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

Lori Teich 1810 Fordem Ave #2 Madison, WI 53704 Complainant vs. Center for Prevention & Intervention 2000 Fordem Ave Madison, WI 53704 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON ATTORNEY'S FEES Case No. 20002153

This matter came before Madison Equal Opportunities Hearing Examiner Clifford E. Blackwell, III, on September 18 and 19 and December 21, 2001. The Complainant, Lori A. Teich, appeared in person and by her attorneys Krekeler Law Office, S.C., by Gard Strother. The Respondent, Center for Prevention and Intervention, appeared by its attorneys Brown and LaCounte, LLP, by Alysia E. LaCounte and Steven Levine, Executive Director of the Respondent. The Hearing Examiner issued a Recommended Order in this matter on June 12, 2002, ordering the prevailing Complainant to submit a petition for costs and fees including a reasonable attorney's fee to be paid by the Respondent. On the basis of the petition submitted by the Complainant and the Hearing Examiner's own review, the Hearing Examiner now makes his Recommended Findings of Fact, Conclusions of Law and Order, as follows:

RECOMMENDED FINDINGS OF FACT

1. The Hearing Examiner issued a Recommended Order on June 12, 2002. The Recommended Order provided that the Complainant was to submit a petition for costs and fees including a reasonable attorney's fee incurred in connection with her complaint. The petition was to have been filed within 15 days of the order's becoming final. The order became final on July 3, 2002 when the Respondent did not appeal the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order.
2. The Complainant filed a timely petition on July 12, 2002.
3. The Complainant's counsel, Gard Strother, has a usual and customary billing rate of $200.00 per hour.
4. The Complainant's counsel performed 112.05 hours of work in connection with this proceeding, incurring fees of $21,626.00
5. The Complainant's counsel made disbursements in the amount of $663.88.
6. The Complainant's counsel has received $1,385.55 in prior payments relating to securing the testimony of Joanne Pritchett.
7. The total amount due to the Complainant's attorney is $20,904.33.
8. The Recommended Order provided that the Respondent had 15 days from the receipt of the petition to respond with objections.
9. The Hearing Examiner has received no objections from the Respondent as of the undersigned date.

CONCLUSIONS OF LAW

10. An attorney's usual and customary billing rate is presumed to be reasonable.
11. The fees and costs as presented in the Complainant's petition for costs and fees including a reasonable attorney's fee and costs appear to be reasonably necessary and nonduplicative.
12. An award of reasonable fees and costs is necessary to make the Complainant whole and to further the purposes of the Madison Equal Opportunities Ordinance.

ORDER

1. The Respondent is ordered to pay the Complainant $663.88 for costs less the amount appropriately credited from the prior payments of $1,385.55.
2. The Respondent is ordered to pay the Complainant $21,626.00 for attorney's fees less the amount appropriately credited from the prior payments of $1,385.55.
3. The total of costs and fees paid by the Respondent is not to exceed $20,904.33

MEMORANDUM DECISION

This is a case concerning alleged employment discrimination and termination due to a perceived disability. The Hearing Examiner issued a Recommended Findings of Fact, Conclusions of Law and Order in favor of the Complainant on June 12, 2002. The Order provided that the Respondent was to pay the Complainant's costs and reasonable attorney's fees. The Complainant submitted a timely petition for costs and fees including a reasonable attorney's fee. The Respondent did not lodge any objections. The Hearing Examiner has reviewed the petition's costs and found them to be reasonably necessary and nonduplicative. In order to make the Complainant whole and to further the purposes of the Ordinance, the Hearing Examiner will now direct the Respondent to pay the Complainant in accordance with the Recommended Order.

Signed and dated this 5th day of August, 2002.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

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This matter came before Madison Equal Opportunities Hearing Examiner Clifford E. Blackwell, III, on September 18 and 19 and December 21, 2001. The Complainant, Lori A. Teich, appeared in person and by her attorneys, Krekeler Law Office, S.C., by Gard Strother. The Respondent, Center for Prevention and Intervention, appeared by its attorneys Brown and LaCounte, LLP, by Alysia E. LaCounte and Steven Levine, Executive Director of the Respondent. On the basis of evidence 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, Lori A. Teich, resides in Madison, Wisconsin.
2. The Respondent, Center for Prevention and Intervention, is a non-profit organization that seeks to prevent drug and alcohol abuse in local at-risk youth, with its principal place of business at 2000 Fordem Ave., Madison, Wisconsin. The Respondent employs clerical, administrative and professional staff at this and other locations.

