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

Marilyn Rosin 6378 Stockwell Dr Marshall WI 53559 Complainant vs. Riteway Leasing Company 4212 Robertson Rd Madison WI 53714 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER ON ATTORNEY'S FEES Case No. 19982206

The Recommended Order in this matter on October 3, 2001 awarded the Complainant, Marilyn Rosin, her costs and reasonable attorney's fees for prevailing in her action against the Respondent, Rite-Way Leasing Company. On April 23, 2002, the Commission affirmed the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order, including the award of attorney's fees. On May 7, 2002, the Complainant submitted a petition for costs and fees as directed by the Hearing Examiner. The Respondent expressed concern for the amount of the fees and costs in letters to the Hearing Examiner, culminating in a May 23, 2002 formal response to the Complainant's petition for costs and fees.

The Hearing Examiner has received no briefs or other information from the Complainant regarding costs and fees beyond the initial petition. The Hearing Examiner has considered the argument presented by the Respondent and now makes the following:

RECOMMENDED FINDINGS OF FACT

1. On October 9, 1998, the Complainant, Marilyn Rosin, filed a complaint alleging discrimination due to a disability. She alleged that the Respondent, Rite-Way Leasing Company, effectively terminated her due to a perceived mental or physical disability. The Complainant also alleged that the Respondent failed to accommodate her disability.
2. On January 20, 1999, an Initial Determination was issued, finding probable cause to believe that the Respondent discriminated against the Complainant based on her disability. The Initial Determination found no probable cause to believe that the Respondent failed to accommodate her disability.
3. The Complainant appealed the finding of no probable cause. Her appeal was denied on November 9, 1999 by the Hearing Examiner and on April 13, 2000 by the Commission.
4. After conciliation failed, the probable cause finding was brought to hearing before the Hearing Examiner.
5. On October 3, 2001, the Hearing Examiner found that the Respondent had discriminated against the Complainant on the basis of disability and entered a recommended order awarding the Complainant her costs and reasonable attorney's fees in the proceeding. On April 22, 2002, after appeals by both parties, the Commission affirmed the Hearing Examiner's decision and order.
6. On May 7, 2002, the Complainant filed a petition for costs and attorney's fees, together with affidavits executed by her attorney, Douglas J. Phebus.
7. The Complainant has incurred certain costs in connection with the proceeding, which are as follows:

    a. Photocopying costs in the amount of $99.80
    b. Expert costs in the amount of $250.00
    c. Delivery costs in the amount of $49.65
    d. Deposition/Statement costs in the amount of $445.60
    e. Legal research costs in the amount of $27.26
    f. Medical records costs in the amount of $106.68

8. The Complainant's attorney, Douglas J. Phebus, is currently employed by the firm of Lawton and Cates, S.C. Phebus first represented the Complainant in this matter while he was employed by Action Law, S.C.
9. The usual and customary fee charged by Douglas J. Phebus to his individual clients is $150.00 per hour.
10. The Complainant has filed an itemized bill that reflects that her attorney expended a total of 85.75 hours representing the client.
11. Of the 85.75 hours, 5.0 hours were not reasonably necessary to bring this claim to its conclusion.

CONCLUSIONS OF LAW

12. A prevailing complainant in proceedings before the Madison Equal Opportunities Commission is entitled to recover costs, including reasonable attorney's fees.
13. It is appropriate to use an attorney's customary billing rate when calculating reasonable attorney's fees where the fees are reasonably necessary and not duplicative of other work.
14. An attorney's customary rate for billing is rebuttably presumed to be a reasonable rate before the Commission.
15. A prevailing Complainant is entitled to the payment of costs, including a reasonable attorney's fee, even when the complainant does not prevail on all issues properly before the Commission.

ORDER

16. The Respondent is ordered to pay the Complainant's attorney's fees in the amount of $12,112.50 within thirty (30) days of this order's becoming final.
17. The Respondent is ordered to pay the Complainant's costs in the amount of $978.99 within thirty (30) days of this order's becoming final.

MEMORANDUM DECISION

This case features two objections to a petition for attorney's fees and costs. The Respondent objects to fees related to an unsuccessful appeal of an Initial Determination and specific fees related to arguments that did not succeed at the Hearing Examiner review stage.

There is a rebuttable presumption that an attorney's regular billing rate is reasonable and it is the Respondent's burden to demonstrate that it is not, given the attorney's experience and the rates of area lawyers with similar experience. The Respondent does not contest the Complainant's hourly rate. Once the Complainant offers an itemized statement of time expended in her petition, it is the Respondent's burden to make a particularized showing that the billing is wholly inaccurate or that specific items are not reasonably necessary or duplicative of other work.

For purposes of this decision the Hearing Examiner will break up the long history of this litigation into three parts. All expenditures made by the Complainant from the filing of the complaint up to the Initial Determination were reasonable and non-duplicative. Work expended on issues to which there was a finding of no probable cause at this stage are necessary because of the tentative nature of the untried claims.

The Initial Determination, issued on January 20, 1999, determined that there was probable cause to believe that the Complainant had been discriminated against on the basis of disability and no probable cause to believe that the Respondent failed to accommodate a disability. The Investigator/Conciliator found that the Complainant had difficulty resulting from a broken sternum and had also been perceived by the Respondent as "having a physical or mental disability."

From the Initial Determination, up to the Pre-Trial Conference held on July 24, 2000, the Complainant devoted some of her time preparing an appeal of the no probable cause portion of the Initial Determination. Items listed on the petition for fees and costs from this time period include:

1-28-99	Prepare and mail appeal for substantial weight review	1.0
2-10-99	Review notice of appeal	0.5
5-4-99	Letter to the Hearing Examiner	0.5

10-29-99	Telephone conference with EOC	0.25
11-10-99	Review decision	0.25
11-11-99	Correspondence to EOC	0.25
1-3-00	Brief to EOC	2.00
4-20-00	Review of EOC decision	0.25
	Total	5.00

These fees were not incurred towards an issue that proceeded to hearing. Therefore, the Hearing Examiner concludes that it would be inappropriate to reward the Complainant and penalize the Respondent for work on an issue that was not properly before the Commission. However, many other costs not isolated above appear to be closely related to pursuit of the issues for which a hearing was actually held. Those efforts are awardable. Accordingly, the 85.75 hours claimed in the Complainant's petition are hereby reduced to 80.75 hours.

The final period examined here extends from the July 24, 2000 Pre-Hearing Conference to the present. The Complainant's expenditures during this period went towards the hearing and Commission appeal of the alleged discrimination due to disability. The Hearing Examiner determined that the Respondent had not discriminated against the Complainant in connection with her broken sternum.

The Hearing Examiner did find that the Respondent discriminated against the Complainant with regard to a perceived disability. The perceived disability related to a loss-of-consciousness incident the Complainant suffered at the workplace. The Complainant was found unconscious in a break room and was instructed to get medical clearance regarding the fainting before a reinstatement could occur. The Commission affirmed the Hearing Examiner's findings.

The Respondent objects to certain fees from this time period because it feels that it should not have to pay for lines of argument that ultimately proved unsuccessful. The Respondent does not argue that some fees and costs were unreasonable. The Hearing Examiner notes that the Respondent seems not to argue that the Complainant's costs and fees for her unsuccessful appeal to the Commission should also be denied. This lack of consistency on the part of the Respondent casts doubt on its argument about Dr. Daniel Icenogle's expert testimony.

The primary argument advanced by the Complainant to the Hearing Examiner centered around discrimination based on her prior sternum injury. To this end, the Complainant obtained expert testimony from Dr. Icenogle and paid to acquire medical records. The Respondent asks that the Complainant be denied payment for fees and costs for items directly related to the unsuccessful sternum argument. The Respondent does not provide a listing of which specific fees and costs are unreasonable.

To answer whether or not the Hearing Examiner may accept the Respondent's objection requires an examination of the purpose of attorney's fees as a remedy. The Ordinance has a clear intent to encourage lay citizens to resolve discriminatory injuries through the Commission's process. Rose v. Marquip, MEOC Case No. 21026 (Ex. Dec. 6/29/89). The Ordinance requires a make-whole remedy. Teich v. Center for Prevention and Intervention, MEOC Case No. 20002153 (Ex. Dec. 6/12/02).

These ideas combine to form an overarching principle that the Commission encourages victims of discrimination to secure attorneys by allowing attorney's fees and costs. The history of the Commission shows that a significant portion of Complainants lack the financial power needed to hire attorneys, making awards of attorney's fees a vital ingredient to pursuing claims. While attorneys are not necessary in the complaint review process, any judicial action may be fraught with hazards that attorneys are better equipped to handle. Schenk v. City of Madison (St. Mary's), No. 02-CV-885 (Dane Cty. Cir. Ct. 6/19/02).

In effect, the Respondent seeks to pay only for the fees that directly pertain to the Complainant's arguments that the Hearing Examiner determined were dispositive of liability. In the Hearing Examiner's view, using this standard would severely limit complainants' ability to secure top-quality representation. Complainants would be less likely to allege discrimination due to multiple protected classes or offer arguments in the alternative for fear that fees and costs spent on alternatives could not be recovered. This scenario would cause attorneys to

refuse to represent complainants before the Commission or not represent complainants to the best of their ability.

The public good does not benefit by a system that encourages complaints to be brought only when complainants are sure they will prevail. Once a claim has made it past the probable cause stage, a Complainant should not be unreasonably hampered in pursuing all of her potential claims by prospective application of some likelihood-of-success equation.

In addition, a request to remove specific expenditures from a petition for costs is difficult to grant in this instance because a substantial portion of the work needed to prove unsuccessful arguments is reasonably necessary to prevail on issues that succeeded. The Hearing Examiner is not able to determine precisely what percentage of events that contributed to both arguments are successful or unsuccessful. It is not the Hearing Examiner's job alone to make a determination of what spending is unreasonable. The burden clearly rests on the Respondent to identify with a fair degree of specificity those items that it challenges and present reasons for the challenges.

In hindsight, the Hearing Examiner is somewhat in agreement with the Respondent concerning the necessity of Dr. Icenogle's testimony. It is tempting to second-guess litigation decisions made months before when reviewing a petition for fees. It is to temper that tendency towards Monday-morning quarterbacking that the burden rests so heavily on the Respondent to challenge petitions for fees and costs with specificity. Still, the Hearing Examiner finds that the Respondent failed to carry its burden of proof as to rebutting specific expenditures as being unreasonable.

The Ordinance demands a make whole remedy. If the Complainant did not recover the full amount of fees and costs due, the Complainant would be in a position of owing their attorney money. The Complainant would not be in as good a position as she would have been absent the discriminatory actions. The standard for awarding attorney's fees is whether the outcome of the case achieved the purpose of bringing the initial claim. Sprague v. Rowe & Hacklander-Ready, MEOC Case No. 1462 (Comm. Dec. on Atty. Fees 2/9/98), Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. on Atty. Fees 7/29/93 and 9/23/93), Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984). There is no question here that the Complainant did prevail on a significant issue, that is, showing that the Respondent discriminated against her based on her membership in the protected class "disability." The Complainant is entitled to be made whole for achieving the purpose of her initial claim.

Signed and dated this 1st day of July, 2002.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

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

Marilyn Rosin 6378 Stockwell Dr Marshall WI 53559 Complainant vs. Riteway Leasing Company 4212 Robertson Rd Madison WI 53714 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 19982206

This matter came before Madison Equal Opportunities Hearing Examiner Clifford E. Blackwell, III, on November 1 and 2, 2000. The Complainant, Marilyn Rosin, appeared by her attorneys Lawton & Cates, S.C., by Douglas J. Phebus. The Respondent, Rite-Way Leasing, appeared by its attorney Walter R. Stewart. On the basis of evidence and briefs submitted, the Hearing Examiner now makes his Recommended Findings of Fact, Conclusions of Law and Order, as follows:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Marilyn Rosin ("Rosin") resides in Marshall, Wisconsin.
2. The Respondent, Rite-Way Leasing Company ("Rite-Way"), is a corporation principally located in Madison, Wisconsin at 4212 Robertson Road that provides school bus transportation services.
3. In 1985, the Complainant was involved in a motor vehicle accident that resulted in injuries to her sternum.
4. On August 9, 1996, the Complainant applied for a position as a Bus Aide with the Respondent. The duties of a Bus Aide generally include the supervision and assistance of children on the school bus.
5. The Complainant earned $13 per bus route, or $39 a day.
6. The Respondent hired the Complainant for the 1996-97 school year. The Complainant was assigned to two (2) routes with kindergarten through fifth-grade children and one (1) route with four year-old children.
7. The Respondent rehired the Complainant for the 1997-98 school year for the same position and duties.
8. The Respondent rehired the Complainant for the 1998-99 school year. Before the school year began, the Complainant filled out a form requesting that she be given only one (1) four year-old route and two (2) routes with older children. The Complainant desired this route arrangement because she occasionally found lifting young children difficult.
9. On September 9, 1998, the Complainant was assigned to two (2) four year-olds routes and one (1) older children route.
10. On September 10, 1998, the Complainant requested that she be assigned to work two (2) older children routes and one (1) four year-old route.
11. On September 11, 1998, the Complainant expressed dissatisfaction with the routes to her direct supervisor, Roy Feltz.
12. In the early part of the 1998-99 school year, the Respondent received a complaint from an unidentified parent about the Complainant's behavior on the school bus.
13. On September 17, 1998, a meeting was held to address the Complainant's concerns and the Respondent's concerns regarding the Complainant's performance. The meeting was attended by the Complainant, one of the owners, Nancy Kiefer, the Personnel Director, Rick Johnson, and the Complainant's Supervisor, Roy Feltz. No changes were made as a result of this meeting.
14. The Complainant met privately with Mark Lichte, the principal of Frank Allis School. Lichte asked the Respondent to place the Complainant on routes serving the school because of her exemplary work.
15. On September 21, 1998, the Complainant's physician, Dr. Susan Padberg, wrote a letter setting forth work restrictions for the Complainant due to sternum pain. The restrictions involved not working more than one (1) four year-old route per day. The letter did not indicate the Complainant had a physical disability, merely physical discomfort. The letter did not indicate that the Complainant had a condition that would substantially limit a life activity.
16. On Friday October 2, 1998, the Complainant presented her work restrictions to Roy Feltz as set forth in the September 21 Padberg letter. The Complainant was told that a meeting on Tuesday, October 6, would be held to address the restrictions.
17. On October 5, 1998, while in the Respondent's driver break room, the Complainant lost consciousness and collapsed to the floor. Paramedics were called, but upon regaining consciousness, Rosin declined medical attention.
18. On October 6, 1998, the Respondent instructed the Complainant to obtain medical clearance addressing the loss of consciousness. Later that day, the Complainant provided a statement from Dr. Benjamin Atkinson restating work restrictions related to her sternum. The statement did not address the loss of consciousness.
19. At a meeting on October 6, 1998, the Complainant was placed on family medical leave by the Respondent and was told that the Respondent would review her job status in thirty (30) days.
20. On October 7, 1998, a letter from Dr. Padberg was given to the Respondent. Dr. Padberg indicated that the Complainant had a clean bill of health and the loss of consciousness on October 5 would not affect her work.
21. The Respondent took no action with respect to Dr. Padberg's October 7 letter and made no effort to recall the Complainant or contact her.

22. The Respondent had knowledge of the October 7 letter's content before the date set for the thirty (30) day job status review meeting.
23. The Complainant filed a claim for unemployment compensation.
24. The Complainant applied for jobs after being placed on family medical leave.
25. The Complainant did not find a job.
26. The last date of the Complainant's job search was February 24, 1999.

CONCLUSIONS OF LAW

27. The Complainant, Marilyn Rosin, is an individual entitled to the protection of the City of Madison Equal Opportunities Ordinance, Sec. 3.23, M.G.O. by virtue of being regarded as having a disability.
28. The Respondent, Rite-Way Leasing Company, is an employer subject to Sec. 3.23(2)(m), M.G.O.
29. The Respondent did not have knowledge of or regard the Complainant as having a physical disability as applicable under Sec. 3.23(2)(m), M.G.O.
30. The Respondent did regard Complainant as having a mental impairment as applicable under Sec. 3.23 (2)(m), M.G.O.
31. The Respondent violated Sec. 3.23, M.G.O., by discriminating against the Complainant in effectively terminating her because it regarded her as having a mental impairment.
32. The Complainant reasonably mitigated damages until February 24, 1999.

ORDER

1. The Respondent is ordered to cease discrimination against the Complainant.
2. The Respondent is ordered to pay the Complainant at the rate of $39 per day for days in which the Complainant did not work up to the date of February 24, 1999, no later than thirty (30) days from this order becoming final.
3. The Respondent is ordered to pay interest on all amounts due pursuant to Order No. 2. Said interest shall be computed at a rate of five percent (5%) per annum from the time the amount became due or would have become due had she been reemployed on October 7, 1998, no later than thirty (30) days from this order becoming final.
4. The Complainant shall submit a petition for her reasonable costs and fees including a reasonable attorney's fee incurred in connection with this complaint. The petition shall be filed with the Commission within fifteen (15) days of this order's becoming final. The Respondent shall have fifteen (15) days from receipt of the petition to respond. The Complainant shall have ten (10) days to reply.

MEMORANDUM DECISION

As with most cases of discrimination today, the Complainant lacks direct evidence of discrimination. The courts and administrative agencies must examine the record for indirect evidence of discrimination. In this approach, the Commission utilizes the burden-shifting paradigm set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed 2d 207 (1981). In this approach, the Complainant must first set forth evidence that by itself is sufficient to demonstrate a prima facie claim of discrimination. If the Complainant meets this initial burden, the burden shifts to the Respondent to present a legitimate, nondiscriminatory reason for its action. If the Respondent presents such an explanation for its action, the burden once again shifts, this time back to the Complainant to demonstrate that the reason proffered by the Respondent is either not credible or is otherwise a pretext for discrimination. The ultimate burden of proof remains with the Complainant to demonstrate each and every element of discrimination including the entitlement to damages and the amount of damages.

The elements of a prima facie case include membership in a protected class, a sufficiently adverse employment action, and reason to believe the action occurred as a result of membership in the protected class. As part of establishing a prima facie case of discrimination based on disability, a Complainant must show membership in a protected class by satisfying the definition of disability for purposes of the Madison Equal Opportunity Ordinance[1]. On this record, the Hearing Examiner must discuss both physical and mental impairments. With regard to her physical limitation, the Complainant fails to satisfy the first prong of the test, and as such, does not establish a prima facie case. The Complainant fails to show that her injury is a substantial limitation on a major life activity. The Complainant offers the September 21 letter from Dr. Padberg and testimony from the Complainant herself as proof of physical disability. However, the letter only indicates that the Complainant experiences some pain, it does not identify anything leading to a disability. While the

Hearing Examiner has no doubts that the Complainant's injury was painful, proving that she has a disability requires more and may require the testimony of a medical expert. Busto v. Wisconsin Power and Light, MEOC Case No. 20945 (Comm. Dec. 3/14/90, Ex. Dec. 9/25/89), aff'd by State ex rel. Elizabeth Busto v. MEOC and WP&L, 90 CV 1594 (Dane County Cir. Ct. 1/9/91).

The Complainant argues that the Respondent had knowledge of or did regard her as having a physical disability. However, the Complainant has not sufficiently satisfied her burden of proof by showing that she adequately informed the Respondent of her need for work restrictions prior to October 2, 1998. Both parties offer differing testimony regarding when mention of a sternum injury took place. The Complainant claims that on the 11th and 18th of September, she informed the Respondent of her desire to cease working the four year-old routes due to chronic chest pain exacerbated by the occasional need to lift children into their seats. The Respondent denies this, claiming that the Complainant talked about work issues such as higher pay, without mentioning the chest pain. Without delving too deeply into credibility, the Commission has recognized that mere mention of a possible lifting-related injury is not enough to establish knowledge of a disability. Wopat v. St. Vincent de Paul Society, MEOC Case No. 2551 (Ex. Dec. 10/7/80).

The Respondent did not regard the Complainant as having a physical disability. By the Complainant's own admission, she did not seek medical treatment or restrictions related to her chest pain and her work until September 21, 1998. In addition, the Complainant had worked for two (2) years without incident or mention of chest pains, indicating that the Complainant did not find the injury to be substantially limiting. None of the Complainant's route preference forms mention any problems with pain. At most, the Respondent might have known that several years before, the Complainant had been in an accident. But that knowledge does not rise to the level of regarding the Complainant as having a physical disability. Id.

There is no dispute that the Respondent had knowledge of the Complainant's injury and work restrictions on Friday, October 2, 1998, when the Complainant delivered Dr. Padberg's letter to her supervisor. The Respondent did not immediately shift routes, but did schedule a meeting after the intervening weekend on Tuesday, October 6, to speak with the Complainant about her restrictions and incorporate them into the schedule. Ostensibly, this shows a good faith effort, albeit not an immediate one, to make changes to keep an experienced employee. It is not indicative of steps being taken to terminate an employee based on knowledge of her disability. As a result, the Hearing Examiner finds no discrimination based on an actual or perceived disability relating to the Complainant's sternum injury.

The Complainant does establish a prima facie case for discrimination based on mental disability. After the Complainant's loss of consciousness, the Respondent required her to receive medical clearance to work again. The Respondent was fearful that the Complainant might suddenly lose consciousness while on the bus, thereby endangering herself and children. On the same day, the Respondent placed the Complainant on indefinite family leave, promising to revisit the situation in thirty (30) days. The Complainant brought in a letter from her physician the next day, giving her full clearance to work again. The Respondent claims to have actually seen the letter anytime up to a month after October 7. The accuracy of that statement does not change the fact that the Respondent had full knowledge that the Complainant was ready and able to return to work, but did nothing to retain her.

The Respondent, by virtue of requiring the Complainant to obtain medical clearance to work, regarded the Complainant as possessing some kind of mental impairment. The Respondent also believed that this mental impairment limited the Complainant's ability to fulfill her duties as a Bus Aide, in that she posed a risk to children's safety. The Respondent's constructive termination of the Complainant is a sufficiently adverse action, paired with its failure to follow through on its pledge to examine the situation after a thirty (30) day period. The Respondent failed to recall the Complainant because it regarded the Complainant as having a mental impairment.

With the Complainant's initial burden satisfied, the burden shifts to the Respondent to articulate a legitimate, nondiscriminatory reason for the action. The Respondent satisfies its burden by articulating a legitimate reason. The Respondent advocates that safety concerns for the Complainant and the children on the bus were the reason for the placement of the Complainant on indefinite leave. It is unnecessary for the Hearing Examiner to question the importance of safety in the workplace, especially when the job entails public contact and children.

When the Respondent satisfies its burden of producing a legitimate reason for an adverse action, the Complainant may still prevail if she can show the reason is pretextual or is not credible. When looking at the

actions Respondent took following the Complainant's loss of consciousness, it is apparent that the Respondent evidenced no desire to retain the Complainant. The Respondent did not allow the Complainant to resume working on October 6, 1998, until the Complainant had produced medical clearance concerning the blackout. The Respondent placed the Complainant on family medical leave, with a re-evaluation to take place in thirty (30) days. The perceived mental disability was the sole factor in the medical leave decision.

On October 7, the Complainant presented the Respondent with a clearing statement that should have triggered a duty to respond. The Respondent received the clearing statement from Dr. Padberg indicating that the Complainant had no mental disability and was fully cleared to work before the thirty (30) day re-evaluation. When Dr. Padberg cleared the Complainant to work, the Respondent took no action. No re-evaluation was held and no contact with the Complainant was ever made. The Respondent's non-response demonstrates the Respondent's bad faith and pretext. The bad faith overcomes the inference of reasonableness of the Respondent's proffer, and therefore it is clear that on this record, the Respondent was illegally motivated by regarding the Complainant to have had a mental impairment when it constructively terminated her.

Once discrimination is found, the Hearing Examiner must determine what will make the Complainant whole again. Possible awards of damages may come in the form of back pay, emotional damages, out-of-expense damages, costs, and attorney's fees. In certain circumstances, some damage may be presumed, but it is generally the Complainant's burden to establish each element of damages. In this case, the Complainant claims to have lost back pay in the amount of thirty-nine dollars ($39) per day. While the Complainant might normally receive lost wages for a reasonable period, the Respondent may reduce the entitlement to the award by demonstrating that the Complainant has failed to mitigate damages.

In this matter, the burden shifts to the employer to show that a complainant did not use due diligence in seeking other employment to mitigate the wages lost due to the employer's discrimination. Steinbring v. Oakwood Lutheran Home, MEOC Case No. 2763 (Comm. Dec. 3/10/83, Ex. Dec. 2/11/82). It is an established tenet of law that the victim of a tort has a duty to mitigate damages. Savino v. C.P. Hall, 199 F.3d 925, 934-35 (7th Cir. 1999). The doctrine of avoidable consequences, in this case, required the Complainant to make reasonable efforts to seek employment after being effectively terminated by the Respondent.

It is the Respondent's burden to raise the issue of insufficient mitigation of damages and to demonstrate a lack of mitigation on the part of the Complainant. The Respondent argues that the Complainant, by filing for unemployment benefits on October 9, 1998, had no desire to be reinstated or to mitigate damages. This action does not eradicate the Respondent's obligation to follow through on its medical leave procedure. There is no evidence on this record that shows the Respondent had any plans or desire to give the Complainant the opportunity to prove her capability at a thirty (30) day hearing or any other time. The Complainant did try to mitigate her damages by seeking other employment. The record reflects multiple instances where the Complainant applied for comparable jobs through February 24, 1999, but was denied each time.

The Complainant offers documents showing the results of some job searching and testimony from herself and her husband indicating she has sought out jobs from October 1998 to the present. The Hearing Examiner finds it unlikely that the Complainant has pursued a job search with reasonable diligence for the entire period of her unemployment. A line must be drawn beyond which a terminated employee may not receive awarded pay, as the employee should eventually have found comparable employment. Williams v. Pharmacia, Inc., 137 F.3d 944, 954 (7th Cir. 1997). That being the case, the Hearing Examiner must examine the record to determine at what point due diligence ceased. On this record, the last evidence of a job search comes on February 24, 1999. As a result, an award of back pay will extend only up to that date.

Victims of employment discrimination are entitled to recover back pay, pre-judgment interest[2], and costs and attorneys fees[3]. As discussed above, the Complainant is entitled to back pay up to February 24, 1999. The Complainant would be doubly awarded if she were allowed to keep the money she received in the form of unemployment benefits. To remedy this, the Complainant is directed to reimburse the state unemployment compensation fund for the employment compensation she received from October 9, 1998 to February 24, 1999.

The ordinance permits damages for emotional distress. In this instance, the best evidence that the Complainant suffered emotional damages is that coming from the Complainant herself. Competent evidence of a Complainant's emotional distress may be established by her testimony alone. Chomicki v. Wettekind, 128

Wis.2d 188, 201, 381 N.W.2d 561, 568 (Ct. App. 1985) (quoting Crawford v. Garnier, 719 F.2d 1317, 1324 (7th Cir. 1983). As a result, the Hearing Examiner must determine if the record indicates competent evidence of the Complainant's emotional distress. On this record, the Hearing Examiner is unable to locate any evidence that would establish emotional damages. The Hearing Examiner has no doubt that the Complainant, like most discrimination victims, suffered some degree of emotional distress. However, the Hearing Examiner may not make an award for this component of damages unless the record clearly supports that award. Mere references to anguish or being upset fail to provide the Hearing Examiner with sufficient support to make an award of emotional distress damages.

When discrimination is found, the Complainant is entitled to an award of costs and attorney's fees where appropriate. Watkins v. LIRC, 117 Wis.2d 753, 345 N.W.2d 482 (1984). The award of attorney's fees exists to help restore a prevailing complainant to the same position she would have been in had no discrimination requiring expenses to vindicate her rights ever took place. Id. Even where the amount of the other damages is small or nonexistent, the awarding of fees and costs represents a vindication of a complainant's position against discrimination. Rogers v. New Horizons, MEOC Case No. 19982232 (Ex. Dec. 8/10/99), Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. on liability 2/10/93, on attorney's fees 7/29/93 and 9/23/93)

The Hearing Examiner will not order reinstatement, given that the Complainant has failed to show substantial recent efforts in obtaining a job and appears to be content with her employment status as it stands.

Signed and dated this 3rd day of October, 2001.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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[1]Madison General Ordinance Sec. 3.23(2)(m) defines disability, in part, as:
1. A physical or mental impairment which substantially limits one or more of such person's major life activities; or
2. A record of having such an impairment; or
3. Being regarded as having such an impairment.

[2]Hilgers v. Laboratory Consulting Inc., Nos. 86-CV-6488 and 86-CV-6673, Dane Co. Circ. Ct. (8/24/87); aff'd, 148 Wis. 2d 946, 437 N.W. 2d 234, (Wis. Ct. App 1988).

[3]MEOC Rule 17