge of Wunschel's conduct is imputed to the Respondent.

As noted above, Wunschel's conduct revolved around repeated questions about the Complainant's hair and how she styled her hair. Wunschel's first inquiry came in early October of 1994. This was about a month and a half after the Complainant and Wunschel began working together at Store 188. At first, the Complainant did not find Wunschel's questions offensive. However, as the questions were repeated and simple answers did not end the inquiries, the Complainant began to become more uncomfortable with Wunschel's questions. At some point not reflected in the record, the Complainant found Wunschel's questions harassing and she began to dread coming to work. Wunschel's attention to the Complainant's hair created a condition that impaired the Complainant's ability to work under conditions similar to those of other employees.

It is not clear on this record how frequently Wunschel would speak to the Complainant about her hair. Wunschel testified that he believed he asked the Complainant about her hair on five (5) or six (6) occasions. The Complainant testified that Wunschel asked something about her hair nearly every time they worked together. The truth is most likely somewhere in between these two extremes. The Hearing Examiner believes that Wunschel, who was not particularly concerned with his questions, is likely to have underestimated the frequency of his questions while the Complainant's emotional focus is likely to have resulted in a recollection that is too high in frequency. For purposes of supervisor instituted harassment, the Commission has taken a more strict line than other jurisdictions. The Commission will tolerate fewer incidents of harassment before imposing liability. Vance v. Eastex Packaging, Co., MEOC Case No. 20107 (Comm'n Dec. 08/29/85, Ex. Dec. 05/21/85), Guyton v. Rolfsmeyer, MEOC Case No. 20424 (Comm'n Dec. 07/18/86, Ex. Dec. 04/28/85), Stinson v. Bell Laboratory, MEOC Case No. 20762 (Comm'n Dec. 12/14/89, Ex. Dec. 03/17/89).

That Wunschel's interaction with the Complainant was unpleasant cannot really be disputed on this record. Owens, the only other African American employed at Store 188 during the relevant period, testified that the Complainant had spoken with her about Wunschel's conduct both while the Complainant and Owens were at work and on the telephone after work. DeKeyser testified that she approached the Complainant on at least two (2) occasions about Wunschel's conduct because of information passed on to her by other store employees. For Wunschel's conduct to have risen to the level of comment by other employees is a clear indication of a more than insignificant problem. DeKeyser's first contact with the Complainant about the rumors that DeKeyser had heard indicated that there was a problem between Wunschel and the Complainant, but that the Complainant believed that she could handle it. When rumors of Wunschel's mistreatment of the Complainant persisted, DeKeyser spoke to the Complainant a second time. This second conversation resulted in a meeting confirming the existence of a problem that was larger than the Complainant could handle on her own.

The Complainant testified that she had informed DeKeyser or Ziehli of her problems with Wunschel on several different occasions but had gotten no resolution of the problem. The Complainant's testimony, in this respect, is not credible. Owens testified that she had told the Complainant that the Complainant should complain to the Store Manager about Wunschel's conduct. Owens did not seem to believe that the Complainant had followed this advice. DeKeyser testified that she had initiated the contacts with the Complainant, not the other way around. The lack of credibility on this point does not overcome the extrinsic evidence that Wunschel's conduct towards the Complainant was harassing and, at a minimum, made the Complainant's work more difficult than for other employees not of her race.

At first blush, the Hearing Examiner found the notion of questions about one's hair unlikely to be sufficiently disruptive to form the foundation for a claim of racial harassment. However, upon reflection, the Hearing Examiner is convinced that depending upon the nature, frequency and manner of such questions, a reasonable person could find them to be disruptive to one's work and poisonous to

the work atmosphere. The record in this case indicates that Wunschel's questions had risen to this level.

The above findings also support the conclusion that Wunschel's conduct was unwelcomed by the Complainant. The Respondent produced no evidence to demonstrate that Wunschel's conduct was welcomed by the Complainant.

The most difficult question is whether Wunschel's conduct was racially motivated or not. If there is no racial component to Wunschel's behavior, then no matter how outrageous it was there can be no finding of discrimination.

