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

Linda Laitinen-Schultz 407 N Main Fall River WI 53932 Complainant vs. TLC Wisconsin Laser Center 2810 City View Dr Ste 200 Madison WI 53704 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 19982001

This matter came on for hearing before Madison Equal Opportunities Commission Hearing Examiner Clifford E. Blackwell, III. The Complainant, Linda Laitinin-Schultz, appeared in person and by her attorney, Bret A. Petranech. The Respondent, TLC The Laser Center of Wisconsin, appeared by a corporate representative and by its attorney, Amy O. Bruchs. Based upon the record in this matter, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. Linda Laitinin-Schultz lives in Fall River, Wisconsin.
2. TLC Wisconsin Laser Center is located at 2810 City View Drive in Madison, Wisconsin.
3. Complainant has a congenital hip condition. She limps while walking and must use a cane for long walks. She cannot lift or carry objects weighing more than twenty-five (25) pounds.
4. Complainant began work with Respondent as a Patient Consultant/Receptionist in September 1996. Her starting salary was $18,700 per year.
5. Before beginning work, the Complainant informed the Respondent of her disability and weight restrictions on lifting.
6. The Complainant was recruited to the position by Dr. Charlotte Burns, the director of the Respondent's Madison clinic.
7. Burns knew of the Complainant's disability before the Complainant was hired.
8. Duane Morrison served as a regional manager for the Respondent.
9. During the Respondent's Madison clinic's grand opening, the Complainant helped conduct walking tours. Near the end of the evening, Morrison asked the Complainant if she needed to sit down to rest due to her visible limp.
10. After the opening, Dr. Goldman invited a few people out for dinner and drinks. The Complainant and some other Respondent employees were not invited.
11. On January 22, 1997, Morrison announced a Physician Relations Coordinator (PRC) position. This job involved marketing directly to doctors and instructing them as to the Respondent's capabilities. The job involved travel and lifting. The position paid $32,000 per year base salary and provided for bonuses and commissions.
12. Burns told the Complainant to fax a resume to Morrison if she was interested in the PRC position.
13. Burns told the Complainant that the PRC position involved car travel and lifting heavy objects.
14. Burns told the Complainant that she would have to prove that her "hips would not be a liability."
15. The Complainant was not hired for the PRC position.
16. It is not clear that the Complainant was less qualified than Stacy Nadler, the person who was hired for the position. The new hire had previous experience marketing to doctors and was married to a medical student. The Complainant had some marketing experience and had a good working relationship with most of the referring doctors with whom she had contact.
17. The Complainant received a performance evaluation on February 3, 1997.
18. Burns rated the Complainant as being average to excellent in every category.

19. At a performance evaluation meeting, Burns asked the Complainant if she was interested in positions other than the PRC position. The Complainant stated she was only interested in the PRC position.
20. A meeting was held on February 23, 1997. In attendance were the Complainant, Morrison, Burns and Cheryl Armstrong, the Respondent's office manager.
21. Burns voiced a fear that the Complainant would fall or have an accident if she got the PRC position.
22. Burns later told the Complainant not to get her hopes up regarding the PRC position.
23. Armstrong told Burns that she could not say that to the Complainant.
24. Burns again stated that the Complainant would have to prove that her disability would not be a liability to the Respondent if she were to get the PRC position.
25. The Complainant related Burns' comments to her husband, Scott Schultz, as they occurred.
26. Just before Morrison and Burns were to conduct interviews for the PRC position, the Complainant fell on ice and missed one week of work.
27. After one call to schedule an interview, the Respondent did not contact the Complainant or return her calls regarding an interview for the PRC position.
28. Upon her return to work, Burns informed the Complainant that the position was filled.
29. During the Complainant's missed week of work, a disabled temporary employee performed the Complainant's duties.
30. On March 10, 1997, Burns stated that she did not appreciate people using their handicaps to get jobs.
31. The Complainant called her husband after these comments.
32. On March 11, 1997, Burns told the Complainant that she had an attitude problem. The two had a closed-door meeting.
33. The Complainant had been intentionally avoiding speaking to Burns.
34. Burns told the Complainant that her March 10th comments were directed at the Complainant. Burns reasserted that she did not like handicapped people complaining about their handicaps.
35. The Complainant called her husband immediately after the meeting and informed him of the proceedings.
36. The Complainant told her cousin, Peggy Mickelson, about the meeting at lunch on the same day.
37. The meeting greatly upset the Complainant.
38. On March 12, 1997, the Complainant wrote a letter of resignation and gave it to Burns. The letter did not make reference to any claim or feelings of discrimination. The letter provided the Respondent with two weeks notice.
39. The Complainant spoke with Dr. Connors, a referring physician, via telephone. She related that her employment with the Respondent was ending. Dr. Connors then spoke with Burns. After the call, Burns informed the Complainant that if she informed others that she was leaving the Respondent, she would be terminated immediately.
40. The Complainant called her husband to relate her conversation with Burns.
41. The Complainant asked Lori Bandt, the then current Office Manager, for information regarding the Respondent. Bandt informed the Complainant that Burns had ordered her not to assist the Complainant with any information.
42. The Complainant left the workplace.
43. Bandt later called the Complainant's home and told the Complainant's husband that she was sorry about what had happened to her.
44. After leaving the Respondent, the Complainant experienced mood swings and depression.
45. The Complainant saw Dr. Samuel Poser on May 19, 1997 to get help for her depression.
46. Dr. Poser prescribed Effexor, an anti-depressant.
47. The Complainant worked at the Columbus Vision Center in a temporary capacity from May 7, 1997 to mid-June 1997.
48. In July 1997, the Complainant began taking classes in pursuit of a realtor's license.
49. In August 1997, Stark Company Realtors hired the Complainant.
50. The Complainant suffered emotional harm.
51. The Complainant lost wages as both a Patient Consultant/Receptionist and a Physician Relations Coordinator as a result of the Respondent's actions.
52. The Complainant is not entitled to bonuses for the period of time in question.

CONCLUSIONS OF LAW

53. The Complainant is a member of the protected class disability and is entitled to the protection of the ordinance.

54. The Respondent is an employer as defined by the ordinance and is subject to the provisions of the ordinance.
55. The Respondent violated the ordinance when it hired Stacy Nadler and did not hire the Complainant for the position of Physician Relations Coordinator in March of 1997.
56. The Respondent violated the ordinance by permitting the harassment of the Complainant on the basis of her disability and by causing her constructive discharge from employment.
57. The Complainant is entitled to be made whole as a result of the Respondent's violations of the ordinance.

ORDER

1. The Respondent shall pay to the Complainant her lost wages as a Patient Consultant/Receptionist and Physician Relations Coordinator in the amount of $8,720 for the period March 14, 1997 to July 1, 1997 less any usual payroll deductions and her wages at the Columbus Vision Center. This represents two weeks salary at the rate of the Patient Consultant/Receptionist and three months of salary as a Physician Relations Coordinator. This amount will not include any bonuses. Payment shall be made within thirty (30) days of this order's becoming final.
2. The Respondent shall pay prejudgment interest on the Complainant's lost wages at a rate to be agreed upon by the parties. Should the parties be unable to agree on an appropriate rate of interest within fifteen (15) days of this order's becoming final, The Hearing Examiner will schedule additional proceedings to fix an appropriate rate of interest.
3. The Respondent shall pay to the Complainant $15,000.00 to compensate her for the emotional distress, humiliation and embarrassment resulting from the Respondent's discrimination. Payment of this amount shall take place within thirty (30) days of this order's becoming final.
4. The Complainant shall submit a petition to the Hearing Examiner no later than forty-five (45) days of this order's becoming final setting forth her costs and fees including a reasonable attorney's fee for bringing of this action The Respondent may respond to the Complainant's petition within fifteen (15) days. The Complainant may reply to the Respondent's submission within ten (10) days. The Hearing Examiner may schedule further proceedings if necessary.

MEMORANDUM DECISION

The Complainant has a congenital hip condition that limits her ability to walk for long periods of time without assistance and prevents her from lifting and carrying items of greater than twenty-five (25) pounds. The Respondent is a provider of laser correction services with its headquarters located in Toronto, Canada. In the Fall of 1996, it opened a facility located in Madison, Wisconsin. The facility was under the directorship of Charlotte Burns. The opening of the Madison facility was supervised by the Respondent's Regional Manager, Duane Morrison.

In the summer of 1996, the Complainant worked as a Receptionist for the Columbus Vision Center. The Complainant met Dr. Charlotte Burns as Burns was making a recruitment visit to the Complainant's office.

Burns was the Director of the TLC office located in Madison which was scheduled to open during the fall of that year. Burns was visiting local vision centers and optometrist's offices to acquaint them with the services to be offered by the Respondent and to seek such office's cooperation in the form of referrals to the Respondent.

During one of these visits, Burns met the Complainant and indicated that she should consider applying for work with the Respondent. As the Complainant's employment was only part-time, when the Complainant saw an advertisement for the Respondent, she applied for a position as Receptionist/Patient Consultant. After interviews with the office Manager, Cheryl Armstrong, and Burns, the Complainant was hired.

The Complainant's employment began in September of 1996. The Respondent's clinic was not scheduled to open until sometime in the following month. During the Complainant's first weeks of employment she assisted with the preparation of office materials and systems and answered the telephone and gave the public information about the Respondent and its opening. The Complainant and other employees had some difficulty performing their own jobs and keeping up with the press of telephone inquiries. Other members of the Respondent's staff occasionally had to assist the Complainant and in turn, the Complainant assisted other employees when she was able.

In October, 1996, the Respondent held an open house for local optometrists and other professionals from which the Respondent hoped to receive referrals. The entire staff including the Complainant were present to welcome guests, provide information and to give tours of the facility. By the end of the day, the Complainant was tired and her limp was more noticeable. Morrison, who was present for the open house, observed the Complainant and suggested that she sit down for a while to rest.

At the end of the open house, one of the Respondent's doctors, Dr. Goldman, organized a post-event gathering at a restaurant for drinks and dinner. The Complainant was not invited.

The Complainant contends that these two incidents represent the first steps down a path of harassment leading to her constructive discharge from employment.

The testimony at hearing, taken as a whole, does not support the Complainant's contention that Morrison played a substantial role in the events leading to her termination. Also, the record does not support the contention that there was evidence of discrimination as early as the open house. While the Complainant took Morrison's expression of concern as evidence that he was embarrassed for the clinic to have the Complainant limping around, nothing in the record indicates that he was doing anything more than showing concern for an employee who had worked hard during the day and appeared to be tired. It is possible that the Complainant's perception of Morrison's conduct was tainted by statements made at a later date by Burns that Burns attributed to Morrison. The Hearing Examiner will address these statements more fully later in this decision, however, the Hearing Examiner finds nothing to support the Complainant's beliefs about Morrison's discriminatory intent.

With respect to the post-open house dinner, the Complainant again believed that this was an event organized by Morrison and that Morrison intentionally excluded her for some discriminatory purpose. The record demonstrates that Dr. Goldman, not Morrison organized the outing and that several other employees were not invited and did not attend the dinner. The Complainant's testimony that she believed Morrison to have been the organizer and that she was the only person excluded tends to depict the Complainant as someone who is ready to believe that any comment that she considers unfavorable must result from some discriminatory animus. While it appears that the Complainant's judgment may be correct in some instances, it is not with respect to Morrison.

While the Complainant's troubles may not have begun with the open house, the record demonstrates that as time progressed, one can see a pattern of increasing intolerance leading to several confrontations that caused the Complainant to leave her employment with the Respondent. Little of note occurred with respect to the Complainant's employment until the Respondent announced in January, 1997 that it would be creating a new position to interact with and better market it services to local optometrists. This new position was to be called a Physician Relations Coordinator. This position differed in emphasis from that held by the Complainant from the beginning of her employment. As a Receptionist/Patient Consultant, the Complainant's focus was on helping customers and the general public with inquiries and with services in connection with their treatment. The Physicians Relations Coordinator position was intended to better serve the optometrists who had referred patients to the Respondent and to better market the services of the Respondent to existing referring doctors and potential sources of referrals.

The Complainant first came aware of the Respondent's new position on or around January 22, 1997. An announcement of the new position was circulated around the Respondent's office. The Complainant was interested in the position because it paid more than her current position and because it represented a chance to utilize other skills and to do more in the area of marketing. The Complainant made Dr. Burns aware of her interest and asked how she could be considered. Burns indicated that once a full position description was available, the Complainant should send the District Office her statement of interest and a copy of her resume. Burns from this point on cautioned the Complainant not to get her hopes up for the position.

Burns specifically indicated that the Complainant would have to show Morrison that the Complainant could do the job and that she would not represent a liability for the Respondent. Burns on other occasions indicated that Morrison was concerned that the Complainant could slip and injure herself while traveling to trade shows or optometrists' offices.

Burns' statements did not quell the Complainant's enthusiasm for the potential promotion. She kept expressing her interest and inquiring about when the position would be posted. When the position was posted, the Complainant promptly submitted her statement of interest and her resume. Interviews for the position were

finally scheduled for early March, 1997. Unfortunately, the weekend prior to the interviews, the Complainant slipped and injured herself in a grocery store parking lot. She needed to stay home and rest and to be seen by a specialist in the Milwaukee area. The Complainant called the Respondent to make sure that Burns and Morrison, the individuals conducting the interviews, knew that the Complainant would be available for an interview even though she could not come to work for a few days.

The Complainant had to travel to Milwaukee to be seen by a physician. As fate would have it, that was the same day that the Respondent wished the Complainant to interview for the PRC position. The Respondent called the Complainant's home number and received no answer. The Complainant after becoming aware of the telephone message attempted to reach Burns and Morrison to reschedule an interview. Ultimately, the Complainant was never interviewed for the PRC position. Burns and Morrison interviewed other candidates and decided to hire Stacy Nadler. Burns and Morrison made their decision without first interviewing the Complainant. Burns and Morrison indicate that they felt that other candidates were sufficiently more qualified for the position that they did not require an interview of the Complainant to reach their conclusion.

The Complainant contends that she was not hired for the PRC position because of a discriminatory perception of her hip condition. She points to Burns statements about Morrison's alleged concerns, the pattern of what she considers to be less favorable treatment and to the fact that she was not interviewed for the position even though she had made it known that she could and would be available. She also contends that she was at least as qualified for the position as any of the other candidates.

The Respondent asserts that the Complainant had not performed as well as she might have in her current position and that other candidates were better qualified for the position than the Complainant. Specifically the Respondent points to the fact that Nadler, the person hired, was married to a medical student and might be more comfortable dealing with doctor's and that she had more pertinent employment experience.

There is appeal in the Respondent's claim that Nadler was more qualified than the Complainant especially because of some professional marketing experience. The contention that Nadler might be more qualified because her husband was a medical student and therefore Nadler might be more comfortable dealing with doctors is almost offensive. The Complainant had worked at the Columbus Vision Center without problems. With the exception of one or two of the Respondents referring doctors, the Complainant seems to have had good working relations with most of the doctors with whom she came in contact.

What is more difficult for the Hearing Examiner to assess is the quality of the Complainant's past marketing experience as opposed to that of Nadler. In most cases, the Hearing Examiner would bow to the Respondent's explanation of two applicants relative experience where it is as close as the facts seem to make this one. However, the record as a whole casts doubt on the Respondent's evaluation.

The Hearing Examiner finds that the record shows that Burns engaged in a pattern of conduct beginning with the Complainant's expression of interest in the PRC position to discourage and prevent the Complainant from obtaining that position. It is not clear why Burns originally recruited the Complainant to come to work for the Respondent only to discourage the Complainant's advancement. However, there is no doubt in the Hearing Examiner's mind that Burns did not want the Complainant to have the PRC position.

Burns discouraged the Complainant by attempting to indicate that Morrison had doubts about the Complainant's suitability for the position because of the Complainant's hip disability. The Hearing Examiner is convinced that the record fails to demonstrate that Morrison held such views. Rather Burns wished to deflect blame from herself to Morrison for the concerns that Burns actually harbored.

Most telling in the record are Burns' efforts to steer the Complainant to a less publicly visible position at the time of the Complainant's evaluation. Though Burns generally gave the Complainant favorable ratings, Burns attempted to discourage the Complainant's enthusiasm for the PRC position and asked if there might be some other position that the Complainant might be interested in.

Also, Burns' statements at a meeting in February, 1997 demonstrate that Burns seemed obsessed with the Complainant's interest in the PRC position. The meeting was attended by the Complainant, Morrison, Burns and the Office Manager, Armstrong. Despite Armstrong's telling Burns that Burns' statements about the potential liability to the Respondent that the Complainant might cause in the PRC position, Burns persisted.

Given the clear record of obstruction by Burns, the Respondent's evaluation that Nadler was more qualified than the Complainant must be questioned. Though Burns was joined in the selection process by Morrison, there is little in the record to show that Morrison was willing to override Burns' stated concerns where the position would be working directly for Burns. It seems apparent to the Hearing Examiner that Burns' feelings tainted the whole hiring process.

On this record, the Hearing Examiner concludes that the Respondent did not offer the Complainant the position of PRC in March of 1997 because of the Complainant's disability. It did not provide her with the opportunity to explain how her hip condition might or might not affect her ability to perform the necessary functions of the job. In this way, the Respondent discriminated against the Complainant on the basis of her disability directly or because of a perception that her disability might prevent her from performing the job. Either way, the Hearing Examiner finds that the Respondent has violated the ordinance.

The Hearing Examiner now turns to the Complainant's claim that she was harassed by Burns to such an extent that she was constructively terminated from her employment.

Once the Complainant returned from her leave subsequent to her slip and fall, she was very disheartened that she had not been selected for the position of PRC. She avoided Burns and tried to keep to herself. On or about March 10, 1997, Burns called the Complainant in to her office and told the Complainant that the Complainant had a bad attitude and that it had to stop. When the Complainant sat down to discuss her feelings with Burns, Burns indicated that the temporary who had covered the Complainant's position in her absence had repeatedly made reference to her own disability and that she wanted to come to work at the Respondent's. Burns told the Complainant that she (Burns) felt there were enough people with disabilities and that Burns did not like people using a disability to get ahead. The Complainant was extremely offended by Burns' remarks and promptly left Burns' office. She called her husband to express her shock and humiliation.

The next day, the Complainant confronted Burns about the discussion in her office. The Complainant told Burns that she was very offended by Burns comments and that the Complainant felt as if Burns meant that the Complainant had attempted to use her disability to gain an unfair advantage. Burns indicated that the Complainant could take the comments personally if she wished. The Complainant understood Burns to be saying that Burns had meant that the Complainant had attempted to take advantage of her disability.

This conversation again upset the Complainant. She left the office to attempt to regain her composure. Instead, the Complainant in discussion with others determined that she could not return to work for the Respondent while Burns was her manager.

The Complainant wrote a letter of resignation putting a shiny gloss on her employment and not indicating that she have been a victim of harassment or discrimination. She did follow up this letter with an attempt to contact the Respondent's corporate offices to lodge a formal complaint against Burns. Burns had apparently told the Office Manager, Lori Bandt, not to provide the Complainant with any material or information.

There are several important issues surrounding this claim. First, did the events occur and second, if the events occurred, do they represent either actionable harassment or are sufficient to support a claim of constructive discharge.

With respect to the question of whether the events occurred, it is to some extent a question of who is more credible since there were no witnesses to the conversations between Burns and the Complainant. The Complainant's credibility was somewhat shaken "by her allegations relating to the opening of the clinic." However, Burns' testimony at the hearing did not instill great confidence in the Hearing Examiner with respect to her veracity.

The Complainant's version of events is bolstered some by the testimony of her cousin and her husband about her statements and her state of emotional distress immediately or soon after the conversations with Burns. While testimony of close relatives is often subject to question about bias, on this record, the Hearing Examiner finds no reason to doubt the witnesses about the basics of their conversations with the Complainant. While just because a witness testifies that he or she was told something by another, it doesn't necessarily make the original statement true. However, to the extent that the subsequent testimony remain essentially consistent without necessarily being identical, one can find that the testimony is useful in determining credibility.

As indicated above, Burns did not impress the Hearing Examiner with her veracity. Her testimony was given in a somewhat detached manner that relied on the passage of time to support her claim that she did not remember individual incidents. She also made a general denial that she would ever say such a thing.

The statements and conduct of Burns in January and February of 1997 also shake her credibility. Armstrong's testimony and the clear indication that the Complainant was prepared to use others to shadow her own feelings cast substantial doubt on her credibility.

Taking the record as a whole, the Hearing Examiner finds that the Complainant's version of the conversations with Burns is more likely than that of Burns. This finding is based upon the Hearing Examiner's determination that the Complainant's testimony, in this particular instance, is corroborated by the testimony of other witnesses.

The next question is whether these interactions over two or three days represent sufficient harassment to support the Complainant's actions in terminating her employment. Certainly, the Complainant was very offended given her reaction as stated in her testimony and that presented by those who saw her soon after the events. While on the state and federal levels, harassment must be of a prolonged and patently offensive nature, the Commission has taken a much more critical view of harassment claims. Guyton v. Rolfsmmeyer, MEOC Case No. 20424 (Comm. Dec. 07/18/86, Ex. Dec. 04/28/86), Vance v. Eastex Packaging, MEOC Case No. 20107 (Ex. Dec. 05/21/85). There is no magic number of incidents necessary to create the type of intolerable working environment that can cause a reasonable person to find that he or she cannot face continued employment where attitudes and actions create such a harassing environment. One must look at the situation and judge as best as one can whether the circumstances would lead a reasonable person to quit rather than to endure the conditions. Harris v. Forklift Sys., 510 U.S. 17 (1993).

Given the openness with which Burns described the person who had temporarily replaced the Complainant, the manner in which Burns indicated that she had believed that the Complainant had attempted to use her disability to gain advantages in the work environment and, Burns' efforts to dissuade the Complainant from seeking the PRC position, the Hearing Examiner finds that a reasonable person could feel compelled to quit or constructively terminate his or her employment. Such hostility and insensitivity would reasonably create such friction and doubt with the Respondent's managers, an employee would have no real option but to leave employment. The fact that the comments were made by not only a manager, but the ultimate manager at the work location creates an even more compelling claim for constructive discharge. Accordingly, the Hearing Examiner concludes that the Respondent violated the ordinance by creating a work environment so hostile on the basis of handicap/disability that the Complainant was forced to constructively discharge herself from employment. The next question is one of remedy.

The Commission has routinely made awards in employment cases that include orders for reinstatement, front pay where reinstatement is not possible, back pay, money for emotional distress and other forms of economic and non-economic damages. The Hearing Examiner will address each category of damages in turn.

Given the nature of the claims upon which the Complainant has prevailed, it is inappropriate to order reinstatement. The Complainant was forced to leave employment as a result of the actions of Dr. Burns. It would not be sensible to return the Complainant to that same environment. To the extent that Burns is no longer a local manager for the Respondent, it might be possible to consider reinstatement. However, Burns is still employed with the Respondent and her influence or potential for contact with the Complainant is not clear. Given the hard feelings generated by this claim, the Hearing Examiner will not order the Complainant reinstated to employment with the Respondent.

Where reinstatement is not possible, front pay may be an acceptable alternative. Front pay is appropriate to replace the Complainant's lost wages for some prospective period during which the Complainant is attempting to mitigate her damages by securing roughly equivalent employment or while seeking participating in education to prepare her for such employment. Given this record, an award of front pay is not appropriate.

At the time of hearing, the Complainant had fully replaced her damages. She had undergone training and was employed as a realtor with the likelihood of being able to more than replace her lost wages. In general, the more appropriate measure of damages for the period of time would be in the form of back pay. The Hearing Examiner will discuss the limitations of back pay in the next section.

The Complainant contends that her back pay award should be calculated on the basis of her potential salary as a Physician Relations Coordinator. The back pay must be calculated on the basis of the Patient Consultant/receptionist position and the PRC position for a limited period of time.

The next question is what period of time should the back pay award cover? Once injured in a discrimination suit, a prevailing Complainant must demonstrate that she or he has taken reasonable steps to mitigate or replace the lost wages. If one is not reasonably able to replace his or her lost wages, back pay can cover a period of time for retraining.

The parties disagree on the period to be covered by an award of back pay.

The Complainant left employment with the Respondent on March 12, 1997. On or about May 7, 1997, the Complainant began a temporary position with the Columbus Vision Center. There is nothing in the record to indicate that the Complainant have an option to significantly increase her hours at the Columbus Vision Center. However, there is little in the record to show the steps taken by the Complainant to obtain alternative employment. She indicated that she wanted time to consider what she wanted to do next. She also stated that she wanted to take some time off in the summer to be with her children.

The Complainant began to take classes in July to become a realtor. She completed her studies in August and then went to work for a local realty company. By the end of 1997, the Complainant was making in excess of what she had been making with the Respondent.

The Respondent contends that this record discloses a failure to mitigate her wage loss. Given this record the Hearing Examiner agrees.

The Hearing Examiner finds that the Complainant should be entitled to her wage loss from the period beginning on the day that she left employment with the Respondent until July 1, 1997. The Hearing Examiner is convinced by the testimony that the Complainant wished to spend time off during the summer with her children that she was not seriously attempting to replace the income lost by her constructive discharge.

The Complainant also testified that she had committed to the Columbus Vision Center to stay with them during another worker's maternity leave. While the Complainant's loyalty to the Columbus Vision Center is commendable, the Complainant was under an obligation to seek employment to reduce her income loss. A certain period of time during her employment at the Columbus Vision Center is compensable because it was replacing some income. However, as the period of her employment continued without effort to supplement the wage loss, the Complainant runs afoul of her duty to mitigate her damages.

The issue of the Complainant's decision to attend classes to become a realtor presents a problem for the Hearing Examiner. On one hand, one should be encouraged to take steps to improve his or her earning capacity. However, the Respondent should not necessarily be required to pay for the Complainant's decision to change careers. If the record demonstrated that the Complainant had been unsuccessfully seeking employment or could not reasonably find substantially equivalent employment, the Hearing Examiner would support the Complainant's career change and the education necessary to achieve it. However, the Complainant's voluntary decision to change careers should not be compensable. Gardner v. Wal-Mart Vision Center, MEOC Case No. 22637 (Ex. Dec. on liability 03/06/01).

The Hearing Examiner uses July 1, 1997 as the cut off point for back wages because that is approximately the end of the school year and equates to the period that the Complainant wished to spend with her children. Also, the Complainant was working at the Columbus Vision Center until approximately June 15, 1997.

The record indicates that the Complainant would have worked approximately two weeks more at her position of Patient Consultant/Receptionist at her annual rate of $18,700. It appears, given Nadler's starting date, that the Complainant could have expected to start the PRC position on or about April 1, 1997. That would give the Complainant three months of earnings at the PRC base salary of $32,000.

Due to the loss of the opportunity costs of those wages, the Hearing Examiner will award the Complainant prejudgment interest on that amount running from June 15, 1997 until the date that amount is paid. The record is insufficient to fix the percentage of the interest rate. Previously, the Commission has used 5 percent per annum. However, economic conditions have changed and it seems likely that a different percentage rate may

be more appropriate. If the parties are unable to agree upon an appropriate percentage rate, the Hearing Examiner will hold further limited proceedings to set this rate.

The Complainant also asks for bonuses and commissions to be earned in the position of PRC. She uses John Hunter, successor to Nadler, to attempt to create a record supporting an award. The Hearing Examiner finds that the amount requested by the Complainant is far too speculative to support any award. There is no telling how the Complainant may have actually performed in the PRC position. She may have chosen to move on as Nadler did before bonuses and commissions could be earned. There is no basis on this record for comparing Hunter's performance with that of the Complainant's possible performance. Accordingly, the Hearing Examiner declines to make an award for this amount. The Hearing Examiner does believe that such amounts could be awardable, but finds that the Complainant failed to lay an adequate foundation.

The Complainant asks the Hearing Examiner to make a substantial award of damages to compensate her for her emotional distress. The Respondent asserts that the Complainant has not proven what amount would be appropriate. Setting an appropriate award of damages for emotional distress is one of the most difficult phases of a complaint. The record speaks eloquently to the hurt and injury done to the Complainant as a result of Burns statements to her. Testimony at hearing was tearful and was corroborated by that of her husband and others. She did seek medical treatment and was prescribed an anti-depressant.

Complicating this picture for the Hearing Examiner is the fact that the Complainant was able to consider her employment options and wrote a positive non-accusatory letter of resignation. She was able to sufficiently make her way through daily activities and to run for a seat on the Fall River School Board. One would suspect that a person suffering through a major depression would not be able to conduct a political campaign for elected office.

The Complainant attempts to draw comparisons between her claim and that in Leatherberry v. GTE Directory Sales, MEOC Case No. 21124 (Comm. Dec. 04/14/93, Ex. Dec. 01/05/93). Leatherberry holds the distinction of having the largest award for emotional distress, $25,000. In Leatherberry, a long-term employee of GTE Directory Sales endured several instances of racially or ethnically offensive language and threats for her future advancement made to her by her direct supervisor. Once she attempted to complain to higher managers, her trust in the system established by the company was betrayed.

While the cases bear some similarities, The Hearing Examiner cannot conclude that the Complainant in the present case, at least on the record depicted by her counsel, experienced the same or a greater level of emotional distress as did the complainant in Leatherberry. In Leatherberry, the Complainant had worked her way up through the Respondent's employment structure over a longer period of time than the Complainant in the present case. In Leatherberry, the Complainant had much more time invested in her career with the Respondent and she had followed the Respondent's complaint procedures only to have had the Respondent's higher managers fail to support her. In the present case, the Complainant had less time with the Respondent and failed to utilize any internal procedures that may have been available to her to secure correction of the situation.

That is not to say that the Hearing Examiner considers that the Complainant's discomfort and injury is insubstantial. On this record, the Hearing Examiner finds that an award of $15,000 for emotional distress is appropriate. This represents the second largest award made by the Hearing Examiner. It reflects a balance between the Complainant's emotional testimony and the indication that she was able to muster sufficient personal reserves to run for an elective office and to take steps to substantially change her career path.

The Commission regularly awards a prevailing Complainant his or her costs of bringing the complaint including a reasonable, actual attorney's fee. The Hearing Examiner knows of no reason why this component of the "make whole" remedy should not be made in this matter. It is a critical element of such a remedy that the prevailing Complainant not be made to expend his or her own resources in bringing such a complaint. Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d482 (1984), Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec on attorney's fees 07/29/93 and 09/23/93).

Signed and dated this 1st day of July, 2003.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner