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

Ju Yang
235 S Musket Ridge Dr
Sun Prairie WI 53590

Complainant

vs.

American Family Insurance Group
6000 American Pkwy
Madison WI 53783

Respondent

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

CASE NO. 20112016

EEOC CASE NO. 26B201100021

The Commission Hearing Examiner, Clifford E. Blackwell, III, held a public hearing on the allegations of the above-captioned complaint on August 20, 2013, August 21, 2013 and August 28, 2013 in room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard, Madison, Wisconsin. The Complainant, Ju Yang, appeared in person and by her attorney Richard F. Rice of the law firm of Fox and Fox S.C. The Respondent, American Family Insurance Group, appeared by its corporate representative, Beth Boyer-Ryan, and by its attorney, Sarah A. Zylstra of the law firm of Boardman and Clark, LLP. Based upon the record of proceedings in this matter, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant is an Asian woman of Hmong, Laotian heritage.

2. The Respondent is a mutual insurance company that employs in excess of fifteen employees with its principal place of business at 6000 American Parkway, Madison, Wisconsin, and other facilities located across the United States including one designated as the East Regional Building in Madison located at 302 N. Walbridge. The Complainant worked at this location.

3. The Complainant began working for the Respondent in January, 1993, as a Mail Room Clerk. Over time, the Complainant received promotions until she achieved the position of Remittance Processor I, which was her position at all times relevant to this complaint.

4. The Complainant was married to Chue Yang. In 2006, the Complainant sought a Restraining Order in Dane County Circuit Court because of physical and mental abuse by Chue Yang. The Complainant also intended to seek a divorce from Chue Yang.

5. The Respondent, in the person of Ed Neve, the Respondent's Environment and Safety Officer, participated in the hearing on the Complainant's Restraining Order, expressing concern for the safety of the Complainant and other employees of the Respondent due to Mr. Yang's actions. The Respondent requested a provision in the Restraining Order to keep Mr. Yang away from contact with the Complainant on the Respondent's property.

6. In December of 2007, after a Restraining Order had been granted to the Complainant, the Complainant requested that the Restraining Order be lifted so that the Complainant and Mr. Yang could attempt reconciliation. In her request, the Complainant noted that the Hmong culture places an emphasis on support of the families in a dispute and that reconciliation is strongly encouraged by the Hmong culture.

7. The Restraining Order was extinguished. The Respondent did not hear of additional issues with the Complainant's marriage until August of 2010. At that time, the Complainant indicated to her supervisors that she was going to seek another Restraining Order and divorce from Chue Yang.

8. On August 25, 2010, the Complainant indicated that she was going to court for the Restraining Order and requested the Respondent to accommodate her request for time off. Though the notice was deemed short by the Respondent, it accommodated the Complainant's need for time off.

9. On August 25, 2010, the court granted the Complainant's request for a temporary Restraining Order, which was extended on September 3, 2010. Hearing on an injunction was set for November of 2010.

10. On August 26, 2010, Amanda Bell (one of the Complainant's supervisors), Coreen Oradei (from Human Resources and a member of the Respondent's Threat Assessment Team (TAT)), Ed Neve (Respondent's Environment and Safety Manager) and Rich Thruman (an Assets Protection Consultant) met with the Complainant to discuss her court proceedings. As a result of this discussion, the Complainant was placed on a paid leave of absence.

11. On September 9, 2010, the Complainant and Oradei spoke about the Complainant's returning to work from her paid leave.

12. On September 20, 2010, the Complainant returned to work. The Respondent required the Complainant to execute an agreement not to have contact with Mr. Yang on the Respondent's property and to notify the Respondent of any additional issues concerning Mr. Yang.

13. On September 22, 2010, the Complainant filed for divorce.

14. On October 18, 2010, the Complainant met with Oradei. Oradei requested that the Complainant not come to work the next day because of a scheduled hearing in the Complainant's divorce. On October 19, 2010, the Complainant called Oradei to report on the divorce proceedings. On October 20, 2010, the Respondent once again placed the Complainant on paid leave.

15. On November 8, 2010, the Complainant once again called Oradei and one of her supervisors, Sharon Ring, to report on the progress of the Complainant's divorce proceedings. The same day, Ring reminded the Complainant that she remained on paid leave. On November 15, 2010, Oradei called the Complainant to arrange for a meeting the next day.

16. On November 16, 2010, the Complainant met with Oradei and Ring. The Complainant was informed that her employment was being terminated due to concerns over workplace safety. The Complainant was offered a severance package which she declined to accept.

17. After the meeting on August 26, 2010, the Respondent retained Rolf Katzenstein to review the Complainant's situation and how it might affect the safety of other employees of the Respondent. Katzenstein expressed great concern for the possibility of violence from an abusive domestic relationship spreading to others in the workplace. Katzenstein recognized the importance of marriage and the role of the woman in some Asian cultures. While recognizing that there was this potential cultural component to the situation, Katzenstein felt that the threat of violence from a failing marriage with a history of physical abuse presented a serious risk to the Respondent.

18. Subsequent to the receipt and review of Katzenstein's report which was contained in two emails, the Respondent's Threat Assessment Team retained a second "expert," Dr. Lawrence Barton, to examine the implications of the Complainant's situation and the risk to the Respondent's workplace. Barton also was concerned about the potential for violence spreading to the Respondent's workplace from the Complainant's divorce. While Katzenstein seemed to be more concerned, Barton seemed to believe that the risk could be managed by allowing some time to pass after the divorce hearing before bringing the Complainant back into the workforce or by maintaining security while the Complainant returned to work.

19. The Respondent's Threat Assessment Team reviewed both Katzenstein's recommendations and those of Barton. The Team did not believe that Barton's recommendations for either continued paid leave or work from home or the expenditure of continued security costs were sustainable and determined that separation of the Complainant represented its best course of conduct.

20. When the Complainant's supervisor, Sharon Ring, was consulted about the Team's discussions and decision, she was uncomfortable because she viewed the action as being "unfair" to the Complainant. Ring was eventually convinced by the Team that there was an unacceptable risk of violence to the Respondent's workplace and concurred with the decision to terminate the Complainant. Ring stated that the Complainant's race did not play any part in the discussions or her decision or that of the Team.

21. The Complainant experienced emotional distress in the form of anxiety and problems sleeping subsequent to her termination. The Complainant also experienced a loss of income due to not being able to find comparable employment.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class "race" and is entitled to the protections of the Equal Opportunities Ordinance.

2. The Respondent is an employer within the meaning of the Equal Opportunities Ordinance and is subject to the requirements of that Ordinance.

3. The Respondent did not violate the provisions of the Ordinance when it terminated the employment of the Complainant.

4. While the Complainant experienced economic loss and emotional distress as a result of the Respondent's termination of her employment, these did not result from a violation of the Ordinance.

ORDER

The complaint is dismissed. The parties shall bear their own costs.

MEMORANDUM DECISION

The record in this matter demonstrates a case presented through the means of the indirect method. In the indirect method, the Complainant presents facts and testimony that along with the reasonable inferences and deductions to be made from that evidence demonstrate each of the elements of a *prima facie* claim of discrimination. This is the approach outlined in the McDonnell Douglas/Burdine burden-shifting paradigm. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Generally speaking, the *prima facie* claim consists of three elements: membership in a protected class, an adverse employment action, and some causal connection between the Complainant's membership in a protected class and the adverse action.

The present matter sets forth a claim of discrimination in employment on the basis of the Complainant's race. Essentially, the Complainant asserts that her employment was terminated because of the Respondent's perception of a high-level threat of workplace violence stemming from the Complainant's divorce. The Complainant contends that the perception of a high level of risk of workplace violence came from her Hmong heritage and that of her ex-husband, and the Hmong people's past war experience in support of American troops during the Viet Nam War.

The Respondent contends that it terminated the Complainant's employment because it was concerned that the past history of domestic violence experienced by the Complainant would represent an unacceptable risk that the violence might spread to the Respondent's workplace. The Respondent states that the Complainant's race did not play a part in the decision to terminate the Complainant's employment. The Respondent argues that its Threat Assessment Team and outside experts believed that situations of domestic abuse posed an unreasonable risk of violence extending to the workplace.

The record adequately demonstrates the first two elements of the general *prima facie* claim. There is no doubt that the Complainant is a member of the protected class "race." As a person who is Asian, the Complainant's race is different from the majority of other persons

employed by the Respondent. This point is not contested by the Respondent. The Hearing Examiner believes that the Complainant's claim might have been more precisely stated as one based upon "national origin/ancestry" rather than "race," but as neither party contests this point, the Hearing Examiner's views appear immaterial.

Similarly, there is no doubt that the Complainant has established that her termination from employment was an adverse employment action. Loss of one's employment is likely the ultimate in adverse employment actions. The Respondent does not contest this point.

Where the parties take different positions is on the question of whether there is evidence supporting the proposition that the Complainant was motivated, at least in part, by the Complainant's status as a member of the Asian race. It is on this point of causation where the majority of discrimination cases are resolved.

Before the Hearing Examiner addresses the arguments of the parties with respect to the issue of causation, a brief statement of the history of the Complainant's employment and divorce is necessary.

The Complainant began her employment with the Respondent in 1993 in the Mail Room. Over time, she advanced in the company until she achieved the position of Remittance Processor I. While the Complainant's employment was generally uneventful, she did have some problems meeting her data entry goals.