The Complainant's belief that her race was the basis for Wunschel's questions has four (4) separate threads. First, the Complainant believes that as an African American, her hair is physically different in color and texture from that of Whites. The Complainant asserts that Wunschel, as a White, was interested in her hair because of her race and because of her racial specific characteristics. Second, the Complainant and Owens testified that they never observed Wunschel question any other employees about their hair or its style. Third, both the Complainant and Owens testified that Wunschel told them specifically to watch African American customers to make sure that the customers would not steal from the Respondent. Fourth, Owens testified that DeKeyser had told Owens that Wunschel did not like Blacks.

There is some support in the record for the proposition that Wunschel's interest was focused upon the Complainant's hair because of her race. Wunschel is by avocation a female impersonator. While this fact was apparently known to many of the employees at Store 188, it was not known by all. A fair reading of the record leads the Hearing Examiner to the conclusion that because of his avocation, Wunschel was particularly interested in the Complainant's hair because of her race. It seems likely that Wunschel wished to incorporate aspects of the Complainant's hair style and treatment into his avocation.

Wunschel's professional interest in the Complainant's hair, while annoying, might not lead to the conclusion that the Complainant was being racially harassed without more. Under most circumstances, once the Complainant objected to Wunschel's inquiries, he would have stopped. However, giving some credit to the Complainant's testimony that she had asked Wunschel to stop and he did not, the conduct takes on the tone of harassment.

Wunschel testified that the Complainant had only asked him to stop on one occasion and that was the same day that DeKeyser and Ziehli spoke to him about the same subject. The Hearing Examiner does not give much credit to this testimony. Wunschel's testimony tended to be vague and more than occasionally confrontational. He seemed to willfully misunderstand the questions of the Complainant's counsel. It is too convenient a story that Wunschel was notified twice on the same day that the Complainant found his questions about her hair objectionable.

While Wunschel was not employed by the Respondent at the time of hearing and, in fact, had been fired by the Respondent, he seemed inclined to protect the interests of the Respondent. He had enjoyed his employment with the Respondent because of the economic benefit of discounts on women's clothing and his access to a source of information about women's fashion and style. Additionally, Wunschel was understandably defensive and wished to portray himself in the best light possible.

The Complainant's testimony was far from a model of precision and clarity. At times she sought to have the Hearing Examiner accept her conclusory testimony without providing support of dates or witnesses. However, under the circumstances of this claim, the Complainant's testimony appears generally more consistent and more in line with the Hearing Examiner's experience of behavior than that of Wunschel. While the Hearing Examiner is reluctant to pronounce the Complainant's testimony as credible in all respects, he finds with respect to this matter that the Complainant is more credible than Wunschel.

The Complainant's claim that Wunschel was particularly interested in the Complainant's hair because of her race is bolstered by the testimony that Wunschel told the Complainant and Owens to watch African American customers to determine whether they were shoplifting. Both the Complainant and Owens testified that Wunschel had given them this directive. Wunschel testified about security procedures somewhat more broadly and did not credibly refute the specific allegation.

In general, Wunschel testified that the Respondent's store was prone to shoplifting because of its physical set up. He stated that all employees were told to watch for shoplifting. He also testified that he relied on an informal pipeline of information about specific individuals coming from other stores in the mall. He noted that this information did not come from any official source but reflected common experience or perception.

The Hearing Examiner is troubled by Wunschel's testimony. Reliance on "word of mouth" accounts relating to allegations of shoplifting and other illegal activity strikes the Hearing Examiner as a practice particularly prone to abuse and possible discrimination. In such a system there are no safeguards to protect from discriminatory attitudes, errors in judgment or just plain mistake. One only need look as far as the childhood game of "telephone" to observe the potential for misidentification. Such a system, because of its inaccuracy, will tend to fall prey to any individual's prejudices and stereotypes.

Based on Wunschel's willingness to rely on a system that seems likely to amplify discriminatory views of minority customers and the mutually corroborating testimony of the Complainant and Owens, the Hearing Examiner concludes that Wunschel did specifically ask the only two (2) African American employees to watch African American customers to protect against shoplifting. Such an approach seems to reflect, at best, some negative stereotypical view of African Americans to, at worst, a prejudicial view of African Americans as thieves.