3. The Complainant was hired and began working for the Respondent on June 29, 2000. The Complainant had been scheduled to begin employment the following week, but started on June 29 to accommodate the needs of the Respondent.
4. The Respondent's policy was that new hires needed to complete a screening for alcohol and drug use and complete a psychological evaluation before being permitted to begin employment.
5. The Respondent requested the Complainant to begin work before her scheduled starting date despite not having completed the tests on the presumption that she would later do so and because it desperately needed her to begin working.
6. At the time of the Complainant's hire, the Respondent was in the process of adopting a policy that each employee should have a valid driver's license.
7. Steven Levine is the Executive Director of the Respondent.
8. Jessica Kachur was an Office Manager for the Respondent, operating as Levine's primary assistant in running the office on a day-to-day basis.
9. The Complainant worked as a full-time administrative assistant to the Executive Director. Though she was to work with the Executive Director, the Complainant worked most closely with Kachur as Office Manager.
10. The Complainant's rate of pay at hire was $11.00 per hour.
11. The Respondent contracted with QTI Human Resources to manage its human resources operations. This included conducting required screenings, completing required paperwork and consulting and delivering suspensions and terminations.
12. QTI's primary source of information regarding the Respondent's employees was Kachur. QTI did not perform independent verification of information provided by Kachur or any of the Respondent's other employees.
13. The Complainant was to make an appointment for a psychological evaluation shortly after commencing her employment. However, she asked to reschedule the evaluation to July 13, 2000.
14. The rescheduled psychological evaluation, per Respondent's request, was postponed to August 10, 2000.
15. General Medical Laboratories conducted drug testing for the Respondent.
16. The Complainant completed the requirement for a drug/alcohol screening the weekend of July 22-23, 2000. The Respondent received the results of this screening which were found to be negative subsequent to the Complainant's termination.
17. During the morning of July 20, 2000, the Complainant left the workplace, upset by Kachur's treatment of her. The Complainant spoke to Levine on the telephone and informed Levine of her difficulties with Kachur. There had been difficulties between Kachur and the Complainant stemming from the Complainant's schedule and her failure to complete the required screenings. Kachur believed that the Complainant's failure to complete the screenings resulted from some drug or alcohol problem that the Complainant wished to hide.
18. After Kachur and Levine explained their concerns about the Complainant to representatives of QTI, QTI recommended that the Complainant be terminated.
19. On July 24, 2000, the Complainant was terminated during an interview with Cindy Schmelzer of QTI and Kachur. The reasons given for the Complainant's termination were failure to complete her screenings and poor attendance.
20. Prior to the Complainant's leaving the office, Kachur made disparaging remarks about the Complainant to, or within the hearing of, various co-workers, including Carreon and Givens.
21. The Complainant missed two days of work due to the hospitalization of a family member.
22. At a meeting of the Respondent's board of directors, subsequent to the Complainant's termination, Levine represented that an employee had been terminated for alcohol abuse. The Respondent later attempted to amend the minutes of this meeting to hide Levine's statement. This representation referred to the Complainant.
23. Kachur was terminated by the Respondent for dishonesty and fraudulent actions concerning the Respondent's budget.
24. The Complainant applied for twelve jobs between her termination and February 4, 2001.
25. It is not clear whether the Complainant would have obtained full-time employment due to her care of her ill mother and her desire to attend school.
26. The Complainant was hired by a different employer on February 4, 2001, working thirty (30) hours per week.
27. The Complainant was unemployed for twenty-eight (28) weeks.
28. The Complainant was very upset by her termination. The Complainant considered her job with the Respondent to be a "dream job" in light of personal factors.

CONCLUSIONS OF LAW

1. The Complainant, Lori A. Teich, is an individual entitled to the protection of the City of Madison Equal Opportunities Ordinance, Sec. 3.23, M.G.O. because she was a person with a disability, by virtue of the Respondent's perception that she had a disability.
2. The Respondent, Center for Prevention and Intervention, is an employer subject to Sec. 3.23 (2)(m), M.G.O.
3. The Respondent regarded Complainant as having a disability (substance abuse) as applicable under Sec. 3.23(2)(m), M.G.O.
4. The Respondent terminated the Complainant due to her disability, in violation of the Madison Equal Opportunities Ordinance.

ORDER

1. The Respondent is ordered to pay the Complainant at the rate of $440 per week for the 28 weeks which the Complainant did not work up to the date of February 4, 2001, no later than 30 days from this order's becoming final.
2. The Respondent is ordered to pay the Complainant prejudgment interest on the above award of damages. The calculation of interest shall begin as of July 25, 2000 and shall run until the judgment is paid, at the rate of 5% per annum, compounded annually.
3. 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 15 days of this order's becoming final. The Respondent shall have 15 days from receipt of the petition to respond. The Complainant shall have 10 days to reply.

MEMORANDUM DECISION

This is a case concerning alleged employment discrimination and termination due to a perceived disability. Lori Teich ("the Complainant") was hired on June 29, 2000 by the Center for Prevention and Intervention ("the Respondent") to serve as an administrative assistant. The Complainant was to assist the Respondent's director, Steven Levine. As it turned out, the Complainant worked closely with Jessica Kachur, an office manager. Levine and Kachur both supervised the Complainant.

The Respondent, being an organization to help troubled youth, required screenings for substance use and psychological testing. Normally, new hires such as the Complainant would have had to pass these requirements in order to work for the Respondent. The Respondent contracted with QTI Human Resources to handle all its personnel activities, including hiring, advising, benefit administration and termination. General Medical Laboratories conducts drug testing for the Respondent. The Respondent's staffing shortage prompted the Respondent to allow the Complainant to work immediately without submitting to the screenings.

The Complainant's tenure with the Respondent worked well at first, but the Complainant and her supervisor Kachur developed a difficult working relationship. Part of the difficulty centered on the Complainant's not having undergone the required screenings. This conflict came to a head on or around July 20, 2000 when the Complainant left work and complained to Levine about Kachur's supervision.

Kachur and Levine, based on Kachur's representations contacted QTI that day and/or the next to seek its advice regarding termination of the Complainant. Kachur provided QTI with her version of the situation with the Complainant, upon which QTI relied in reaching a recommendation to terminate. QTI did not perform any investigation of its own; all its information came from Kachur. On July 24, 2000, the Complainant was directed to a meeting with Kachur and Cindy Schmelzer of QTI. Schmelzer informed the Complainant that she was to be terminated. This news left the Complainant very upset, but she left the building without demonstrative behavior or incident.

In adjudicating allegations of employment discrimination, the courts and administrative agencies must examine the record for direct and indirect evidence of discrimination. Rosin v. Rite-Way Leasing Company, MEOC Case No. 19982206 (Comm. Dec. 4/22/02, Ex. Dec. 10/3/01). In the case of indirect evidence of discrimination, 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. The Respondent needs only to articulate, not prove their offered reasons. 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 as set forth in the Madison Equal Opportunity Ordinance.[1]

The Hearing Examiner must conduct a factual inquiry to determine if the Respondent perceived the Complainant as having a disability. In this case, there is no allegation that the Complainant was actually disabled or had a history of disability. The Complainant argues that the Respondent perceived her as having a disability, alcoholism. The Commission has recognized substance addiction to be considered a disability. 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). On this record, it is clear that Kachur, the Complainant's supervisor, and the person who made the decision to terminate the Complainant, perceived her as having a disability. The testimony of Diane Givens and Robert Carreon at hearing indicates that they overheard Kachur speaking of the Complainant's perceived abuse of alcohol. Perception by an immediate supervisor imputes perception to a Respondent employer. Because the Complainant was perceived as having a disability by the Respondent, the Complainant is a member of a class protected by the Ordinance.

The Complainant's termination is sufficient evidence of an adverse employment action, fulfilling the second requirement of a prima facie case. Thus, to establish a prima facie case, the Complainant must finally show that there is reason to believe the action occurred as a result of membership in that protected class. Facts elicited at hearing indicate that minutes of a Respondent board of directors meeting represented that an employee was terminated because of alcohol abuse. The Hearing Examiner finds that this employee could only have been the Complainant. The minutes of this meeting were later amended to remove references to the termination of an "alcoholic" in an effort to erase evidence of the Respondent's perception of the Complainant's supposed alcohol problem. Furthermore, the credible testimony of Robert Carreon indicated that Levine, the Executive Director, understood that the Complainant's perceived disability was the cause of her termination. As such, the Complainant has established a prima facie case of discrimination. Additionally, the testimony of Givens clearly indicates that Kachur terminated the Complainant because of Kachur's perception of the Complainant as an alcoholic or substance abuser.

The burden next shifts to the Respondent to articulate a legitimate, nondiscriminatory reason for the termination. The Respondent's burden is one of articulation, not proof. The Respondent successfully fulfills this burden by offering several nondiscriminatory reasons for the termination. The Respondent alleges that the Complainant's attendance was spotty. The Commission has recognized that regular attendance is a vital ingredient to a productive workplace. Maas v. Woodman's Food Markets, Inc., MEOC Case No. 21724 (Ex. Dec. 8/4/94); Oviawe v. Madison United Hospital Laundry. Ltd., MEOC Case No. 20723 (Comm. Dec. 8/3/90, Ex. Dec. 9/29/89).

The Respondent also alleges that the Complainant failed to satisfy the screening tests it required for all employees. The Respondent's screening test procedures were handled by QTI Human Resources ("QTI") and General Medical Laboratories ("GML"). QTI contracted with the Respondent to manage its human resources operations. New hires were required to complete screening for substance abuse and undergo a psychological examination. An employer may set nondiscriminatory requirements in hiring, provided they are applied equally and relate to the job. The Hearing Examiner is willing to accept the Respondent's contention that a psychological test is an acceptable requirement considering the organization's focus of giving psychological support to at-risk individuals.

The record clearly shows that the Complainant did not undergo a psychological screening. Again, the parties dispute circumstances surrounding cancellations and reschedulings of the screening. For the purposes of articulating a legitimate, nondiscriminatory reason for the termination, the failure of the Complainant to undergo the screening qualifies as a legitimate reason. Similarly, the failure to take a required drug test would also be a legitimate, nondiscriminatory reason. Nothing in the record indicates that the drug/alcohol screening test was not applied equally to new hires. The Hearing Examiner can accept that using drug tests to prevent a substance abuser from contacting troubled teenagers is an acceptable requirement.

There was much discussion about the Complainant's failure to produce a valid driver's license. The Complainant believed this was an attempt to erroneously enforce the requirements of the Immigration and Naturalization laws. The Respondent asserted that it was part of an independent requirement that all employees possess a driver's license in case it was necessary for an employee to operate one of the Respondent's vehicles.

It seems likely to the Hearing Examiner that at one time, the requirement may have been explained in a manner to lead the Complainant to the understanding she testified to. However, the Hearing Examiner accepts that the Respondent's version of the need for a driver's license and the Complainant's failure to provide proof of such a license could be a legitimate requirement.

When the Respondent satisfies its burden of articulating a legitimate reason for an adverse action, the Complainant may still prevail if she can show the reason is pretextual or is not credible. The Complainant alleges that testimony given by employees of the Respondent at hearing demonstrates that their reasons are not credible and are likely a pretext for discrimination. The Hearing Examiner agrees.

The record does not show the Complainant to have a disregard for good attendance. The Complainant's period of employment lasted about one month, hardly long enough to establish a definitive pattern or trend of absenteeism. The Complainant's absences in that time were paired with excusals from Levine and were credibly connected with legitimate reasons for missing work, i.e., a family hospitalization. The Hearing Examiner would be more persuaded that absenteeism were a problem if a Complainant missed more time than was the case here, did not seek prior authorization from superiors, or offered less than credible reasons for being gone.

The record indicates that the Complainant did not undergo a psychological screening before her termination, although tests had been scheduled. These tests were postponed once by the Complainant's request and once by the Respondent's request. It is difficult to accept that the failure to undergo a psychological screening was a major factor in the decision to terminate the Complainant given the Respondent's own willingness to allow the Complainant to work nearly a month without the screening. By its own initiative, the Respondent permitted the Complainant to work without the screening. Also, the Respondent requested that the Complainant miss the July 13, 2000 test in order to fill a staffing shortage. These actions indicate that the lack of a screening within a month of hiring was not an essential ingredient to the Complainant's dismissal. In addition, in no way was the Complainant given any formal warning, written or oral, concerning any possibility of termination.

The question of the driver's license demonstrates one of the most puzzling aspects of this matter for the Hearing Examiner. If the Respondent was truly concerned about the Complainant's failure to complete certain requirements such as the drug screening, psychological profile and proof of a valid driver's license, why did it not provide the Complainant with a written warning? Since Kachur did not testify, we don't know if an oral warning was ever issued, but there was no testimony indicating that even oral warnings of possible termination were given to the Complainant.

The Hearing Examiner is looking at two to three weeks of actual employment in this case. This small delay seems hardly sufficient to warrant the Respondent's draconian actions especially in light of the apparent absence of any warning having been given to the Complainant.

While the Respondent is under no strictly legal requirement to provide the Complainant with a warning of potential dismissal, the fact that no such warning was given is seen by the Hearing Examiner as demonstrating a lack of credibility with respect to the Respondent's proffered reasons. The lack of a warning further demonstrates that the reasons proffered by the Respondent may well be a pretext for an actually discriminatory motive.

The delayed drug testing might, barring other factors, carry some weight to the Respondent's claim that it was the reason for the Complainant's termination. Normally, a new hire would have completed the testing before commencing employment, but the Respondent permitted the Complainant to work without first completing the tests. Issues of fact exist concerning the Complainant's eagerness to fulfill the drug/alcohol requirement. The Complainant claims to have furnished a sample to GML early in July 2000 and that GML lost the sample. The record reflects that the Complainant expressed trepidation to John Hicks, a co-worker, regarding taking a drug screening. Given the quality assurance procedures and standards used by GML, it is more likely that the Complainant did not actually go through with the testing early in July.

However, the record indicates that the Complainant did undergo the testing before she was terminated on July 24. The problems of the Complainant's delays in testing are severely nullified by the Respondent's demonstrated willingness to temporarily forgo screening requirements to meet its own staffing needs and its failure to issue the Complainant any warning that delay could not and would not be tolerated. The primary reason for termination does not lie with any requirement not being fulfilled, but rather in a conflict between the Complainant and a supervisor.

It is apparent to the Hearing Examiner that the Complainant's termination was the result of a campaign by one individual, Jessica Kachur. Most of the impressions concerning the Complainant's alleged poor work performance centers around information obtained second-hand through Kachur. Various members of the Respondent's board testified that their knowledge of the Complainant's alleged absenteeism and evasion of screening tests came from conversations with Kachur. All of QTI's information regarding the Complainant came filtered through Kachur. There is no doubt that QTI's recommendation to terminate the Complainant arose from Kachur's perceptions of the Complainant. Kachur was eventually terminated by the Respondent for dishonest and fraudulent activity, lending credence to the allegation that Kachur misinformed other Respondent employees about the Complainant's actions.

At hearing, the Respondent's Director, Steven Levine, stated the reasons for the Complainant's dismissal were for nondiscriminatory reasons as identified above. Levine indicated that he knew everything that was happening in the Respondent's small, closely-knit organization. Simultaneously, Levine asserted that he was too busy with the Respondent's management and fundraising operations to know everything that was happening. The Hearing Examiner can come to no other conclusion than Kachur regarded the Complainant as being an alcoholic and sought to have her terminated. The Hearing Examiner believes the proper explanation for Levine's proffered legitimate reasons for termination were to shield it from liability incurred due to Kachur's discriminatory behavior.

The manipulation of minutes of the Respondent's board makes the shielding more evident. Levine had indicated to the board that an employee (clearly the Complainant) had been terminated due to her alcoholism. Later, the minutes were amended to remove the reference to the Complainant's alcoholism. This alteration of documents, along with the mention of a possible lawsuit, illustrates that Levine regarded the Complainant to be an alcoholic and that the Respondent took steps to hide this perception in anticipation of future litigation.

The Respondent contends that the amendment to the minutes represents a non-sinister effort to properly maintain corporate records. The Hearing Examiner does not find such an explanation to be credible. Had the alteration been of a minor item, such as a date or name correction, the Hearing Examiner could accept such an explanation. However, this is too significant an item in the minutes to have slipped in by accident. The Hearing Examiner's conclusion is bolstered by Carreon's and Givens' testimony demonstrating Levine's and Kachur's perception of the Complainant.

The Respondent might generally believe that people recovering from or fighting substance abuse problems should be encouraged to apply and work for the Respondent, as they provide a valuable perspective on the perils of addiction. The Hearing Examiner agrees with this ideal. However, Kachur's actions belie this organizational perspective. Kachur's behavior and words indicate a bias against the Complainant, someone she perceived to have substance abuse problems. The fact that Kachur may have rendered these erroneous conclusions from her observations of the Complainant, do nothing to relieve the Respondent of liability for acting on Kachur's unfounded perceptions. In terms of employment, the Ordinance prohibits such discrimination. Because Kachur filled a supervisory role over the Complainant, the Respondent is liable for Kachur's discriminatory comments and resulting termination. May v. State Medical Society, MEOC Case No. 2584 (Comm. Dec. 4/21/82, Ex. Dec. 10/20/81). As such, the Respondent violated the Ordinance when it terminated the Complainant due to a perceived disability.

In the present case, the Complainant seeks payment of back pay, payment of lost benefits and payment of her costs and fees including a reasonable attorney's fee. The Ordinance gives the Commission the power to order different kinds of remedies, as it deems necessary in order to make a Complainant whole. A make whole remedy is one that places the Complainant in at least as good a position as she would have been, absent the discriminating conduct. The Ordinance provides that remedies may include, but are not limited to, "out of pocket expenses, economic and non-economic damages including damages for emotional injuries and, in regard to discrimination in employment, both front and back pay." This specifically includes back wages "for a period of no longer than two years." M.G.O. 3.23(10)(c)(2)(b).

The Complainant's rate of pay is undisputed. She was hired at the rate of $11 per hour. While employed with the Respondent, she worked a forty-hour work week. The Complainant testified that subsequent to her termination, she applied for at least 12 jobs prior to landing a three-quarter time position in February of 2001. The Complainant also testified that she spent some of the time while unemployed tending to the needs of her mother who was extremely ill.

The Complainant's testimony is sufficient to establish her rate of pay and her anticipated hours of employment. It also demonstrates that the Complainant made some reasonable efforts to mitigate her wage loss by seeking alternative employment.

The record does not demonstrate the value of the benefit package to which the Complainant may have been entitled had she not been wrongfully terminated. While these types of damages are well within the ambit of a make whole remedy, it is the Complainant's burden to prove by the greater weight of the evidence the amount of that damage. The Complainant fails in this proof.

Having established the Complainant's wage loss and demonstrating an effort to mitigate, the burden shifts to the Respondent to show that the Complainant's damages are not proved or that she failed to take steps to reasonably mitigate her damages. The Respondent argues that the employment rate in Madison during the applicable period was very low. It seems to contend that any reasonable person in the Complainant's position could have found work if she had wanted it. The Respondent also claims that the Complainant should not be awarded damages based upon a forty-hour work week because the Complainant was using some of that time to tend to her mother and because she had wanted to return to school.

The Hearing Examiner finds no merit in the Respondent's position. First, while the unemployment rate was extremely low it was not at totally full employment. While a victim of discrimination must take reasonable steps to mitigate her damages, it does not mean that she must take any job that is available. It is clearly the Respondent's burden to demonstrate that the Complainant's efforts were unreasonable. The Respondent, beyond some broad speculation, fails to meet its burden of showing positions for which the Complainant would have been qualified and for which she did not apply. In order to meet its burden, the Respondent needs to do more than state that the unemployment rate was very low. This is particularly true in light of the Complainant's production of twelve job applications.

Similarly, how the Complainant spent her hours of unemployment does not necessarily demonstrate that she was holding herself unavailable from work. The fact that she spent time tending to the needs of her ill mother does not demonstrate that she would not have made alternative arrangements for her mother's care if she had not lost her job to discrimination.

The Complainant's indication that she had hoped to return to school fails to establish any ground for reducing the award of back pay. On this record, there is nothing to permit the Hearing Examiner to conclude that the Complainant would have actually attended school and reduced her hours. She may well have been able to work out a school and work schedule that would have permitted her to maintain her employment. Simply raising the possibility falls short of meeting the Respondent's burden of proof to reduce the Complainant's damages.

The most puzzling issue with respect to damages for the Hearing Examiner relates to damages for emotional distress. There is evidence in the record that could serve as the basis for an award of such damages. The ordinance clearly contemplates the award of such damages. However, the Complainant made no argument in either her initial or reply brief for an award of such damages. There is not even a simple statement leaving calculation of such an award to the Hearing Examiner.

The Hearing Examiner believes that the best proof of such damages is that provided by the injured party. Absent a request for such damages, either explicit or implicit, the Hearing Examiner must reluctantly conclude that the Complainant does not believe that she is entitled to such damages and accordingly, the Hearing Examiner makes no such award.

In another area, the Hearing Examiner will make an award of damages not specifically requested by the Complainant. The Hearing Examiner will make an award of pre-judgment interest on the Complainant's award of back pay because to do so is more a matter of mathematical calculation rather than the exercise of judgment over sensitive issues of personal damage. The Commission has used an annual percentage rate of 5% for awards of pre-judgment interest in the past. Absent argument to the contrary by either party, the Hearing Examiner will order the Respondent to pay pre-judgment interest on her award of back pay to be calculated from the date of the Complainant's termination to the date the award is paid by the Respondent at an annual rate of 5%.

Before closing the Hearing Examiner must offer some observations about the credibility of three important witnesses. The most important witness, Jessica Kachur, did not appear despite having been named by both sides. It is impossible to know how Kachur's testimony might have affected the outcome of this complaint.

The primary witness for the Respondent, Steven Levine, is obviously dedicated to the goals and programs of the Respondent. However, his testimony was riddled with internal inconsistencies that severely limit his credibility. On one hand, he asserts to be a hands-on manager with knowledge of all aspects of the day-to-day operation of the Respondent. On the other hand, he claims to be so busy fundraising that he couldn't be expected to know of day-to-day details. Levine is very confident and seemingly loyal to those who follow his lead. However, this confidence, at hearing, translated itself as single mindedness and an unwillingness to accept evidence of wrongdoing if it did not fit into his view of how things should run. In general, Levine's testimony on disputed matters is not given much weight by the Hearing Examiner. Levine's attempt to explain away a significant change in the minutes of the Board of Directors comes close to being insulting. The material that Levine and Kachur wished the Board to amend was not some clerical mistake. The Hearing Examiner might be able to accept the Respondent's amendment theory had it been a clerical error instead of a substantive matter with legal import. The fact that Levine was prepared to present such an argument to the Hearing Examiner further injures his credibility.

The Complainant appeared generally credible. The one point that is not fully explained on this record is her assertion that she attempted to meet the drug screening component of her screening shortly after her start. The witnesses for General Medical Labs were forthcoming and non-confrontational about the controls used to track and maintain privacy of samples. This testimony convinces the Hearing Examiner that the Complainant did not have one sample taken that was subsequently lost by GML. The Hearing Examiner concludes that the only sample given by the Complainant was that given the weekend before her termination.

This incident might be sufficient to destroy the Complainant's credibility if not for the fact that other aspects of the Complainant's testimony are corroborated by other witnesses. It is this corroboration that assists the Hearing Examiner to find that the Complainant's testimony was generally credible except for that related to one drug test.

Robert Carreon testified clearly and without obvious animus towards either party. Though he did not get a position that he sought with the Respondent, he did not appear to hold a grudge and his testimony was given forthrightly and without hesitation or apparent coloration.

It would be remiss of the Hearing Examiner not to address the testimony of Joann Pritchett. Ms. Pritchett served on the Respondent's Board of Director's during the period of time relevant to the complaint. She provided written statements to both parties and both parties listed her as a potential witness.

The written statements provided are essentially contradictory and the Hearing Examiner makes no determination of which is correct. Ms. Pritchett's in-person testimony did not clear up the matter of her written statements and was helpful to neither party. Ms. Pritchett had no credibility. The Hearing Examiner found her to be purposefully evasive and uncooperative and not worthy of any credibility. If the Hearing Examiner had the authority to sanction Ms. Pritchett for her intentional waste of the Commission's time and that of the parties, he would so sanction her.

Two other witnesses credibility should be discussed briefly, John Hicks and Diane Givens. Mr. Hicks had very little credibility in the mind of the Hearing Examiner. As a continuing employee of the Respondent, Hicks' testimony was generally given in shadings that would clearly favor his employer. Where questioning got into areas that might be adverse to the Respondent, Hicks became noticeably more vague.

The one exception to Hicks' lack of credibility is his discussion with the Complainant about drug testing that apparently lead to her testing the weekend prior to her termination. This tended to corroborate the testimony of other witnesses and thereby gains some additional support. Similarly Hicks' testimony that the Complainant's drug test came back negative was corroborated by other evidence in the record.

Diane Givens' testimony tended to corroborate that of other witnesses and therefore has support in the record. The fact that she is no longer an employee of the Respondent indicates that she would not shade her testimony in favor of the Respondent. There is nothing in the record to indicate that the circumstances surrounding her leaving the employ of the Respondent would give rise to a reason to want to hurt the Respondent.

For the foregoing reasons, the Hearing Examiner concludes that the Respondent discriminated against the Complainant in employment of the basis of disability (perceived disability) in violation of the Equal Opportunities Ordinance.

Signed and dated this 12th day of June, 2002.

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.