In 2006 and again in 2007, the Complainant's domestic life was becoming more difficult. In 2006, the Complainant began the process of obtaining a Restraining Order because of domestic violence she was experiencing from her husband, Chue Yang. However, in 2006, the Complainant withdrew her application for the Restraining Order and attempted a reconciliation with her husband.

In October of 2007, the Complainant informed the Respondent of her intention to seek a divorce and to once again file for a Restraining Order. The information provided by the Complainant indicated to the Respondent that Chue Yang had been following and observing the Complainant at work including making repeated phone calls to check on her presence. The Respondent was sufficiently concerned for the safety of the Complainant and its other workers that it participated in the hearing on the Complainant's request for a Restraining Order and sought a provision to exclude Chue Yang from the Respondent's premises.

In December of 2007, the Complainant sought to have the Restraining Order extinguished so that she and her husband could seek reconciliation. In her request to have the Restraining Order removed, the Complainant stated that her culture placed a high value on the family unit and working with the extended family to attempt to resolve differences in a troubled marriage. The Restraining Order was lifted.

There were no further issues with the Complainant's marriage affecting the Respondent until August of 2010. At that time, the Complainant informed the Respondent that she was once again going to seek a Restraining Order because of her husband's physical and mental abuse and that the Complainant would seek a final divorce from Chue Yang. The Complainant asked the Respondent for time off to attend meetings with her attorney and to attend court proceedings. The Respondent accommodated the Complainant's needs and schedule.

On or about August 25, 2010, the court held a hearing on Complainant's Restraining Order. On or about September 3, 2010, the court granted the Restraining Order. On or about August 26, 2010, the Respondent placed the Complainant on paid administrative leave.

On or about September 16, 2010, the Respondent wished to bring the Complainant back from administrative leave. As a condition of this recall, the Complainant was not to have contact with her husband on the Respondent's property and was to inform the Respondent of any events involving the Complainant and her husband. The Complainant was recalled from administrative leave on or about September 20, 2010. On or about September 22, 2010, the Complainant filed for divorce from her husband.

About the time of the Complainant's announcement that she was seeking a Restraining Order in August of 2010, the Respondent's Threat Assessment Team retained two outside experts to provide them with an assessment of risk and to make recommendations concerning the Complainant's employment. The two experts, Rolf Katzenstein of Farmington and Dr. Larry Barton, provided the Respondent with analyses of the situation as they saw it.

On or about October 20, 2010, the Respondent once again placed the Complainant on paid administrative leave because of pending proceedings in the Complainant's divorce. An initial hearing on custody and placement was held in early November, 2010. On or about November 8, 2010, the Complainant called the Respondent to inform her supervisors that she was to have custody of the children and the home and that her husband and his mother would have to find a new place to live. The Complainant remained on leave.

On November 15, 2010, Coreen Oradei called the Complainant to set up a meeting on November 16, 2010. At that meeting, Oradei and Sharon Ring, Complainant's immediate supervisor, met with the Complainant to terminate her employment and to offer a severance package. The Complainant did not sign an acknowledgement of her termination nor did she agree to accept the severance package offered to her.

It is within the context of this generalized series of events that the Complainant must find evidence or facts, inferences and deductions to demonstrate that the Respondent in terminating her employment was motivated, at least in part, by her Asian race. The only discussion of the Complainant's race, outside of questions by the attorneys, is contained in Respondent's Exhibit O, a September 9, 2010 email from Respondent's expert, Rolf Katzenstein, analyzing the threat level posed by the Yang's divorce proceedings to the Respondent's enterprise.

I quote from the Katzenstein email as follows:

> We note that in Asian cultures, divorce carries a more severe stigma than in most western cultures. There is pressure from both families to continue the marriage even with the known risk to the female spouse. Ms. Yang's statement that led the Court to issue the TRO and then the RO, suggests that Mr. Yang does not value his wife's humanity. Cultural differences notwithstanding, the outcome of escalating domestic abuse is well known to all.

It is this passage that the Complainant points to as showing awareness and concern over the Complainant's Asian heritage on the part of the Respondent. The Complainant's argument does not rest solely on Katzenstein's reference. The Complainant points to a different level of concern about the Complainant's situation from 2007 to 2010 and to the fact that the Complainant's immediate supervisor did not appear to support the decision to terminate the Complainant.

Essentially, the Complainant's brief and reply brief attack the reasons propounded by the Respondent for its decision to terminate the Complainant rather than to draw a causal link between the Complainant's race and her termination. In any claim of discrimination, it is the duty of the Complainant to put into evidence facts that demonstrate each element of their claim of discrimination. Unfortunately, from the perspective of the Hearing Examiner, the Complainant falls short in meeting her burden of proof on one of the critical elements of her claim.

The Complainant argues that the language in Katzenstein's emails shows knowledge and bias against the Complainant that helped to motivate the Respondent to terminate the Complainant. The Hearing Examiner, while acknowledging that Katzenstein's emails demonstrated knowledge of the Complainant's race, they do not indicate, in any way, that the Complainant or her situation was particularly dangerous to the Respondent due to the Complainant's race. Rather, they appear to note one factor of which the Respondent might wish to be aware in making determinations of how to address the Complainant's situation. It must be noted that the Complainant stated much the same sentiment in 2007 in her request to extinguish the Restraining Order that had been issued in 2006.

The Complainant's argument that the Respondent acted inconsistently between 2006/2007 and in 2010 appears to be true, but fails to demonstrate how that is linked with the Complainant's race. While the Respondent took a more aggressive position in supporting the Complainant in 2006/2007 going so far as to testify at the hearing on her Restraining Order and requesting language in the order to protect the Respondent's location, the fact that it did not do so again in 2010 does not appear causally linked with the Complainant's race or, at least, the Complainant does not demonstrate that connection.

The final general argument made by the Complainant to support a finding that her race was a motivating factor in the Respondent's decision is that her immediate supervisor, Sharon Ring, opposed the decision to terminate the Complainant on the grounds of fairness until she was pressured/convinced by the TAT to agree to the termination. While the Hearing Examiner is troubled by this circumstance, Ring's testimony did not indicate what the basis of her concerns over the fairness of the Complainant's termination were. For instance, it's not stated that Ring felt that the Complainant was being treated unfairly because of her race or because she was the victim of domestic abuse and as such was again being victimized by the Respondent's action. With contradictory possible explanations, the Hearing Examiner cannot choose between them without more in the record.

The Complainant also impliedly argues that the fact that its consultant Lawrence Barton only made suggestions that would allow the Complainant to remain employed suggests that the Respondent wanted to terminate the Complainant and was only going to take steps that furthered that goal. While the Hearing Examiner agrees with the Complainant's conclusion that the Respondent seemed to have decided that it wished to rid itself of what it perceived as

troubles surrounding the Complainant's situation, there is nothing in the record that convincingly ties that decision to the Complainant's race.

The Hearing Examiner agrees with the arguments presented in the Complainant's briefs and through the testimony presented at hearing that the Respondent overreacted to the Complainant's situation and circumstance and treated her unfairly, but the Hearing Examiner cannot conclude that this treatment was as a result of the Complainant's race.

Even if the Complainant has demonstrated that her race was a motivating factor in her termination, the Respondent has the opportunity to present evidence demonstrating that its decision to terminate the Complainant was based upon a legitimate, nondiscriminatory reason. That the Respondent believed that the Complainant's continued employment represented an unacceptable risk of violence to its other employees and its customers and visitors to the East Regional Building is such an explanation. Over time, the threat of workplace violence has increased and the number of incidents occurring nationwide provides stark reminders of the potential for violence arising from abusive relationships and the termination of those relationships. It is not imprudent or illegal for an employer to take reasonable steps to minimize or eliminate the risk of workplace violence, so long as it does not base its determination of risk on an impermissible basis.

If the Hearing Examiner reached this point in the analysis under the McDonnell Douglas/Burdine test, the Complainant could overcome the Respondent's presentation of a legitimate, nondiscriminatory explanation by presenting evidence to show that the Respondent's explanation was not credible or represented a pretext for an otherwise discriminatory motive. The Complainant primarily attempts to demonstrate that the Respondent had no reason to believe that the Complainant's ex-husband posed a threat of violence to the Complainant or to the workplace. As such, the Hearing Examiner sees this as an effort to cast doubt on the credibility of the Respondent's explanation.

When taking the record as a whole, the Hearing Examiner does not find the Respondent's explanation to lack credibility. It is clear that the Complainant experienced extreme abuse at the hand of her former husband. The fact that this violence was limited to sites off of the Respondent's property does not mean that it would necessarily stay off the Respondent's property or that it was imprudent for the Respondent to take steps to assure that it would not occur at its site in the future.

While the Hearing Examiner believes that the Respondent's actions were heartless and represented a somewhat paranoid view of the world and the risk and possible expense that retaining the Complainant might represent, the Hearing Examiner cannot conclude that the Respondent's stated reason was incredible or a pretext for discrimination.

The Complainant has, from the record presented in this matter, experienced substantial loss due to her status as a victim of domestic abuse. The Respondent's actions have compounded the Complainant's losses and exacerbated the damage done by domestic abuse. However, the Hearing Examiner concludes that those injuries, as severe as they have been did not result from discrimination on the basis of the Complainant's race.

Signed and dated this 19th day of January, 2017.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Richard F Rice
Jennifer S Mirus