These two (2) conclusions, in combination, lead the Hearing Examiner to the ultimate conclusion that the Complainant was racially harassed by Wunschel. Wunschel's conduct was not that of a hard-bitten racist who uses racial epithets or freely expresses his hate but was that of a person who is indifferent to the consequences of his own conduct. In this case, his conduct, which was triggered by some particular awareness of the Complainant's race, had the effect of making the Complainant's work place hostile and made it more difficult for the Complainant to perform her job. As earlier noted, as a managerial employee, Wunschel's actions are inextricably tied to the Respondent.

The other two (2) incidents pointed to by the Complainant in support of her harassment claim are not credibly demonstrated. Owens' statement that DeKeyser told Owens that Wunschel did not like Blacks is contradicted by DeKeyser. Under the circumstances of this complaint, there is little reason to believe Owens over DeKeyser. At the time of hearing, DeKeyser no longer worked for the Respondent and had left her position voluntarily. DeKeyser has no apparent reason to favor the Respondent with her testimony.

The fact that the Complainant and Owens did not observe Wunschel ask anyone else about their hair style or fashion, even if true, fails to carry any weight. The Complainant testified that she only worked two (2) or three (3) days per week and not always with Wunschel. There is no way for the Complainant to have known what Wunschel was doing on those occasions. Additionally, other witnesses such as Ducklow, Brendel and DeKeyser testified to Wunschel's interest in women's fashion as manifested by his questions of other employees.

The Complainant's second allegation, constructive discharge, requires the Hearing Examiner to find that the harassment being suffered by the Complainant was so intolerable that a reasonable person would feel compelled to quit his or her employment rather than to endure their treatment another day. On this record, the Hearing Examiner cannot reach this conclusion.

The Hearing Examiner believes that the circumstances of the Complainant's giving notice indicate that the Complainant was more likely motivated by dissatisfaction with her work schedule. On December 23, 1994, the Complainant had not quit her employment because of Wunschel's treatment of her. On December 24, 1994, the Complainant gives her notice that her last day will be December 31, 1994. The question becomes what triggered this apparent change in attitude. There was no testimony indicating that Wunschel had been particularly rude or nasty to the Complainant on either December 23 or 24 in the week immediately preceding the Complainant's giving of notice. The only incident of note was Ziehli's insistence that the Complainant work on December 24 when the Complainant had not been expecting to work. The Complainant's statement to DeKeyser at the time that she gave her notice to the effect that it was no longer fun at work supports the conclusion that the Complainant was not motivated by some incident involving Wunschel. It seems likely that the Complainant would have mentioned such an incident if her quit had resulted from Wunschel's treatment.

The Complainant's actions subsequent to her giving notice and her termination also indicate that she was not motivated by the level of her harassment. On December 24, 1994 when the Complainant would have been expected to ascertain her work schedule for the next week, she apparently took no steps to do so. She was in fact scheduled to work on December 26, 1994. She failed to appear for work and when she called on December 26 to determine when she was scheduled and was told that it was not clear, the Complainant took no steps to clarify her schedule until two (2) days later. On December 28, 1994, the Complainant stopped at the store to shop and to verify her schedule. This casual approach to her last week of work does not seem to be consistent with someone who has undergone a significant trauma at work.

Similarly, the Complainant's post-employment correspondence with the Respondent nowhere mentions being racially harassed. Instead, the Complainant seems to be more focused upon the general work atmosphere and particularly the work relationship between Ziehli and Wunschel. Had her racial harassment risen to a level to motivate her termination of her employment, the Hearing Examiner would expect that the Complainant would have brought that to the Respondent's attention in her January and February, 1995 letters.

Given the Hearing Examiner's resolution of the claim of constructive discharge, the issue of damages and remedy becomes less complicated. The Complainant has suffered no economic loss because of Wunschel's conduct. She did not lose work or have any change of pay. Sec. 9(c)2.b. of the ordinance requires, where there is discrimination found, to enter an order redressing the complainant's injuries and effectuating the purposes of the ordinance. In the past, the Commission has interpreted this to permit an award of monetary damages to compensate the complainant for the emotional distress, humiliation and embarrassment that frequently results from discrimination. Leatherberry v. GTE

Directories Sales Corp., Case No. 21124 (MEOC 04/14/93, Ex. Dec. 01/05/93), Nelson v. Weight Loss Clinic of America, Inc. et al., Case No. 20684 (Ex. Dec. 09/29/89), Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. 2/6/93, Ex. Dec. on fees 7/29/93, Ex. Dec. on fees 9/23/93). However, the Court of Appeals, since trial of this case, has determined, given the construction of the ordinance and state law in effect at the time of the circumstances giving rise to this action, that the Commission lacks the authority to make awards for emotional distress type injuries. State of Wisconsin ex rel. Caryl Sprague v. City of Madison and City of Madison Equal Opportunities Commission, Ann Hacklander-Ready and Moreen Rowe, 94-2983 (Ct. App. 09/26/96). Accordingly, the Hearing Examiner is left only with the ability to craft non-monetary remedial relief and to award attorney's fees and costs in order to assure that the Complainant is made as whole as can be under the circumstances

The Hearing Examiner has ordered that the Respondent cease and desist from its discriminatory practice and submit a plan demonstrating what steps the Respondent will take to assure compliance with the order. This is intended to protect any future African American employees from the type of conduct endured by the Complainant. This relief may come too late to help redress the wrongs done this Complainant but the finding of discrimination alone vindicates her rights. Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984). In order to protect the Complainant and any witness testifying on her behalf, the Hearing Examiner has ordered the Respondent not to retaliate against the Complainant or any witness or person who acted to support the Complainant's claim or who opposed a discrimination practice protected by the ordinance.

The Hearing Examiner has ordered the payment of costs and attorney's fees even though the Complainant has prevailed on one (1) of her two (2) claims and has received no monetary compensation. In order to encourage persons to file complaints when they believe they have been the victim of discrimination, they must believe that they will not have to shoulder the substantial financial burden if they fall short of some of their claims. Watkins, supra; Nelson, supra; Chung, supra. By taking her claim to an order finding that the Respondent had discriminated against her, the Complainant has accomplished much of her original goal. The Complainant should not be punished for the unanticipated change in the law relating to the Commission's ability to award emotional distress damages. To hold otherwise would have a significant chilling effect on complainants seeking to enforce their rights under the ordinance. If a dispute arises over the Complainant's reasonable costs and fees, the Hearing Examiner will hold any necessary supplementary proceedings.

The Hearing Examiner believes it appropriate to take a moment to discuss some aspects of this complaint that did not bear directly on the Hearing Examiner's conclusion. The Respondent in this case displayed an appalling lack of interest or concern over the working conditions at Store 188 and matters later brought to the attention of the Respondent's corporate office. The record indicates that Wunschel, in addition to his harassment of the Complainant, was rude to the point of cruelty to other employees and apparently customers. Wunschel suffered no repercussions for this behavior and there are indications that it may have been actually condoned by the District Manager, Marsha Hemmesch. It appears that Hemmesch may have witnessed Wunschel's taunting of another employee with a learning disability and took no action to reprimand him. The employee, Kari Bader, later quit even though she wished to remain working for the Respondent. It seems clear that Ziehli was told not to discipline Wunschel by Hemmesch for some reason not specified in this record.

Both the Complainant and Owens subsequent to their quitting the Respondent's employment wrote letters to the corporate office outlining problems at Store 188. In Owens' case, she specifically noted problems with racism at the store. The Respondent's approach was to pay polite lip service to these complaints by indicating that they would be investigated. The record makes it abundantly clear that no

reasonable investigation, if any at all, was undertaken. Certainly there is no record of the outcome of any investigation.

Andrew George, as one of the primary corporate contacts with responsibility for this complaint, displayed a striking lack of knowledge about the circumstances of this complaint, the obvious problems occurring at Store 188 or appropriate procedure regarding allegations of discrimination. His testimony had to be dragged out of him and questions most frequently resulted in an indication that he did not remember or didn't know matters that would normally be well within his sphere of knowledge. George was either one of the most skillful dissemblers or the most incompetent personnel officers to have appeared before the Hearing Examiner.

At a minimum, this complaint should cause the Respondent to perform a drastic review of its personnel and procedures.

Signed and dated this 20th day of August, 1997.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner