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

Rochelle McGhee
2411 Allied Drive
Madison WI 53711

Complainant

vs.

YMCA of Dane County
5515 Medical Cir
Madison WI 53719

Respondent

HEARING EXAMINER'S DECISION AND ORDER ON COMPLAINANT'S PETITION FOR COSTS AND FEES

CASE NO. 20142153

EEOC CASE NO. 26B201400057

BACKGROUND

On September 22, 2014, the Complainant, Rochelle McGhee, filed a complaint of discrimination with the City of Madison Department of Civil Rights Equal Opportunity Division (EOD). In the complaint, McGhee charged that the Respondent, the YMCA of Dane County, Inc., discriminated against her in a number of ways on the bases of her sex, race, color and age. The Respondent denied having discriminated against the Complainant on any of those bases or in any of the ways alleged by the Complainant. On November 6, 2014, the Respondent discharged the Complainant alleging that the discharge was due to improprieties in the Complainant's reporting of her time. In response, on November 6, 2014, the Complainant amended her complaint to allege that her discharge was in retaliation for filing of her original complaint and the actions necessary to pursue her complaint.

Subsequent to an investigation of the allegations in the complaint as amended, a Division Investigator/Conciliator concluded that there was probable cause to believe that the Respondent had discriminated and retaliated against the Complainant as alleged. Efforts to conciliate the complaint proved unsuccessful and the complaint was transferred to the Hearing Examiner for a hearing on the merits of the complaint.

A hearing on the merits of the complaint was held on May 3 and 4, 2016. On November 6, 2017, the Hearing Examiner issued his Recommended Findings of Fact, Conclusions of Law and Order. In that decision, the Hearing Examiner proposed an award of damages for emotional distress and ordered the parties to confer and determine an amount of back pay and a rate for the calculation of prejudgment interest. The Hearing Examiner also provided a schedule for the filing of a petition for the costs and fees including a reasonable attorney's fee by the Complainant. That schedule provided for a period for the Respondent to object to the Complainant's costs and fees. Subsequent scheduling gave the Complainant the opportunity to reply to the Respondent's objections.

The Respondent timely appealed the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order to the Equal Opportunities Commission. The Commission issued a briefing schedule for the submission of written argument. The Respondent's initial brief was determined by the Commission to have been filed late and the Respondent's appeal was dismissed by the Commission. The dismissal of the Respondent's appeal was not further appealed by the Respondent. This meant that the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order became final on March 13, 2018.

On April 26, 2018, the Complainant filed her petition for costs and fees, including a reasonable attorney's fee, seeking $90,055.00. On May 18, 2018, the Respondent submitted its objections to the Complainant's petition and a brief in support of its objections. On June 1, 2018, the Complainant replied to the Respondent's objections.

DECISION

The Department of Civil Rights and the Equal Opportunity Commission has long held that a prevailing Complainant should be awarded the reasonable costs and fees associated with bringing and pursuing a successful claim including a reasonable attorney's fee. Nelson v. Weight Loss Clinics of America, Inc. et al., MEOC Case No. 20684 (Ex. Dec. 9/29/89), Harris v Paragon Restaurant Group, Inc. et al., MEOC Case No. 20947 (on liability/damages: Comm. Dec. 2/14/90, 5/12/94, Ex. Dec. 6/28/89, 11/8/93; on attorney's fees: Comm. Dec. 2/27/95, Ex. Dec. 8/8/94), Sprague v. Rowe and Hacklander-Ready, MEOC Case No. 1462 (Comm. Dec. on attorney's fees 2/9/98), 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), Gardner v. Wal-Mart Vision Center, MEOC Case No. 22637 (Ex. Dec. on attorney's fees 6/1/01), Groholski v. Old Town Pub, MEOC Case No. 20072041 (Ex. Dec. on attorney's fees 5/10/10), Johnson and Goodwin v. Madison Taxi, MEOC Case Nos. 20093110 and 20093094 (Ex. Dec. on attorney's fees: 02/22/2013), Obriecht v. Midwest Infinity Group, MEOC Case No. 20162022 (Ex. Dec. on attorney's fees: 04/21/2017). The underlying theory for the making of such awards is the dictate to make the Complainant whole. In theory, a prevailing Complainant might win an award of damages and still come out at a loss if the costs of bringing a complaint, including attorney's fees, had to be shouldered by the Complainant.

In order to encourage the public to file complaints when an individual feels that his or her rights under the Equal Opportunity Ordinance have been violated, the Commission is directed to issue a "make whole" remedy. MGO 39.03(10)(b)(4). This remedy includes the costs and fees incurred in pursuit of the complaint. As an enactment intended to further the social good, the Ordinance relies on the filing of individual complaints of discrimination or retaliation. As these complaints can sometimes be over relatively minor monetary sums, but rest on important legal principles, the public must receive awards of their costs and fees in order to effectuate the social good embodied in the ordinance.

The method utilized in cases brought before the Department of Civil Rights essentially tracks that used by state and federal courts. In this approach, the Hearing Examiner will first establish a lodestar figure. The lodestar is calculated by taking a reasonable hourly rate for an attorney's services and then multiplying that rate by the number of the hours reasonably expended in pursuit of a successful claim. Once this lodestar is fixed, adjustments may be made, either up or down, for a variety of factors. See Sprague, supra, Gardner, supra, Groholski, supra.

The Complainant states that his usual and customary hourly rate for similar cases is $350.00 per hour. He contends that the Hearing Examiner should use this hourly rate to determine the lodestar amount. Complainant's counsel, as part of the petition for costs and fees, has included a contemporaneously maintained list of his work and charges for this matter. Complainant's counsel asserts that he reasonably expended 257.3 hours in his representation of the Complainant in this matter.

The Respondent objects to both the Complainant's hourly rate as set forth in the petition and the accounting of counsel's time. With respect to the counsel's hourly rate, the Respondent states that it does not reflect the hourly rate charged for such services in the local area and the rate proposed by the Complainant appears to be created for purposes of this litigation alone. With respect to counsel's accounting of time expended in representation of the Complainant, it argues both that the accounting is too vague to permit reasonable scrutiny by the Respondent or the Hearing Examiner, and reflects time and charges that are not reasonable, given the counsel's work product or the complexity of this complaint.

Proof of the elements of the lodestar amount rests on the Complainant. In the present matter, the Complainant presents an affidavit averring that his hourly rate for similar cases is $350.00 per hour. The Complainant does not present examples of awards of this hourly rate in other matters or affidavits of other counsel in the Madison area attesting to the hourly rate for other similar types of cases in the Madison area.

An attorney's usual and customary hourly rate for similar types of representation is presumed to be a reasonable hourly rate for purposes of calculating the lodestar. The Complainant asserts that his usual and customary rate for this type of case is $350.00 and that should be used in calculating the lodestar. Unfortunately, Complainant's counsel does not present other extrinsic evidence to support his request. Customarily, the Hearing Examiner sees evidence of awards made before other tribunals, affidavits of hourly rates by other local attorneys or evaluations of the hourly rate or fee request performed by attorneys in the area.

The Respondent objects to use of $350.00 per hour as the Complainant's hourly rate. The Respondent contends that there is no credible proof that $350.00 is what the Complainant actually charges clients with civil rights claims in the Madison area. The Respondent contends that the contingency fee agreement which the Complainant uses to establish the $350.00 rate is illusory in that under the terms of the agreement, the Complainant would never be required to actually pay a fee based upon that hourly rate. The Respondent further argues that the webpage of Complainant's counsel does not set forth an hourly rate, but rather provides "packages" with fees assessed on the basis of the proposed representation. The Respondent also contends that the proposed hourly rate does not reflect the hourly rate of other attorneys of similar experience and expertise in the Madison area, and that the proposed hourly rate would give a windfall to Complainant's counsel and act as a punitive award to the Respondent.

After reviewing the record as a whole, the Hearing Examiner does not find that there is support for finding that Complainant's counsel's usual and customary hourly rate for representation of clients in civil rights matters in the Madison area is $350.00. While the Hearing Examiner gives weight to Complainant's counsel's own statement of his hourly rate, there is sufficient circumstantial evidence in the record to cast some doubt on the reasonableness of this rate.

The Hearing Examiner agrees with the Respondent that the contingency fee agreement placed into evidence by the Respondent appears not to establish a usual and customary rate in that under no circumstance contemplated by the agreement would the Complainant actually be expected to pay counsel at the rate set forth in the agreement. Similarly, the screen shot of the Complainant's counsel's webpage does not demonstrate that he has a usual and customary fee that he charges individual clients. Rather, he appears to set his compensation in packages that contemplate a range of work, rather than charges by the hour.

The Hearing Examiner is prepared to recognize that these new billing arrangements may reflect changes in the delivery of legal services, but they currently fall short of the proof necessary to support the Complainant's petition for costs and fees. Since it is the Complainant's burden of proof to support his claimed hourly rate, the Hearing Examiner must find that he has failed in meeting this burden.

Where a prevailing Complainant's petition fails to demonstrate what the reasonable hourly rate should be in calculating the lodestar, it falls to the Hearing Examiner's discretion to establish a reasonable hourly rate. Typically, the Hearing Examiner will make reference to the usual hourly rate for similarly experienced counsel in the area handling substantially similar complaints. In this regard, the Complainant's counsel asserts that his requested $350.00 hourly rate is in line with awards made by the Hearing Examiner in previous decisions on attorney's fees. In particular, Complainant's counsel points to the award made in Groholski v. Old Town Pub, supra. The Complainant compares himself with Attorney Sally Stix and asserts that the Hearing Examiner's award of an hourly rate of $350.00 to Stix is evidence of the market rate for an attorney of his expertise and experience. The Hearing Examiner fails to find support for this contention by Complainant's counsel.

First, the Hearing Examiner cannot conclude that the Complainant's counsel has the same degree of experience or expertise as that of Attorney Stix. Attorney Stix has practiced in the Madison area and, specifically, in the area of civil rights for a much longer period of time than that of Complainant's counsel. Further, review of the Hearing Examiner's decision in Groholski demonstrates that at the time of the Groholski case, Attorney Stix charged a rate of between $250.00 and $350.00 per hour depending on a variety of factors. Though Attorney Stix requested an award of her limited time at the rate of $350.00 per hour, the Hearing Examiner concluded that there was insufficient evidence in the record to support use of that hourly rate. Instead, the Hearing Examiner used the mid-point of Attorney Stix's scale and used the hourly rate of $300.00 for Attorney Stix's time.

The Hearing Examiner believes that a more closely analogous hourly rate from the same case would be that of the primary attorney in that matter Timothy Scheffler. Attorney Scheffler's experience and abilities more closely match those of Complainant's counsel. Attorney Scheffler, as with Attorney Stix, billed his time out on a scale that depended upon various factors similar to those used by Attorney Stix. Attorney Scheffler's scale was between $150.00 and $250.00 per hour, instead of Stix's higher scale, reflecting attorney Scheffler's level of experience in comparison with that of Attorney Stix.

Using the same rationale as that for Attorney Stix, the Hearing Examiner determined that use of the mid-point of Attorney Scheffler's scale was the appropriate hourly rate for calculating his time.

More recently, in the case of Obriecht v. Midwest Infinity Group, supra, the Hearing Examiner awarded prevailing Complainant's counsel an attorney's fee based upon an hourly rate of $250.00 per hour. As Respondent points out, counsel in the Obriecht case and counsel in the present matter appear to have approximately the same number of years of practice. Though on this record, it is difficult to compare the type and nature of two attorneys' professional experience, length of practice appears to be a sufficient comparator.

Counsel in the Obriecht case provided examples of awards of an hourly rate of $250.00 made to him by other courts and tribunals. Complainant's counsel did not provide other similar corroborating documentation.

Given the fact that the Groholski decision was reached in 2010 and the Obriecht decision in 2017, and granting Complainant's counsel some benefit of the doubt as to his special experience and practice, the Hearing Examiner finds that an hourly rate of $275.00 represents an appropriate hourly rate for purposes of establishing the lodestar.

In determining that $275.00 per hour represents a reasonable attorney's fee for purposes of calculating the lodestar in the present matter, the Hearing Examiner compares the experience of Complainant's counsel with that of Attorney Sulton from the Obriecht case. Sulton and co-counsel, Jessica Butler both charged $250.00 per hour for their representation. As pointed out in the Respondent's opposition to the Complainant's petition, Complainant's counsel, Sulton, and Butler all have practiced law for approximately the same length of time. While it is not possible to directly compare their levels of experience, Attorney Sulton does provide a decision of the U.S. District Court recognizing his $250.00 per hour rate to be reasonable, if not modest. The Hearing Examiner recognizes the court's finding that Attorney Sulton's fee might be low for the market in increasing the amount of Complainant's attorney's hourly rate to $275.00.

While the Hearing Examiner has compared Complainant's counsel's experience with that of Attorney Scheffler from the Groholski case rather than the experience level of Attorney Stix in the same case, the Hearing Examiner recognizes that fees for legal representation tend to rise over time and that the passage of time since the Groholski award would likely justify an increase in the awards made in Groholski.

The Hearing Examiner recognizes that the Madison area has attorneys who can support fee requests of substantially more than those made in this case. There is nothing in the record of this matter that would support making such an award here. The levels of expertise and experience of attorney's whose fees might be higher than those of Complainant's counsel are not shown to be present in the current matter.

Having determined that the Hearing Examiner will use the hourly rate of $275.00 in calculating the lodestar, the Hearing Examiner now turns to the question of the number of hours claimed by Complainant's counsel as being reasonably necessary to the prosecution of this action. Complainant's counsel, as part of his petition, provides his contemporaneously maintained billing records for this matter. Complainant's counsel claims that he and he alone expended 257.3 hours in representation of the Complainant.

The Respondent objects to the accounting provided by Complainant's counsel contending that it lacks sufficient specificity for the Respondent and Hearing Examiner to make a meaningful review of the hours expended to determine their connection with the present matter or to determine whether the charges were for work that was reasonably necessary to obtain the result in this matter.

The Hearing Examiner finds that the accounting provided by the Complainant is fatally insufficient for a meaningful review of the work performed. As such, it falls to the Hearing Examiner to attempt to determine how much time, and for what services, the Complainant should be compensated. Given the different categories into which the Complainant's accounting can be separated, it does not seem appropriate to simply reduce the hours claimed by a specific amount. The Respondent suggests setting the number of hours reasonably expended at 150. However, the Respondent provides no explanation for why this specific amount is appropriate. The Hearing Examiner will address particular areas of concern and attempt to adjust the Complainant's accounting accordingly. In taking this approach, the Hearing Examiner makes reference to a recent case in the Northern District of Illinois, Smith v. Rosebud Farm, Inc. slip op. 2011 CV 9147, (N.D. Ill August 23, 2018).

The Complainant seeks her counsel's hourly rate for Client Communications totaling 56.1 hours. While the Hearing Examiner accepts that an attorney must regularly communicate with his client and respond to client needs, it does not necessarily follow that all contact between a client and an attorney is or should be compensable and even where such communication is compensable, it is not clear that it should be at the attorney's hourly rate.

The Smith case makes clear that activities that could or should be performed by administrative or clerical staff may not be charged at the attorney's hourly rate. Parties cannot recover attorneys' fees or paralegals' fees for tasks that can be delegated to a non-professional. Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 553 (7th Cir. 1999); Delgado v. Village of Rosemont, 2006 WL 3147695, at *2 (N.D. Ill. Oct.31, 2006); Morjal v. City of Chicago, Ill., 2013 WL 2368062, at *2 (N.D. Ill. May 29, 2013); Smith, supra. This is true even where the attorney does not have administrative or clerical staff. The fact that Plaintiff's counsel is a sole practitioner who has decided to forgo additional support staff does not entitle him to bill professional rates (e.g., attorney rates or paralegal rates) for clerical work. Pecha v. Barnhart, 2008 WL 3850388, at *2 (W.D. Wis. March 8, 2008), Smith, supra.

It is in this area that the Complainant's vague categorization of counsel's time is particularly difficult. There is no indication of the manner of communication; in person, by telephone, by email or text, or who initiated the communication. All these data points would help to judge the appropriateness of charges in this category of hours.

As a general matter, it would seem that very short communications, those of perhaps .2 hours or less, would be of a nature that could or should be handled at a level lower than that of the attorney. It seems likely that some of these short duration communications were for purposes of scheduling or status updates. If there was some more substantive purpose to these communications, it is not possible to glean that information from the provided records. Given the likelihood that many of these short duration communications might have been handled at a level lower than an attorney, the Hearing Examiner will strike those communications of .2 hours or less from the fee petition. That reduces the hours dedicated to Client Communication from 56.1 to 40.4. This is still a significant number of hours allotted to Client Communication. A better accounting of the purpose and direction of the communication might have saved some of these hours.

Of a greater concern to the Hearing Examiner is the fact that over the period of this case's processing, the Complainant documents 148 client contacts on 148 separate days. In several periods, there was daily contact for which the Complainant seeks compensation. Given the lack of specificity in the Complainant's billing, it is not possible to determine to what extent these contacts were necessary in this representation. Simply because a client calls, it does not automatically generate a billable interaction. While it is tempting to reduce the number of Client Communication hours further, the Hearing Examiner cannot do so without engaging in speculation without a basis in fact.

The Complainant seeks to charge 1.0 hours for Hearing File Data Format Conversion. This is clearly a charge that should not be made at the attorney's hourly rate. Though it is a modest period of time, this is particularly the type of work that could and should be performed by someone else in an office other than the attorney. Additionally, it is not necessary to achieving the result obtained in this matter. Changing formats for the convenience of counsel is an expense that does not contribute to the outcome of this matter.

The next category identified by the Complainant for which the Hearing Examiner has concern is that for Appellate Motion preparation. The Complainant seeks 38 hours for preparation of a nine page motion and brief to dismiss the Respondent's appeal for its failure to timely file a brief. This strikes the Hearing Examiner as an extraordinary length of time for this work. Again, the Complainant fails to meaningfully account for this time. How much of the time was legal research? How much was drafting? Was the research time duplicated in other categories of billing? How much was consultation with the Complainant or with other attorneys? The Complainant merely lists work in this category performed on four separate dates without any indication of what was involved in that time.

It is always difficult to assess how much time should have been allotted to a given task, especially in an area of practice where someone might not be well experienced. The Hearing Examiner, however, believes that research, consideration of strategy and drafting of the Motion to Dismiss should have taken the Complainant no more than ten hours and in the mind of the Hearing Examiner, an attorney of the experience and expertise claimed by counsel in this matter, the time necessary would likely be less. However, the Hearing Examiner believes that ten hours of billable time is not unreasonable. Any attorney who needs the opportunity to educate himself or herself in an area should expect to absorb the cost of the time it takes to bring themselves up to a professional level of competence. It is not appropriate to seek to charge a client or opposing party for that time.

The Hearing Examiner will reduce the requested hours from 38.0 to 10.0 hours.

The Complainant seeks compensation for 41.8 hours for Brief Drafting. This presumably covers the time necessary for both the Complainant's initial post-hearing brief, as well as the time for the Complainant's reply to the Respondent's initial post-hearing brief. However, due to the Complainant's lack of specificity in the accounting provided to the Hearing Examiner, it is not entirely clear. It does not appear that any of the dates on which the Complainant seeks compensation overlap with the dates the Complainant is seeking for the Appellate Motion.

The Hearing Examiner cannot find that the amount of time requested by the Complainant is necessarily out of the norm for a matter of this complexity. However, it does seem that the time requested in relationship to the briefs submitted by the Complainant does not seem entirely related. However, the Hearing Examiner is not in a position to question the need of Complainant's counsel to spend that amount of time on two briefs and related preparation.

The Hearing Examiner is confused by a separate category for Legal Research accounting for 37.7 hours. It would seem to the Hearing Examiner that research would be subsumed in the drafting process for post-hearing briefs and for the appellate Motion to Dismiss. While some general research is certainly necessary and warranted, the Hearing Examiner suspects that much of that time was required to raise Complainant's counsel's level of expertise to that of professional competence. That type of research should not be billed to a client or to the opposing party. Accepting that some research into the standards of proof and the history of the Department's rulings in discrimination and retaliation cases is necessary, the Hearing Examiner will not strike all the hours in this category. However, the Hearing Examiner will reduce the Complainant's hours by 13.7 hours. This allows three days' worth of full-time research that should be adequate given the Department's history of cases contained in it Decision Digest.

The remaining categories of time are not extraordinary and the Hearing Examiner will not question the appropriateness of those amounts.

The Complainant does not seek an enhancement to the proposed fee. The Respondent does assert that a further reduction in the fee from the lodestar is warranted.

The Respondent poses essentially two arguments for reduction of the lodestar. First, the Respondent contends that the mixed results in the outcome of the case warrants a reduction. Second, in order to avoid a windfall to Complainant's counsel that would act as a punitive measure to the Respondent the award should be reduced. Regardless of the calculated lodestar, the Respondent argues that the lodestar should be reduced by 50%.

As to the Respondent's first argument, it is true that the complaint in this matter as amended stated five different bases for recovery, four discrimination and one retaliation. The Complainant was successful on only the retaliation claim. The Respondent asserts that it would be appropriate to reduce the Complainant's award of costs and fees proportionally with the bases upon which the Complainant was successful. The Hearing Examiner finds this suggested approach not to be consistent with the purposes for making attorney's fee awards.

Though the Complainant was not successful in demonstrating liability on four of the five bases claimed, the Complainant did establish liability on the fifth, and the award of damages would not have changed whether the Complainant had demonstrated discrimination on any or all of the claimed bases for the discrimination claims. The award of back pay and emotional distress would not have been greater had the Complainant demonstrated liability on one or all of the discrimination claims. Though one can argue that the Complainant's results were mixed, the ultimate goal of the claim, an award for back pay and emotional distress damages was accomplished. The court in Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W. 2d 482 (1984), found that attorney's fees were appropriate when even no damages were awarded but a finding of discrimination was made. The Hearing Examiner has followed the teachings of Watkins in the past and sees no reason to deviate from that path now.

While some courts, in limited circumstances, have applied a reduction for limited success, the Hearing Examiner is charged with enforcing the purposes and interests of the Equal Opportunities Ordinance, not federal or state law. In the present circumstance, the Hearing Examiner is not convinced that the outcome in the present matter warrants a reduction on the basis of the Complainant's failure to establish discrimination, while she did demonstrate retaliation and received an award that would not have been greater had she demonstrated discrimination as well.

As for the Respondent's second argument, the Hearing Examiner is not persuaded that he should recognize such a claim. Both sides in a hearing before the Department can choose to be represented and can choose by whom to be represented. Both parties understood, or should have understood, the risks associated with taking a claim to hearing. In the case of the Respondent, one of those risks was that it might be held responsible for the costs and fees, including an attorney's fee, of the Complainant should the Complainant prevail. Now that the Complainant has prevailed, it seems inappropriate for the Respondent to be requesting relief from its own failure of calculation of the risk in proceeding to hearing and beyond.

The purpose of an attorney's fee award is to provide an incentive for the private bar to assist in the enforcement of rights conferred and protected by the Equal Opportunities Ordinance. Were the Hearing Examiner to reduce an award based upon an attorney's expenditure of time and for a reasonable rate, because it places a hardship upon the Respondent, it would chill the willingness of attorney's to undertake the types of representation necessary to the success of the social good sought by the ordinance. While the Complainant's counsel may be well compensated for his work in this matter that should not be seen as a windfall, but rather a compensation for the risk he undertook to represent a client in an action brought under the ordinance.

The Hearing Examiner notes that there have been a number of cases brought before this body that have been much more lengthily litigated such as the Sprague case, where the total numbers of hours was less than those sought in this matter. Attorney's fees have also been awarded in many cases that are substantially less than those awarded in this matter. Some of this is due to the passage of time and the gradual increase in the prevailing rates paid to attorneys, and part of it is due to more experienced attorneys needing less time to produce the desired outcome. The Hearing Examiner views both parties as having failed to adequately present the Hearing Examiner with sound documentation for their respective positions and as a result, the Hearing Examiner has endeavored to do the best he can with the record presented to him.

ORDER

For the foregoing reasons, the Hearing Examiner orders the Respondent to pay to the Complainant, the amount of $54,697.50. This represents an hourly rate of $275.00 per hour for 198.9 hours. The 198.9 hours represents the Complainant's requested hours of 257.3 reduced by 58.4 according to the above-stated reductions. Payment or arrangements for payment shall be made no later than 30 days from this order's becoming final.

Signed and dated this 13th day of September, 2018.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Samuel L Owens
Thomas A Cabush

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

Rochelle McGhee
2411 Allied Drive
Madison WI 53711

Complainant

vs.

YMCA of Dane County
5515 Medical Cir
Madison WI 53719

Respondent

HEARING EXAMINER'S DECISION AND ORDER ON COMPLAINANT'S REQUEST FOR ADDITIONAL PROCEEDINGS

CASE NO. 20142153

EEOC CASE NO. 26B201400057

BACKGROUND

This matter commenced when the Complainant, Rochelle McGhee, filed a complaint of discrimination with the City of Madison Department of Civil Rights on September 22, 2014. The complaint alleged that the Respondent, YMCA of Dane County, Inc., discriminated against McGhee in a number of ways and for a number of reasons. On November 6, 2014, the Complainant amended her complaint to add retaliation as a basis for her complaint due to her termination from employment by the Respondent. The Respondent denied all of the allegations of discrimination and retaliation.

The complaint made its way through the Department's complaint process, resulting in an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated and retaliated against the Complainant as alleged. Efforts to conciliate the complaint were unsuccessful. As a result of the failed efforts at conciliation, the complaint was transferred to the Hearing Examiner for further proceedings.

The Hearing Examiner held a public hearing on the merits of the complaint on May 3 and 4, 2016. Subsequent to the filing of briefs and review of the record, the Hearing Examiner issued his Recommended Findings of Fact, Conclusions of Law and Order on November 6, 2017. The Hearing Examiner found that the Respondent had not discriminated against the Complainant on any basis during her employment and dismissed those claims. The Hearing Examiner concluded, however, that the Respondent had retaliated against the Complainant for her exercise of a right protected by the Ordinance and proposed various remedies for the Respondent's illegal acts. These remedies included an award of economic damages consisting of back pay. The specific amount of back pay was to be determined, after the parties consulted with each other, to see if they could agree on the amount of back pay. The parties did so consult, and reached a stipulation as to the amount of back pay owed the Complainant. The Hearing Examiner's Order also included damages for the Complainant's emotional distress stemming from the violation of the Complainant's rights. The Hearing Examiner also directed the

Complainant to file a petition for her costs and fees in bringing her complaint. A decision on the Complainant's petition remains pending at this time. Finally, the Hearing Examiner indicated that the parties should consult in an effort to determine an interest rate for the fixing of pre-judgment interest on the Hearing Examiner's award of back pay.

It is this final element of the Hearing Examiner's order that brings us to this point. The parties did consult on the matter of pre-judgment interest, but were unable to come to an agreement on this figure.

It should be noted that the Respondent filed an appeal of the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order on November 20, 2017. That appeal was dismissed by the Appeals Committee of the Equal Opportunities Commission on March 13, 2018. The reasons for that dismissal do not have a bearing on this matter at this time.

DECISION

The Complainant requests the Hearing Examiner to schedule further proceedings to determine a method for calculating the lost opportunity costs arguably attributable to the Complainant's loss of pay subsequent to her termination. She seeks the opportunity to conduct discovery and to present evidence demonstrating some additional economic loss beyond that calculated by reference to a simple percentage rate. She pins her request on MGO Sec. 39.03(10)(c)(2)(b) of the Equal Opportunities Ordinance which, in general terms, requires the fashioning of a remedy that will make the Complainant whole from the act of discrimination or retaliation from which the Complainant has suffered.

In the past, the Hearing Examiner and the Equal Opportunities Commission have sought to make prevailing Complainants whole through their awards of economic and non-economic damages including a calculation of pre-judgment interest to account for the lost opportunity cost of money that should have been paid, but wasn't.

As a result of the Commission's decision in Hayes v. Clean Power, MEOC Case No. 19982028 (Ex. Dec. 10/7/99, Ex. Dec. on damages 10/7/99, Ex. Dec. on prejudgment interest 10/7/99), the Complainant believes that opportunity costs may well include economic losses beyond those contemplated by the application of a demonstrated interest rate.

The Respondent objects to the Complainant's request on two primary grounds. First, the Respondent asserts that the Complainant's motion is untimely and should have been brought prior to the issuance of the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order on November 6, 2017. Second, the Respondent contends that the Complainant's motion seeks to amplify pre-judgment interest to the level of economic damages and that the Complainant missed her opportunity to present testimony on that issue at the time of trial. As a corollary to this second argument, the Respondent argues that the Complainant has failed to meet her burden to demonstrate the appropriate rate of interest and the Hearing Examiner should not order any pre-judgment interest, but at most utilize the average rate for the prime rate during the applicable period.

The Complainant contends that her motion is within the contemplation of the Recommended Findings of Fact, Conclusions of Law and Order and is, therefore, timely. As for the Complainant's rejoinder about damages and the appropriate calculation of interest, the Hearing Examiner finds it difficult to summarize the arguments of the Complainant.

As to timeliness, the Hearing Examiner finds that the Complainant's motion is timely. The Hearing Examiner's order directed the parties to confer as to the appropriate rate of interest to be used in calculating pre-judgment interest. The Hearing Examiner recognized that there might be a circumstance in which the parties were unable to agree and that further proceedings might be necessary.

The parties conferred and were unable to come to an agreement. While the Hearing Examiner believed that the fixing of a rate of interest would be a simple matter, it seems that the Hearing Examiner's assumption was misplaced. The natural consequence of the failure of the parties to agree is that the task of fixing an appropriate rate of interest now falls to the Hearing Examiner. Further proceedings might have been necessary if there was a dispute as to which rate would best represent the actual lost time cost of the Complainant's back pay. However, the Complainant wishes to argue not about the rate of interest, but to present additional testimony to demonstrate that because of her lost wages, the Complainant has experienced damages associated with the loss of her wages and to show that those additional economic costs should be considered as part of the adjustment to back pay for pre-judgment interest.

While the Complainant's argument falls well outside of the contemplation of the Hearing Examiner, the request of the Complainant for additional proceedings was made timely based upon the outline detailed by the Hearing Examiner in his Recommended Findings of Fact, Conclusions of Law and Order and the accompanying Memorandum Decision.

While the Hearing Examiner finds that the request of the Complainant is timely, the Hearing Examiner concludes that there is no basis in law or procedure for the type of proceeding requested by the Complainant. For the following reasons, the Complainant's motion for further proceedings will be dismissed.

First, the Hearing Examiner directs the parties to the language of the Order. It directs the parties to meet to confer about the rate of interest to be used to calculate an award of pre-judgment interest. It does not direct the parties to confer about the method for determining pre-judgment interest. It does not invite further discussion of the components of pre-judgment interest. Had the Complainant disagreed with this directive of the Hearing Examiner, she could have appealed the Recommended Findings of Fact, Conclusions of Law and Order to the Commission as did the Respondent. The Complainant did not make such an appeal nor once the Respondent filed an appeal did the Complainant seek to cross appeal the Hearing Examiner's decision.

The Hearing Examiner understands that the procedure for filing of a cross appeal is not specified in the Rules of the Equal Opportunities Commission. However, the Complainant made no effort at filing a cross appeal.

Moving beyond the Complainant's failure to follow the direction of the Hearing Examiner to confer about a rate of interest, the Complainant's request for further proceedings really represents a request to reopen the record on the issue of damages. The types of economic impacts experienced by the Complainant, defaults on loans, inability to pay rent and the inability to meet her daily economic needs based upon her income and the loss of that income, are the type of economic and non-economic damages that should have been proven at the time of hearing not in subsequent proceedings. If the Complainant was concerned about her ability to

demonstrate her damages at hearing, she should have requested bifurcation of the proceedings on the lines of liability and damages. She did not.

The directive of the Ordinance for the Commission or, by extension its designee, the Hearing Examiner, to fashion a remedy that will make the Complainant whole cannot be seen as a grant of authority to speculate as the damages actually experienced by a prevailing Complainant. It remains the obligation of a prevailing Complainant to demonstrate his or her entitlement to damages and the extent of those damages. Damages, as with liability, must be demonstrated by the greater weight of the credible evidence. The requirement for the Complainant to shoulder this burden of proof is set out in the issues for hearing issued after the Pre-Hearing Conference. One issue for hearing is to determine to what, if any, damages the Complainant is entitled. If the Complainant does not present the facts that establish his or her damages, then the Hearing Examiner may not speculate about those damages.

In this proceeding, the Complainant presented testimony about her wages at the time of her termination and her subsequent efforts to mitigate her wage damages. Had the parties not come to an agreement as to the extent of the Complainant's wage loss, the Hearing Examiner could have either ordered additional proceedings to establish the exact extent of those damages or found that the Complainant had not established the extent of her wage loss, or found that she had failed to carry her burden of proof. Since the record established that there was some level of wage loss, the Hearing Examiner believes that additional proceedings in the absence of a stipulation of the parties would have been appropriate. In the case of Obriecht v Midwest Infinity Group, MEOC Case No. 20162022 (Ex. Dec. on liability: 03/24/2017), the Hearing Examiner was faced with a total lack of evidence on the issue of back pay and, therefore, chose to determine that the Complainant had failed to meet his burden of proof. Accordingly, the Hearing Examiner declined to make any award of back pay or to hold further proceedings given the Complainant's failure to present adequate information about his wage loss.

Back pay is but one component of economic damages that might be proven by a prevailing Complainant. If the Complainant's termination from employment was a proximate cause of other economic damages such as lost deposits, loan defaults, loss of property, etc., the time for proof of those damages was at hearing or in a subsequent proceeding if the proceedings were to be bifurcated. The Complainant testified about various losses that she linked to her termination but did not quantify those losses at the time of hearing. She also testified to the emotional impact of those loses and the Order attempted to compensate the Complainant for those emotional losses or impacts.

It is now too late in the process for the Complainant to request the opportunity to quantify that which should have been quantified at the time of hearing. While the Complainant attempts to categorize her request for further proceedings in terms of the lost opportunity costs of her wages, she really is seeking to show what those losses were and that should have been done at the time of hearing.

Pre-judgment interest is intended not to be an opportunity to re-examine a Complainant's economic losses, but rather a simple calculation applying a percentage to a fixed number to generate the time cost of money. Though the Hearing Examiner has cast the time cost of money in the words "opportunity cost," the concepts are the same. As the Respondent points out, the Commission first struggled with the notion of pre-judgment interest in the case of Hilgers v Laboratory Consulting, Inc., MEOC Case No. 20277 (Comm. Final Order on Remand 03/29/89; aff'd Case No. 87-2266 (Ct. App. 12/22/1988); remanded Case No. 86 CV 6488

(Dane County Cir. Ct. 08/24/87); Comm. Dec. on Remand 11/10/86; (not available) Case No. 85 CV 6300 (Dane County Cir. Ct. 8/20/86; rev'd Comm. Dec. 11/18/85; Ex. Recommended Decis. 07/12/85; Ex. Interim Recommended Decis. 04/11/85). At that time, the Commission wished to utilize the 12% rate found in Wisconsin statutes for calculating post-judgment interest. Judge Bartell corrected the Commission noting that the concept of pre-judgment interest required a different calculation related to the lost opportunity costs or time costs of the Complainant's lost wages. While the Commission floundered somewhat in determining the appropriate amount, Judge Bartell eventually approved the use of 5% as outlined in the Respondent's brief.

The Hearing Examiner, in the past twenty five years or so, has attempted to grapple with a method for determining that time cost related to the loss of wages. The Hearing Examiner's efforts are premised on the notion that an award of economic damages and the interest that might have accrued on those damages are necessary to put the Complainant back in the same position in which she would have been absent the effect of discrimination upon her. It is not to better the Complainant's position. That is why an arbitrary percentage rate is not to be used in reaching this result. Use of an arbitrary percentage runs the risk of overstating the actual economic loss of a prevailing Complainant. There should be some attempt to reflect the actual economic conditions during the relevant time period. It is to that end that the Hearing Examiner in Bedford v. The Farm Tavern, MEOC Case No. 20132017 (Ex. Dec. 08/15/2016), and in the current matter, directed the parties to consult on the rate of interest to be used in making the calculation of pre-judgment interest.

The Complainant's argument as noted above does not result in a determination of the actual economic loss of the Complainant as demonstrated on the record, but would result in a post hoc re-opening of the record on the issue of damages. While the Hearing Examiner can agree that those amounts the Complainant wishes to put into the record, through the proposed additional proceedings, are the type of damages that would be appropriate to consider in a remedy to put the Complainant back into the position she would have been absent the Respondent's retaliation, this is not the proper time or procedure for proof of those damages. That time was during the hearing or at a bifurcated hearing on damages after a finding of liability.

The Respondent is correct when it states that the purpose of the Commission's process and procedures has two purposes, to determine liability and a remedy and to create finality. To prolong the process and to attempt to re-order the hearing process does not serve the interests of the parties, the Commission or the public. The Complainant's motion for further proceedings is denied.

The question of what the Hearing Examiner can and should do about fixing a rate for calculating pre-judgment interest remains. The Complainant has chosen not to argue in the alternative for a specific rate of interest other than to propose 5.5% in its post-hearing brief. There is no foundation in the record for this particular percentage rate. The Respondent indicates that it believes that the Complainant has defaulted on her obligation to put in proof of a particular interest rate and, accordingly, the Hearing Examiner should not order a pre-judgment interest.

The Hearing Examiner is in a difficult position given the positions of the parties. The Hearing Examiner believes that he has an independent obligation to set forth a "make whole" remedy. However, the record is, for the most part, devoid of a foundation for the Hearing

Examiner to make such an independent determination. The Hearing Examiner does find that there is one route for him to meet his obligations in this regard.

The Respondent, in arguing the merits of various proposed interest rates, indicates that it was prepared to stipulate to a 5% rate of interest for purposes of calculating pre-judgment interest. It is tempting to hold the Respondent to that stipulation. However, to do so, does not recognize the Hearing Examiner's independent duty. The Respondent as an alternative suggests that pre-judgment interest be calculated using the average of the prime rate for the relevant period. The Respondent opines that this figure is 3.58% compounded annually. The Hearing Examiner can take official notice of that average and will do so. This rate would reflect the economic realities during the relevant period and represents a reasonable method for calculating the rate of pre-judgment interest.

Accordingly, the Hearing Examiner orders the Respondent to pay to the Complainant pre-judgment interest on her back pay award at the rate of 3.58% compounded annually from the date of the Complainant's termination from employment to March 13, 2018, the date that the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order became a final order.

Signed and dated this 9th day of August, 2018.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Samuel L Owens
Thomas A Cabush

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

Rochelle McGhee
2411 Allied Drive
Madison WI 53711

Complainant

vs.

YMCA of Dane County
5515 Medical Cir
Madison WI 53719

Respondent

COMMISSION'S DECISION AND FINAL ORDER ON COMPLAINANT'S MOTION TO DISMISS

CASE NO. 20142153

EEOC CASE NO. 26B201400057

On September 22, 2014, the Complainant, Rochelle McGhee, filed a complaint of discrimination with the Madison Department of Civil Rights Equal Opportunities Division. McGhee charged that the Respondent, the YMCA of Dane County, discriminated against her in employment on the basis of her race, color, age, and sex in violation of the Equal Opportunities Ordinance. On November 6, 2014, the Complainant amended her complaint to charge that the Respondent retaliated against her, at least in part, because of her exercise of a right protected by the Equal Opportunities Ordinance. Both parties in this matter were represented by counsel.

On May 3 and 4, 2015, the Equal Opportunities Commission Hearing Examiner held a public hearing on the merits of the complaint as amended. On November 6, 2017, the Hearing Examiner issued his Recommended Findings of Fact, Conclusions of Law, and Order, finding that the Respondent did not discriminate against the Complainant on the bases of her race, color, age, and/or sex, but finding that the Respondent did retaliate against the Complainant in violation of the Equal Opportunities Ordinance and ordered the Respondent to pay damages for emotional distress, back pay, and the Complainant's costs and fees including a reasonable attorney's fee. The Respondent timely appealed the Recommended Findings of Fact, Conclusions of Law and Order.

On December 4, 2017, the Equal Opportunities Commission issued a notice of appeal and briefing schedule to the parties. That briefing schedule stated "The Respondent shall file written exceptions to the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order and a brief in support of Respondent's appeal within 30 days of the undersigned date." The Respondent filed those documents on January 4, 2018. On February 1, 2018, the Complainant filed a Request for a Cross-Appeal and a Motion to Dismiss the Respondent's Appeal. The basis for the Complainant's Motion to Dismiss was that the Respondent filed its exceptions and brief late without explanation or a request for extension.

The Madison Equal Opportunities Commission Appeals Committee met on February 28, 2018 to consider the Complainant's Motion to Dismiss and Request for Cross-Appeal. Participating in the Committees deliberations were Commissioners Ramey, McDowell and Madden.

DECISION

The Committee finds as follows:

1. The Respondent was to file written exceptions to the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order and a brief within 30 days of December 4, 2017, making January 3, 2018 that deadline.

2. The Respondent filed its exceptions and brief on January 4, 2018, making the filing untimely.

The Committee has an interest in seeing that its orders, including scheduling orders, are strictly followed. The Respondent did not file its exceptions and brief in conformity with the Commission's order. Though the sanction of dismissal is harsh, the Committee's interest in encouraging all parties to strictly comply with its orders justifies imposition of this sanction.

The Committee finds that since granting the Complainant's Motion to Dismiss essentially dismisses the Respondent's appeal, it has no need to address the Complainant's request to file a cross-appeal.

ORDER

For the forgoing reasons, the Complainant's Motion to Dismiss is GRANTED. The Committee has no need to further address the Complainant's request to file a cross-appeal. The deadlines set forth in the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order are now in effect.

The Appeals Committee reaches this conclusion unanimously.

Signed and dated this 13th day of March, 2018.

On behalf of the Equal Opportunities Commission and the Appeals Committee,

Zach Madden
Appeals Committee Chair

cc: Samuel L Owens
Thomas A Cabush

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

Rochelle McGhee
2411 Allied Drive
Madison WI 53711

Complainant

vs.

YMCA of Dane County
5515 Medical Cir
Madison WI 53719

Respondent

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

CASE NO. 20142153

EEOC CASE NO. 26B201400057

On May 3 and 4, 2015, the Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III held a public hearing in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard. The Complainant, Rochelle McGhee, appeared in person and by her attorney, Samuel L. Owens, of the law firm of Owens & Freeman, LLC. The Respondent, YMCA of Dane County, Inc., appeared by its corporate representatives, Carrie Newquist and Cindy Plummer and by its attorney Thomas A. Cabush of the law firm of Kasdorf, Lewis & Sweitlik, S.C. Based upon the record of the proceedings, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Rochelle McGhee, is an adult Black African-American female born on March 12, 1969. At all times relevant to this complaint, she was a resident of the City of Madison.

2. The Respondent, YMCA of Dane County, is an employer with more than 15 employees doing business in the City of Madison.

3. At all times relevant to the complaint, Stephanie Murphy was Youth Development Director of Child Care, two levels above Complainant. Ms. Murphy was Complainant's supervisor's supervisor. Ms. Murphy is female and White.

4. Jason McColl is an Executive Director of Child Care, one level above Ms. Murphy. Mr. McColl is African-American.

5. At all times relevant to this complaint, Carrie Wall was President and CEO of YMCA Dane County. Ms. Wall is a female over age 50 and is White.

6. Complainant began working for Respondent on September 4, 2013, as a Child Care Center Director, earning $12.90 per hour and averaging at least 30 hours a week.

7. Complainant initially worked at Respondent's east Madison location, under the supervision of Megan Murphy. Ms. Murphy was the east side Youth Development Director of School Age Child Care. Ms. Murphy is White.

8. Sometime during her employment, Complainant was transferred from Respondent's east Madison location to their west Madison location. Her position and job duties did not change.

9. When Complainant transferred to the west Madison location, she was supervised by Megan Lemmon, the west side Youth Development Director of School Age Child Care. Ms. Lemmon's position was later taken over by Christopher Ehle.

10. In April 2014, Complainant twice applied for the position of Youth Development Director of School Age Child Care, and was not hired either time by the Respondent.

11. In September 2014, Complainant applied for Youth Development Director of Child Care, and was not hired by the Respondent.

12. In each of these instances, Respondent chose individuals who it believed were better qualified than Complainant.

13. The individuals chosen all happened to be White Caucasian Americans, and two of them were males under age 40. The third was a 42-year-old woman. However, all of them had supervisory experience, and at least two of them had worked for Respondent for several years.

14. Complainant had little supervisory experience, and her total time working for Respondent was just over 14 months.

15. While the Respondent does try to maintain racial, ethnic and gender diversity, its policy is to hire the most qualified applicants for any given position. It considered the three successful applicants more qualified than Complainant.

16. Complainant did not know why Respondent would consider those applicants more qualified than herself, apart from the pattern she noticed of color, race, gender and age.

17. While Complainant was working for Respondent, she was occasionally asked to step in for subordinates. In particular, Respondent asked her to sub for Lead Teachers or Assistant Teachers as needed.

18. It is customary for Respondent to ask supervisory staff, up to and including staff at Jason McColl's level, to step in for subordinates as needed. This is often necessary to maintain state mandated teacher/student ratios. Failure to maintain these ratios could lead to a loss of the Respondent's child care license.

19. Complainant felt that Respondent was asking her to perform more work than other Center Directors were being asked to perform, including tasks that fit within her boss' job description, in addition to coming in for subordinates who were out sick. Complainant was the only African-American Center Director at the time.

20. Complainant, therefore, in good faith, filed a discrimination complaint against Respondent with the Madison Equal Opportunities Division on September 22, 2014.

21. Prior to September 2014, when Complainant had irregularities with her timecard, Respondent would reach out to her and give her opportunities to correct any inadvertent errors or give an explanation for time she was claiming.

22. After September 2014, Respondent abruptly stopped this practice.

23. On October 15, 2014, Complainant attended a conciliation hearing for her original complaint. Her supervisor, Chris Ehle, was also at that hearing as Respondent's representative.

24. On October 15, 2014, Complainant did not go to work. Instead, she used sick time.

25. Respondent's sick leave policy allowed employees to use sick time for mental and emotional illness, as well as physical illness.

26. Complainant also called in sick on October 16 and 17, 2014.

27. She also called in due to transportation issues on October 21, 2014.

28. On all of these dates, she spoke to a supervisor and told them she would not be coming in that day.

29. On each of these dates, she put in for eight hours of work time.

30. On previous occasions, when she had called in sick but put in eight hours of work time, Respondent's agents communicated with her and ensured that her timecards were corrected to reflect that she was out sick.

31. Complainant further reported that she worked on October 4, 12, 18, and 19, 2014. All of these dates are weekend dates.

32. On prior occasions, when the Complainant had claimed weekend hours, Respondent's agents communicated with her to ask why she was claiming weekend hours.

33. After September 2014, Respondent did not contact Complainant about any discrepancies in Complainant's timecards and did not request any explanation from Complainant about her errors.

34. At no time during the Complainant's employment with Respondent did anyone tell Complainant that her conduct needed to improve.

35. In particular, and in spite of Respondent's repeated contacts with Complainant about mistaken timecard entries before September 2014, no one informed her at any time that she needed to improve her time tracking to keep her job.

36. Respondent terminated Complainant on November 6, 2014, for allegedly falsifying time entries during the periods of October 1-15 and 16-29, 2014.

37. At the time of Complainant's termination, she was earning $12.90 an hour.

38. Within the year preceding Complainant's termination, Respondent also terminated a male janitor for allegedly falsifying timecards, apparently after the first time they caught him. However, it is not otherwise clear from the record how similar his situation was to Complainant's.

39. The Complainant received unemployment compensation for a period of time.

40. In the eighteen months prior to the hearing, Complainant applied for at least one hundred and six positions. Of those that are in the record, all but one appear to have been through Indeed. It is not clear if Complainant followed up on any of these applications.

41. It is not clear, as of the undersigned date, if the Complainant has managed to replace her lost income.

42. As a result of her termination by the Respondent, Complainant has lost housing, lost income, and lost the opportunity to advance within her chosen employer.

43. The Complainant experienced stress, embarrassment and humiliation due to her termination. She experienced periods of recurring homelessness and a loss of dignity.

CONCLUSIONS OF LAW

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

2. The Complainant is a member of the protected class Color and is entitled to the protections of the Equal Opportunities Ordinance.

3. The Complainant is a member of the protected class Age and is entitled to the protections of the Equal Opportunities Ordinance.

4. The Complainant is a member of the protected class Sex and is entitled to the protections of the Equal Opportunities Ordinance.

5. The Complainant is an individual who exercised a right protected by the Equal Opportunities Ordinance and is entitled to the protections of the Equal Opportunities Ordinance.

6. The Respondent is an employer within the meaning of the Equal Opportunities Ordinance and is subject to its terms and conditions.

7. The Respondent did not discriminate against the Complainant on the basis of her race in violation of the Equal Opportunities Ordinance.

8. The Respondent did not discriminate against the Complainant on the basis of her color in violation of the Equal Opportunities Ordinance.

9. The Respondent did not discriminate against the Complainant on the basis of her age in violation of the Equal Opportunities Ordinance.

10. The Respondent did not discriminate against the Complainant on the basis of her sex in violation of the Equal Opportunities Ordinance.

11. The Respondent retaliated against the Complainant, at least in part, because of the Complainant's exercise of a right protected by the Equal Opportunities Ordinance when it terminated the Complainant's employment in violation of the Equal Opportunities Ordinance.

12. As a result of the Respondent's retaliation against her, the Complainant has suffered economic and non-economic injuries and is entitled to an award of damages to make the Complainant whole.

13. The Complainant has reasonably attempted to mitigate her economic damages.

ORDER

1. The Respondent, within 30 days of this order's becoming final, shall pay to the Complainant $75,000.00 as damages for her emotional distress, humiliation and emotional distress resulting from the Respondent's termination of her employment in retaliation for the Complainant's filing of a complaint of discrimination.

2. No later than 30 days from this order's becoming final, the parties shall confer to establish the amount of the Complainant's back pay from the date of her termination to the undersigned date. If the parties are unable to agree on the amount of back pay owed to the Complainant, the Complainant shall report that fact to the Hearing Examiner. Back pay shall be reduced by any amount of actual income received by the Complainant during this period.

3. No later than 30 days from this order's becoming final, the parties shall confer to establish an appropriate rate of interest for the calculation of prejudgment interest. If the parties are unable to agree on an appropriate rate of interest or the method of calculation, the Complainant shall report that fact to the Hearing Examiner.

4. No later than 45 days from this order's becoming final, the Complainant shall file a petition for her reasonable costs and fees including a reasonable attorney's fee to the Hearing Examiner.

5. The Respondent may file objections, if any to the Complainant's petition for costs and fees no later than 15 days from the filing of the Complainant's petition.

6. Except for the Complainant's allegation of retaliation due to her filing of her complaint of discrimination on September 22, 2014, all other allegations of discrimination or retaliation found in either the original complaint or the amended complaint are dismissed with prejudice.

MEMORANDUM DECISION

The complaint in this matter is wide ranging and extensive. It encompasses five protected categories, each with multiple allegations of discrimination or retaliation. The Hearing Examiner will attempt to address each claim, though some claims may be congregated with others in an attempt to manage the overall discussion.

Cases of discrimination and retaliation can be proven by either the direct or indirect method. In the direct method, the parties present their cases and the Hearing Examiner examines the facts and without reliance on inference reaches a determination of liability or not. Cases utilizing the direct method usually have convincing testimony of discriminatory language or conduct. In a case presented by the indirect method, the parties present their facts and explanations and the Hearing Examiner uses the reasonable inferences raised by the facts and applies those facts be they inferential or direct to the respective burdens of proof and production that the law places on the parties. The indirect method of demonstrating discrimination is also known as the burden shifting approach and derives from the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and the cases that follow those decisions.

The Hearing Examiner finds that the proof in this matter is best analyzed using the indirect method. When analyzing a case using the indirect method, the Hearing Examiner first must determine for each allegation of discrimination or retaliation if the Complainant has established a *prima facie* claim of discrimination. A *prima facie* claim of discrimination is established when the Complainant presents sufficient evidence after challenge to demonstrate that she/he is a member of a protected group such as race, color, sex or age. Next, the Complainant must establish that they experienced an adverse employment action or condition. Finally, the Complainant must prove that the adverse action or condition was connected to one or more of the Complainant's protected groups. Depending upon the precise allegation of discrimination, there may be additional elements that must be demonstrated such as qualification for a position or acceptable performance of a position. In all cases, the Complainant must prove each element of the *prima facie* claim by the preponderance of the evidence which can also be stated as by the greater weight of the credible evidence.

Presuming that the Complainant meets this burden of proof, the burden shifts to the Respondent to present a legitimate, nondiscriminatory explanation for its actions. This is a burden of production and not one of proof.

If the Respondent carries its burden of production, the Complainant might still prevail if she/he can point to evidence in the record demonstrating that the Respondent's proffered explanation is either not credible or represents a pretext for an otherwise discriminatory or retaliatory motive. The Complainant may use evidence presented as part of her/his case-in-chief to meet this burden.

The Complainant makes parallel allegations of discrimination on the bases of race, color, age and sex. The Complainant also makes a separate claim of retaliation for her exercise of a right protected by the ordinance, i.e., the filing of the initial complaint in this matter.

Some of the Complainant's individual allegations seem intertwined with each other, while others are fairly separate in nature. In part, this commingling of facts and allegations, in the opinion of the Hearing Examiner, stems from the Complainant's belief that she was treated very badly by the Respondent for pretty much all of her employment with the Respondent. This view makes it difficult to separate facts and claims into distinct individual allegations.

The order in which the Hearing Examiner chooses to address the facts and allegations is not an indication of how he views the importance or the potential success or failure of the claims. Rather, it attempts an effort on the part of the Hearing Examiner to present a reasoned analysis of the Complainant's various charges.

Before addressing the allegations of the Complainant, the Hearing Examiner will give a brief introduction to various individuals who played a role in various aspects of this case, along with an indication, where possible, of their positions.

The Complainant held the position of Child Care Center Director. She initially held this position at the Respondent's east side location. During her employment, she was transferred to the same position at the Respondent's west side location.

The Complainant was supervised on the east side by Megan Murphy and on the west side by Chris Ehle. Murphy's and Ehle's position was designated Youth Director of School Age Child Care. When initially applying for employment with the Respondent, the Complainant sought the position of Youth Director of School Age Child Care.

Both Megan Murphy and Chris Ehle were supervised by Stephanie Murphy, Youth Development Director of Child Care. Murphy indirectly supervised the Child Care Center Directors.

Jason McColl was Stephanie Murphy's supervisor and held the position of Senior Executive Director of Child Care. He also served as the Interim Associate Executive of the west region.

The Hearing Examiner will first address the Complainant's assertion that she was subjected to harassment during her employment. In order to establish a claim of harassment, the Complainant must demonstrate that she was subjected to a severe or pervasive pattern of patently offensive language or conduct based upon her claimed protected class sufficient to interfere with her ability to perform her job duties. The Complainant seems to assert that her claim of harassment applies equally to all of her protected classes. In this regard, the Hearing Examiner will separately address the claim of retaliation as it has a more limited set of facts. Also, the Hearing Examiner will combine analysis of the claims of harassment on the bases of race and color as they appear to address the same general circumstances.

In her initial post-hearing brief, the Complainant lays out her claim of harassment. The Complainant relates a circumstance in which the lead teacher at her Child Care Center addressed her disrespectfully in front of a class of children. The lead teacher, Lisa Barker, is

White and younger than the Complainant. The Complainant filed a complaint concerning Ms. Barker's conduct, which the Complainant asserts was not investigated and that Barker was not disciplined as a result of her conduct. The record does not contain any other allegations of similar conduct on the part of Ms. Barker or any other individual. There is an indication that the Complainant contends that the entire circumstances of her employment leading to this complaint represents a form of harassment. The Respondent denies that the circumstances outlined by the Complainant constitute harassment.

While the situation described in the record was undoubtedly upsetting and demonstrated a lack of respect on the part of Barker towards the Complainant, it falls short of demonstrating actionable harassment. The first difficulty is that the Complainant identifies a single incident of harassing conduct rather than a pattern or practice of conduct. While in some very limited cases a single incident may create a hostile workplace, those incidents generally involve claims of violence or extreme provocation such as use of the "N" word or similar racial or sexual epithets. The situation may well have provoked feelings of distress and upset in the Complainant, the record does not indicate the level of extreme language or conduct sufficient to support a finding of harassment based upon the single incident.

It is not clear from the record what steps the Respondent took to address the Complainant's complaint against Barker, but the fact that there does not appear to have been a repetition of the conduct indicates that either it was a single isolated incident or that whatever action the Respondent undertook with respect to Barker was sufficient to end the harassment. In either case, the record demonstrates that there was not a pattern or practice of patently offensive language or conduct rising to the level of harassment sufficient to create a hostile workplace based upon the incident involving Barker.

As to whether the remaining conduct asserted by the Complainant can be utilized to demonstrate a pattern or practice of severe and patently offensive conduct such that it can demonstrate a claim of harassment, the Hearing Examiner is not convinced that such an approach is contemplated by the ordinance. Primarily, the Hearing Examiner sees the remaining allegations of discrimination and retaliation as separate and distinct claims that are better addressed through the Complainant's other theories of liability. The Hearing Examiner concedes that facts and incidents that support a particular claim of discrimination or retaliation can also support a second or third claim of discrimination as well, but the facts and allegations set forth in this record do not seem to fall into this category of claim. The Hearing Examiner understands that the Complainant asserts that Barker was likely emboldened by the fact that she is White and younger to have, in part, acted the way she did and that this pattern of allegation runs throughout the Complainant's other claims; however, a claim of harassment requires demonstration of particular conduct or language which is not generally similar to the other claims asserted by the Complainant.

The Hearing Examiner next turns to the Complainant's allegation that the Respondent failed or refused to hire or promote her during her employment because of her race, color, sex or age. Though the Complainant seems to focus on three positions for which she applied during her employment with the Respondent, she does reference a fourth position for which she applied before she was hired by the Respondent. This fourth position was as Youth Development Director of Child Care. When she was not hired for that position, she was offered and accepted the Child Care Center Director position she held throughout her employment. The Complainant asserts that at the time of her hire, she understood or perhaps was promised that

she would be quickly promoted within the Respondent's framework and that she would receive a Program Director position when the incumbent, Rachel Heiney, went on maternity leave.

The Respondent denies that any of its hiring decisions were discriminatory in any way, and, more specifically, that it did not discriminate against the Complainant on the basis of any of her protected classes.

As a general matter, the Complainant establishes her membership in each of her protected classes and that she experienced an adverse employment action when she did not receive a promotion for which she applied. The Complainant asserts that the element of causation is demonstrated by her general qualifications, in particular, her Master's degree in education and her work experience with the Respondent and a period of time she spent as a manager at a Kmart store.

The Respondent states that the record demonstrates that education is but a single consideration in its hiring decisions. At least as important, if not more so, is the time and experience of the candidate working with the Respondent and specific supervisory experience in a child care setting. The Complainant asserts that her experience with the Respondent and her education credentials are adequate to demonstrate that she was at least as qualified, if not more so, for the positions for which she applied.

The Complainant also points out that in two of the three positions for which she was not hired, the successful candidates were male, White and younger than 40 years of age. In the third position, the successful candidate was a White female of about the Complainant's age. The Complainant contends that the demographics of these hires raise an inference of discrimination.

The Respondent's arguments carry much weight and cast doubt on whether the Complainant's proof is sufficient to demonstrate a *prima facie* claim of discrimination. Giving the Complainant the benefit of the doubt, a finding that the Complainant has made a *prima facie* claim shifts the burden to the Respondent to put forth a legitimate, nondiscriminatory explanation for its decisions.

The Respondent's proffered explanation essentially reiterates its explanation that despite the Complainant's confidence in the superiority of her credentials, she lacked the specific supervisory experience and the "time in place" for which the Respondent was seeking in these positions. The Respondent's argument is essentially that the Complainant was not the most qualified candidate for the positions for a variety of reasons. This represents a legitimate, nondiscriminatory explanation for the Respondent's decisions.

The burden now shifts to the Complainant to demonstrate that the Respondent's proffered explanation is either not credible or represents a pretext for an otherwise discriminatory reason. There is little in the record from which the Hearing Examiner can make a finding that the Respondent's explanation is not credible. The testimony indicates that of the higher levels of the Respondent's management, most had been with the Respondent for many years and had worked their way up through the ranks of supervision and management. In this regard, in its post-hearing briefs, the Respondent emphasizes the relatively short period of time that the Complainant had been employed by the Respondent. On the other hand, the

Complainant's witnesses, Ruen and Lucey-Durrani, emphasize the amount of work performed by the Complainant on behalf of the Respondent.

The Hearing Examiner finds that despite the Complainant's confidence in her qualifications and her abilities, that she has failed to carry her burden of proof that she was more qualified for the Program Director positions that she sought, or for the Youth Development Director of School Age Child Care positions for which she applied. It is the Complainant's responsibility to demonstrate that the Respondent has discriminated against her and, at best, she has shown that she was qualified for the positions she sought, but not that she was the best qualified candidate or at least as qualified as the successful candidates.

The Respondent argues that it is not credible that it would have promised the Complainant Heiney's position when Heiney went on maternity leave. It contends that to do so would have violated Heiney's rights to FMLA leave. While the Hearing Examiner offers no position with respect to the application of the FMLA, it does seem unlikely that the Respondent would promise the Complainant a position to which the incumbent would likely be returning.

As for the other three positions, the Hearing Examiner does not sit as some higher authority judging the credentials of applicants for a given position. The record indicates that the Respondent had a good faith belief in the qualifications of its successful candidates and the Complainant presents no credible evidence to cast doubt on the Respondent's determination. The Hearing Examiner finds that the Complainant has failed to demonstrate that the Respondent discriminated against her with respect to hiring or promotion on the bases of race, color, age or sex.

The next claim of discrimination is that the Respondent discriminated against the Complainant on the bases of race, color, age and/or sex by affording her terms and conditions of employment less favorable than those not in her protected classes. This allegation represents several related allegations, including transfer from the east side to the west side, having to act as a lead teacher or to perform other duties outside of those as Child Care Center Director, being offered a Professional Development Plan and being required to complete an online or outside certification to qualify as a lead teacher. Discrimination in any of these included claims will establish discrimination in the broader claim.

First, when the Complainant was initially hired as a Child Care Center Director, she worked at the east side location of the Respondent. At some point, she was transferred to become the Child Care Center Director for the Respondent's west side location. The Complainant asserts that this transfer was made without asking her consent or for her approval and it complicated her daily commute and created some difficulty getting used to a new location. The Complainant asserts that the west side location served a predominately minority population including Black African-Americans, while the east side location served a mostly White population.

The first question to be answered is whether such a transfer represents an adverse employment action. The record, including the testimony of a witness for the Complainant, Breanna Ruen, indicates that there was no difference in the duties, pay, benefits or responsibilities attached to being the west side Child Care Center Director as opposed to those for the east side location. In arguing that there is no adverse action implicated in this transfer, the Respondent cites to the Hearing Examiner's decision in Peterson v. Madison Metropolitan

School District, MEOC Case No. 22728 (Ex. Dec. 11/16/01), for the proposition that an essentially lateral transfer without a change in duties or pay does not constitute an adverse action. In Peterson, the Hearing Examiner stresses that a lateral transfer does not create a per se violation, but leaves open the possibility that the circumstances of an individual transfer might constitute an adverse action.

In the present matter, the Complainant argues that she knows of no other individual who was transferred without his/her consent. While that may be the case and represents a lack of professional courtesy on the part of the Respondent, it does not mean that the transfer was adverse to the Complainant. The fact that it somewhat complicated the Complainant's commute and the difficulties the Complainant had in adjusting to a new location, while annoyances lack the disruption or level of difficulty that might raise the Complainant's transfer to the level of an adverse action. For a finding of adversity, the Hearing Examiner would expect the Complainant to articulate specific conditions that were not so favorable as her original ones or that the assignment to the west side somehow materially disadvantaged her employment or promotion possibilities. The record contains no such testimony.

Even if the Complainant had convinced the Hearing Examiner that the transfer represented an adverse employment action, the Complainant fails to establish a causal connection between any of her protected classes and the transfer. The Complainant's testimony that she did not know of any other Center Director to be transferred in such a manner does not implicate her protected classes. Though the Complainant's witness, Ruen, testified that she believed there was some racial animus between the Complainant and her supervisor, Megan Murphy, Ruen also testified that she believed that the transfer occurred due to personality problems between the Complainant and Murphy, rather than as a result of any discriminatory feelings on Murphy's part.

Even if the Complainant had demonstrated some causal connection between her protected classes and her transfer, the Respondent offers a legitimate, nondiscriminatory explanation for the decision to transfer the Complainant. The Complainant, while employed on the east side, had to frequently leave work early to provide child care for her own daughter. When the Complainant needed to leave early, the Respondent often had to find a substitute to cover the Complainant's responsibilities. The Respondent stated that the decision to transfer the Complainant to the west side was intended to permit the Complainant an easier method for meeting her own child care responsibilities and to reduce the impact on the Respondent of the Complainant's needing to leave early. While the statement that the Respondent wished to assist the Complainant in her child care obligations strikes the Hearing Examiner as being paternalistic, it does not support a finding of a discriminatory explanation. The need to reduce the impact on the Respondent to find substitutes when the Complainant had to leave early does represent a legitimate, nondiscriminatory explanation for the transfer decision.

In this hypothetical analysis, the burden then shifts to the Complainant to point to evidence in the record to establish that the Respondent's explanation is either not credible or represents a pretext for an otherwise discriminatory motive. The Complainant fails to present any evidence or argument to meet this burden of proof.

The second claim in this charge of terms and conditions discrimination relates to the need for the Complainant, from time to time, to fill in for other employees, especially lead teachers. While performing additional duties may represent an adverse employment action in

that it takes away from one's ability to fully perform the tasks of their primary employment, there is nothing in the record that demonstrates a causal link between the Complainant's protected classes and the need to perform the duties of other employees from time to time. The testimony clearly established that the Complainant's witness, Ruen, was in the same position and, additionally, that Stephanie Murphy and Jason McColl also from time to time filled in in this capacity. The Respondent explained that such assignments were necessary for the Respondent to maintain state required teacher/student ratios in order to maintain their child care license.

The Hearing Examiner cannot find that the occasional obligation for the Complainant to perform duties as a lead teacher or other employee represented discrimination on any basis in the Complainant's terms and conditions of employment. Even if the Complainant had set forth sufficient evidence to make out a *prima facie* claim of discrimination, the Respondent successfully rebuts it and the Complainant fails to overcome the Respondent's proffer of a legitimate, nondiscriminatory reason.

The third claim in this general area is that the Complainant had to do the book work necessary to obtain her certificate as a lead teacher, that she was given the wrong textbook and that she was not compensated for her time in obtaining the required licensure. The record does not establish that this requirement either represented an adverse action or to the extent it could be found to be adverse, that it was causally linked with the Complainant's protected classes. The Hearing Examiner accepts the Respondent's explanation as to why such licensure was necessary to meet state requirements. That there was some confusion over the books sent to the Complainant, while annoying and frustrating does not implicate any of the Complainant's protected classes. Similarly, any concern that the Complainant may have had about payment for her time preparing for licensure lacks any support as a claim of discrimination.

Finally, the Complainant argues that the suggestion that she undertake a Professional Development Plan in order to advance in the Respondent's hierarchy indicates a discriminatory animus on the part of the Respondent. First, there is no indication that the Complainant was ever required to undertake such an effort or that she was punished or disadvantaged because she declined to engage in a Professional Development Plan. It is clear from the record that this was not a form of discipline or a requirement imposed upon the Complainant. The record indicates that a Professional Development Plan was an opportunity extended to its employees by the Respondent for those employees who might wish to advance within the ranks of the Respondent. It seems likely that this mechanism was offered to the Complainant because of her applications for positions above her current level and her inquiries as to the reasons why she was not selected. The Hearing Examiner cannot find that this represents a claim upon which discrimination might be founded.

In summation, the Complainant's various claims that she was discriminated against in her terms and conditions of employment in the form of assignments, transfer and various other claims are not proven. The Complainant fails to establish a *prima facie* case of discrimination and to the extent that she might have demonstrated a *prima facie* claim of discrimination, she fails to rebut the Respondent's provision of a legitimate, nondiscriminatory explanation for its actions.

The Notice of Hearing indicates that the Complainant wished to present a claim for discrimination stemming from wages that were unpaid. There was no testimony or argument from the Complainant concerning this claim of discrimination beyond the limited discussion relating to wages for the obtaining of a lead teacher license, which was briefly discussed above. To the extent that the Complainant intended a finding as to any other claim relating to this subject, the claim is waived or abandoned.

The final claim of discrimination presented by the record is for the Complainant's termination from employment. The Notice of Hearing indicates the parties understood there was a claim that the Complainant's termination was based, in part, upon her race, color, age and/or sex, as well as in retaliation for the Complainant's exercise of a right protected by the ordinance. At hearing and in the Complainant's subsequent briefs, it appears the Complainant has abandoned her claims of discrimination in her termination and is focusing on the claim that her termination was in retaliation for her filing and pursuit of her initial claim of discrimination. There was virtually no testimony at hearing to tie the Complainant's termination to her protected classes of race, color, age and/or sex. Accordingly, the Hearing Examiner will address the Complainant's claim of termination as retaliation for the exercise of a right protected by the ordinance.

As with a claim of discrimination, a claim of retaliation can be proven through either the direct method or the indirect method. Miller v Cuna, MEOC Case No. 20042175 (Ex. Dec. 5/16/08). The record does not contain sufficient evidence of direct statements of a retaliatory intent to support proof by direct evidence. The Hearing Examiner will utilize the McDonnell Douglas/Burdine burden shifting approach. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). The first step is to determine if the Complainant can establish by the preponderance of the evidence that she has demonstrated the elements of a *prima facie* case of retaliation. As is true of the discrimination context, the *prima facie* elements in a claim of retaliation will vary depending upon the exact allegation of retaliation, but in general, the elements may be stated as follows: 1) did the Complainant exercise a right protected by the ordinance?, 2) did the Complainant experience an adverse employment or other action?, and 3) is there a causal link between the right exercised by the Complainant and the Complainant's adverse action? An additional element may sometimes enter the analysis requiring the demonstration that the exercise of a protected right was undertaken in good faith.

After several months of growing frustration with her employment situation, especially with the failure to receive positions for which she believed she was the most qualified candidate, the Complainant, on September 22, 2014, filed a complaint of discrimination with the Department of Civil Rights alleging discrimination as outlined in the above discussion. The Hearing Examiner has no doubt the Complainant filed her initial complaint in good faith honestly believing she'd experienced a variety of discriminatory actions on the part of the Respondent. During the period leading up to the Complainant's filing of her complaint, she experienced stress and sought treatment for the emotional impact of what she saw as discrimination.

Subsequent to filing of her complaint in September of 2014, the Complainant continued to be stressed and took time off work.

On October 15, 2014, the Department of Civil Rights conducted an early mediation in an effort to resolve the complaint. The Complainant appeared at the early mediation as did Chris Ehle on behalf of the Respondent. The mediation proved to be unsuccessful. The Complainant called in ill for the whole day and for October 16 and 17. The Complainant also called in absent on October 21, 2014, claiming to be having transportation problems. On all occasions, she spoke with a supervisor. On November 5 or 6, 2014, the Respondent terminated the Complainant's employment accusing the Complainant of having committed fraud with respect to utilization of sick leave and theft of time from the Respondent.

As previously noted, the Complainant filed, in good faith, a complaint of discrimination with the Department of Civil Rights on September 22, 2014. The filing of such a complaint is the exercise of a right protected by the ordinance. There is no doubt the Complainant's termination represents an adverse action. The Complainant additionally asserts the Respondent's refusal to work in an interactive manner with the Complainant to resolve issues with her timecards and time reporting represents an adverse action in its own right. The Complainant describes a pattern and practice of conduct on the part of the Respondent to help the Complainant with an admitted problem in her timekeeping practices by which once the Complainant turned in her timecard, if there were problems with it, her supervisor or someone else would contact the Complainant and work to resolve any issues with the hours she reported. It is this practice that the Respondent unilaterally ended after the filing of the initial complaint in this matter that the Complainant asserts represents an adverse action.

The Respondent does not appear to argue there was not a leniency with respect to issues surrounding the Complainant's reporting of hours. Rather, it relies on the provisions of the Employee Handbook and its sense that inappropriate use of various leave and errors in reporting of time represent intentional fraud on the part of the Complainant, and that such misconduct represents a theft of the Respondent's resources, for which termination was appropriate.

The Hearing Examiner cannot find the discontinuance of the Respondent's practice of leniency with the Complainant regarding time issues by itself represents an adverse action. However, considering the cessation of such practice resulted in the Complainant's termination, the action does represent an adverse action.

The question is whether the Complainant can demonstrate a causal link between the filing of her initial complaint and her termination. There are several factors which demonstrate this link. First, temporal proximity raises an inference of discrimination. The Respondent is correct in pointing out that mere temporal proximity is not sufficient to demonstrate retaliation, but it is not just the temporal proximity between the filing of the initial complaint and the Complainant's termination that creates the link. It is in this context that the Respondent's change of practice with respect to the Complainant's timekeeping difficulties help to connect the filing of the initial complaint and the Complainant's termination. The fact that the Respondent determined to hold the Complainant more strictly to the Respondent's timekeeping policy and the apparent violations of policy lead to the Complainant's termination, raise a strong inference the Respondent was motivated, at least in part, by the Complainant's filing of her complaint. It is the change in the Respondent's conduct and the temporal proximity in combination which connect the termination to retaliation.

The Respondent states its Employee Handbook sets forth policies on timekeeping and reporting. The Respondent asserts that it has terminated at least one other employee, a janitor, for a first offense timekeeping/reporting violation and it takes such violations seriously. As evidence of the fraudulent nature of the Complainant's reporting violations, the Respondent points to the fact that on October 15, 2014, a day when the Complainant claimed to be ill, she nevertheless attended the early mediation conference in her original complaint. The Respondent also asserts the Complainant's use of sick leave on a day when she had called in claiming transportation problems and for which McColl was covering for her represents fraud. Finally, the Respondent highlights several weekends in October 2014 for which the Complainant claims work hours, despite the fact that the Employee Handbook states that weekend hours can only be compensated with prior written approval of the employee's supervisor.

The Respondent testified its Human Resources Director, Christine Fenner, told several higher authorities at the Respondent of the issue and that the Complainant was likely to file a retaliation claim if the Respondent terminated her. The Respondent asserts it was a measure of how seriously the Respondent takes such matters that it determined to terminate the Complainant despite the likelihood of a retaliation complaint.

The Respondent's position, if true, would represent a legitimate, non-retaliatory explanation for the Complainant's termination. However, the Complainant does point to facts and testimony in the record that causes the Hearing Examiner to doubt the credibility of the Respondent's explanation.

With respect to weekend hours, the testimony clearly indicates the Complainant fairly regularly worked on weekends without prior written approval of a supervisor and filed hours for compensation for that time. The Complainant's explanation that this time was spent preparing work plans, setting up classrooms and purchasing supplies, as well as responding to inquiries of her supervisors were all reasonably necessary and represent compensable time. To the extent the record shows, the Respondent paid the Complainant for these hours without adverse action, which indicates the Respondent's change in practice subsequent to the filing of the initial complaint was, in part, motivated by that filing.

There is nothing in the record to indicate the Respondent ever took any disciplinary action with respect to the Complainant's timecard and recordkeeping faults prior to the filing of the initial complaint. Neither did the Respondent inform the Complainant she was expected to be held to strict compliance with the Respondent's timekeeping procedures and policies after the complaint was filed. Instead of giving the Complainant a warning of the Respondent's desire to have strict compliance with its timekeeping procedures, it terminated the Complainant as quickly as it could document a variance from the procedures.

As for Fenner's warnings of a possible retaliation complaint demonstrating the seriousness with which the Respondent took enforcement of its time policies, it seems equally feasible the Respondent merely accepted the risk of a complaint, since it was already involved with disputing the original complaint. Rather than a demonstration of seriousness, it seems equally likely the Respondent's action represents disdain for having one more claim added to a complaint it does not appear it took seriously.

The Respondent's argument that the Complainant's claiming hours of work on a day where McColl was covering for her demonstrates the Complainant's willingness to commit fraud. While that is certainly one possible interpretation, another equally plausible one is that the Complainant was in the midst of a stressful time in her life and simply made a mistake. The latter explanation seems at least as likely given the Complainant knew of McColl's covering for her, as she had spoken with him about it. It would indeed be a brazen individual who knowing of her conversation would intentionally claim hours she had relinquished to another. Rather than evidence of fraud, the Hearing Examiner is more inclined to accept the mistake hypothesis.

The Respondent's willingness to presume the Complainant was not ill during the period of October 15 to 17, 2014 is suspect, as it did not ask the Complainant for documentation of her medical condition for that period of time. The Complainant's appearance for a limited time for the early mediation on October 15, 2014, in the mind of the Hearing Examiner, does little to demonstrate willful misconduct on the part of the Complainant.

When taken as a whole, the Respondent's new found seriousness about "time theft" and strictly correct accounting of the Complainant's time so closely after the filing of her initial complaint leads the Hearing Examiner to conclude that the Respondent's explanation is not credible and likely pretextual to hide the Respondent's desire to rid itself of the Complainant for her filing of her complaint of discrimination.

Having determined the Respondent terminated the Complainant's employment in retaliation for her exercise of a right protected by the ordinance, the Hearing Examiner must attempt to craft a remedy that will make the Complainant whole. MGO sec. 39.03(10)(c)(2)(b). In this regard, a "make whole remedy" is one that places the Complainant in the same position she would have been absent the retaliation. Miller v. CUNA, MEOC Case No. 20042175 (Ex. Dec. 5/16/08). In an employment case, the Hearing Examiner may award back pay and other economic damages less any actual wages the Complainant has earned in the interim, non-economic damages generally consisting of a monetary award for the embarrassment and humiliation that often accompanies discrimination and other equitable relief. Equitable relief may consist of an order to cease and desist from some given conduct, an order to perform some action such as to rehire the Complainant, or to make some other equitable arrangements in order to make the Complainant whole again.

With respect to back pay, the Hearing Examiner finds that the Complainant was making $12.90 per hour at the time of her termination on November 5 or 6, 2014. The record indicates the Complainant worked an average of 30 hours per week. A back pay award is calculated by multiplying the per-hour wage by the number of days the Complainant would have worked from the date of her termination to the undersigned date. This amount would be reduced by any wages earned by the Complainant during this period, as well as any other payments intended to replace the Complainant's lost income such as unemployment compensation payments. The award should take into account any wage increases which the Complainant might be reasonably entitled. These would include cost of living increases, workforce-wide adjustments to pay level, but would not include possible promotion or other speculative elements. At this time, the record does not contain sufficient information for the Hearing Examiner to adequately calculate an award of back pay. The Hearing Examiner will give the parties a reasonable period of time to confer about the back pay award. If an agreement cannot be reached concerning back pay, the Hearing Examiner will either request the submission of affidavits or hold further proceedings to address this portion of an award.

A prevailing Complainant has a duty to reasonably mitigate her damages. Harris v. Paragon Restaurant Group Inc. et al, MEOC Case No. 20497, (on liability/damages Comm. Dec. 2/14/90, 5/12/94, Ex. Dec. 6/28/89, 11/8/93). The record contains information indicating that the Complainant undertook steps to find other comparable work. To the extent that a Respondent wishes to challenge a prevailing Complainant's efforts at mitigation, the Respondent bears the burden of producing evidence indicating that the Complainant's efforts were not reasonable and an award of back pay should be truncated or eliminated. Harris, supra.

The Complainant's testimony concerning her efforts at mitigation, though sparse, is sufficient to shift the burden to the Respondent. The Respondent, in this regard, fails to demonstrate a lack of reasonable mitigation on the part of the Complainant.

The Complainant requests an award of prejudgment interest at a rate of 5% compounded annually. The purpose of an award of prejudgment interest is to compensate a prevailing Complainant for the lost opportunity costs related to his/her wages. The Hearing Examiner has made such awards in the past. The record, however, is devoid of any information concerning the appropriate rate of interest that should be used to calculate an award of prejudgment interest. Accordingly, the Hearing Examiner will direct the parties to confer during the same period of time that they are conferring about back pay to agree upon an appropriate rate of interest for purposes of calculating prejudgment interest.

Customarily, where an employee has either not been hired for a position or has been terminated from a position, the law considered the best remedy to be an order for reinstatement to the lost position. Where reinstatement is not appropriate or seems doomed to generate future litigation, the Hearing Examiner may consider issuing an award of front pay. Miller, supra. Front pay is an effort to compensate the Complainant for a reasonable period of time while he/she seeks comparable employment. This is an equitable remedy and, as such, rests in the discretion of the Hearing Examiner.

In the present matter, the Hearing Examiner cannot find that an order of reinstatement is appropriate. The history of the Complainant's unhappiness with her working conditions and the policies of the Respondent would make any reinstatement an exercise in futility. From the Respondent's perspective, it has already demonstrated a willingness to take extreme measures not to have to deal with the Complainant as an employee by terminating her employment. The situation would likely only result in further claims of discrimination and/or retaliation and a repetition of this litigation. The Hearing Examiner will not order the Respondent to reinstate the Complainant.

In lieu of reinstatement, some courts have ordered the Respondent to pay a terminated employee pay for some reasonable period of time to permit a prevailing Complainant the opportunity to obtain comparable employment or to otherwise replace lost income. In the present circumstances, the Hearing Examiner declines to make an award of front pay.

The Complainant was terminated approximately three years ago from a position that paid $12.90 per hour. In the intervening time, it seems that the Complainant should have been able to obtain comparable employment or to otherwise replace her lost income. Though it is not in the record, the Hearing Examiner will take official notice of the fact that the Madison area has one of the lowest unemployment rates in the state. While this employment success is not

universally enjoyed by all residents of Madison, the Hearing Examiner believes that during this time and moving forward from the undersigned date, the Complainant should reasonably be able to find comparable employment. A three-year period of time to find employment that would replace that lost by the Complainant seems sufficient. Any award of front pay would, by its nature, be for a very limited period of time. Given the limited period that might have been appropriate for a front pay award and the lapse of time since the Complainant's termination, the Hearing Examiner declines to make an award of front pay.

The issue of damages for the emotional distress that often accompanies discrimination or retaliation is one of the most difficult for any finder of fact/decision-maker. It requires the Hearing Examiner to consider the testimony of the parties and a review of similar awards in other cases. The Hearing Examiner's description of the process and analysis of past Commission awards in the Miller case, Miller, supra., sets forth the burdens and duties of the finder of facts in this regard. The Hearing Examiner must attempt to determine what monetary figure might approach making the prevailing Complainant whole again. It seems axiomatic that no amount of money can truly replace the loss of trust and dignity that comes from discrimination or retaliation, but it is the only mechanism that the law gives us. In crafting an award of damages, the Hearing Examiner must be mindful that the purpose of the award is to compensate the Complainant and not to punish the Respondent. That an award in compensating the Complainant may have a punitive effect upon the Respondent is an unfortunate byproduct of this calculus.

The testimony of the Complainant indicates that she sought medical attention for the stress of her employment, as well as from her employment. In making an award of damages, the Hearing Examiner will not compensate the Complainant for distress that was associated with her claims that were found not to be supported. It is only the distress, embarrassment and humiliation that stems from the Complainant's termination that is compensable. The fact that the Complainant had been experiencing distress and anxiety for some time prior to her termination complicates the job of the Hearing Examiner.

In the end, the Complainant testified that she had experienced stress, distress, embarrassment, humiliation, economic deprivation and homelessness as a result of the Respondent's retaliation. The Complainant's testimony was emotional and entirely credible. The pain of the termination decision and its consequences for the Complainant's life and family relationships were compelling. The Complainant's testimony was corroborated by the witness, Georgette Lucey-Durrani. Lucey-Durrani spoke eloquently of her concern for the Complainant's plight and the effect of her homelessness during the cold of the winter and the impact that such conditions had on the Complainant and her child.

In the Miller case, the prevailing Complainant spoke of the impact upon him when he had to explain to his son why they no longer went to the doctor or could do many of the things they did before. Miller also testified about the loss of society with work companions and the isolation of no longer being part of the same social circle, Miller, supra. Miller had been terminated by his employer in retaliation for his complaint about the discriminatory conduct of another employee. In that case, the Hearing Examiner awarded the prevailing Complainant emotional distress damages of $75,000.00. This represents the largest such award issued by the Hearing Examiner to date.

In the present matter, the Complainant experienced even more harsh consequences of the Respondent's decision to terminate her than did the Complainant in Miller. However, in Miller there was no indication of prior emotional distress as there was in the present matter.

In no other case decided by the Hearing Examiner or the Commission has homelessness and the distress related to that condition been a factor except perhaps for the case of Williams and Oden v. Sinha et al, MEOC Case No. 1605 (Comm. Dec 12235/93 on juris., Ex. Dec. 1/23/96). In that case, a homeless couple were profiled by a rental agent and kept from renting a home for which they might have otherwise qualified. They experienced continuing homelessness and other conditions such as increased consumption of alcohol. The Hearing Examiner, some twenty years ago, awarded the prevailing Complainants a total of $15,000.00 for their emotional damages.

The Williams and Oden case and the present matter are distinguishable in some respects. In Williams and Oden, the Complainants were homeless at the time of the opportunity to rent an apartment. In the present matter, it was, at least in part, a result of the Respondent's actions that the Complainant became homeless. That difference supports a large award of emotional distress damages in the present matter.

While the Hearing Examiner was initially inclined to make an award larger than that in the Miller case, the Complainant's testimony that she had been experiencing distress and other emotional distress prior to her termination convinces the Hearing Examiner that an award commensurate with that in Miller, $75,000.00, is appropriate.

While the Hearing Examiner is somewhat troubled by the Complainant's failure to find comparable employment in the time between her termination and the hearing, the Hearing Examiner finds that the Respondent's action in terminating the Complainant's employment is the proximate cause of substantial economic loss and emotional distress directly resulting from the Complainant's termination and as a result of the loss of income and opportunity stemming from the Complainant's termination.

In making this award, the Hearing Examiner is only marginally relating the circumstances of the Miller case and this one. As stated in the Miller case, the duty of the Hearing Examiner is to assess the injury to the Complainant and to endeavor to make her whole. Reference to other decisions help to outline the considerations of the Hearing Examiner, but, in the end, the duty is to remedy the Respondent's discrimination or retaliation against the present Complainant.

Finally, a prevailing Complainant, as part of the make whole remedy, is entitled to an award of her actual costs and expenses in pursuing her claim including a reasonable attorney's fee. Actions brought under the ordinance as actions to redress a social wrong and to that end, Complainant's must receive an award of attorney's fees in order to make them whole and to keep them from seeing their economic damages whittled away to pay attorney's fees. Harris, supra, Chung v. Paisans, MEOC Case No 21192 (on attorney's fees Ex. Dec. 7/29/93 and 9/23/93), Gardner v. Walmart Vision Center, MEOC Case No.22637 (on attorney's fees Ex. Dec. 6/1/01).

In the present matter, the Complainant is entitled to have the Respondent pay her reasonable costs and fees. To not include this relief would substantially limit the effectiveness of the "make whole" remedy and deprive the Complainant of that to which she is entitled.

Signed and dated this 6th day of November, 2017.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Samuel L Owens
Thomas A Cabush