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

Amber Franklin
3114 Churchill Drive
Madison WI 53713

Complainant

vs.

AJ Prestige LLC
1004 North Sunnyvale Lane
Madison WI 53713

Respondent

COMMISSION'S DECISION AND FINAL ORDER ON APPEAL OF HEARING EXAMINER'S DECISION AND ORDER

CASE NO. 20152133

BACKGROUND

On June 29, 2015, the Complainant, Amber Franklin, filed a complaint of discrimination with the Madison Department of Civil Rights Equal Opportunities Division. Franklin charged that the Respondent, AJ Prestige LLC, harassed her and discriminated against her in employment on the basis of her sex and retaliated against her for making a complaint when the Respondent terminated her employment, in violation of MGO 39.03.

The Respondent denied having discriminated against the Complainant. A Division Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant in regard to her discharge on the basis of her sex, and in retaliation for making a complaint.

The Hearing Examiner held a public hearing on the matter on July 12, 2016 and based on the record of the proceedings, issued his Recommended Findings of Fact, Conclusions of Law and Order on May 11, 2020, finding that the Respondent did not discriminate against the Complainant on the basis of her sex but did retaliate against the Complainant for making a complaint protected by the Equal Opportunities Ordinance.

The Hearing Examiner found that the Complainant was unlawfully terminated by the Respondent shortly after she sent a text message to the Respondent opposing what she believed to be discriminatory behavior. The Hearing Examiner ordered the Respondent to pay the Complainant's lost wages in the amount of $11,072.00, $10,000.00 for compensatory damages due to emotional distress, pain and humiliation resulting from her termination, and an award of the costs and fees expended to bring her case through to resolution, including a reasonable attorney's fee.

The Complainant appealed the Hearing Examiner's Decision and Order to the Equal Opportunities Commission. The appeal was assigned to the Appeals Committee. The parties

were given the opportunity to submit additional written argument in support of their respective positions.

On October 15, 2020, the Appeals Committee of the Equal Opportunities Commission met to consider the Complainant's appeal. Participating in the Committee's deliberations were Commissioners Madden, Ramey, and Matson.

DECISION

After review of the record and the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order finding the Respondent did not discriminate against the Complainant, but did retaliate against the Complainant, the Appeals Committee finds that the Hearing Examiner's decision issued on May 11, 2020 is fully supported by the record. The Committee adopts and incorporates by reference as if fully set forth herein, the Hearing Examiner's Decision and Order.

ORDER

The Hearing Examiner's Decision is affirmed.

Joining in the Committee's action are Commissioners Madden, Ramey, and Matson. No Commissioner opposed this action.

Signed and dated this 4th day of March, 20 21.

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

Zach Madden
Appeals Committee Chair

cc: Colin B Good
Daniel A Kaplan

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

CASE NO. 20152133

On July 12, 2016, the Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, held a public hearing on the merits in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard. The Complainant, Amber Franklin, appeared in person and by her attorneys Hawks Quindel, S.C. by Colin B. Good. The Respondent, Alexandr Letavin dba AJ Prestige, LLC, appeared by its attorneys Kramer, Elkins & Watt, LLC by Jessica M. Kramer. 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. Amber Franklin is a female who was employed with the Respondent from March 9, 2015 through June 29, 2015.

2. Alexandr Letavin dba AJ Prestige, LLC, is an employer doing business in Madison, Wisconsin and employs fewer than 15 employees.

3. The Respondent, Alexandr Letavin dba AJ Prestige, LLC, operates a business providing transportation for corporate travelers and airport transfers.

4. At the beginning of March 2015, Complainant was interviewed by the owner of AJ Prestige, LLC, Alexandr Letavin, for a chauffeur position.

5. Complainant was hired by Respondent to be a full-time chauffeur ("driver").

6. Complainant had no prior chauffeur or professional driving experience prior to her employment with the Respondent.

7. In April 2015, Respondent hired Christina Bocan as a part-time driver. Ms. Bocan was the company's only other female employee during the time Complainant was employed with AJ Prestige, LLC.

8. Complainant was subject to a 90-day probationary period upon her hire.

9. On March 6, 2016, the Complainant received copies, via email, of the AJ Prestige, LLC Employee Manual, Chauffeur Certification Manual, and an e-mail with instructions on use of the Driver Anywhere App, which would be used to view her schedule and accept or decline jobs.

10. At the time of Complainant's employment, AJ Prestige, LLC also employed three (3) other part-time drivers: two males, Brad Lane and James Raschke; and one female, Christina Bocan.

11. During her employment with AJ Prestige, LLC, Complainant was the only full-time driver on staff.

12. A Driver Performance Log kept by the Respondent for Complainant included entries on March 11, 2015 (late for a pickup), April 8, 2015 (late for a pickup), April 13, 2015 (didn't pick up passenger), May 11, 2015 (didn't pick up passenger) and June 26, 2015 (refused assignment). The performance log indicated it was updated on August 10, 2015.

13. On June 24, 2015, Complainant met Mr. Letavin at the AJ Prestige, LLC garage. Complainant was asked to provide a parking receipt for a job the previous day. When she was unable to do so, Mr. Letavin responded, "That's what you get when you hire a woman".

14. On June 24, 2015, Complainant sent a text message to Mr. Letavin regarding the comment made at the garage earlier, and that the comment made her "feel bad" and that she was "not good enough".

15. At the time of the Complainant's employment with AJ Prestige, LLC, Mr. Letavin utilized a voice over internet (VoIP) cellular telephone service provided by Ring Central that allowed him to maintain a local telephone number while he was traveling.

16. Mr. Letavin claimed he never received the Complainant's June 24, 2015 text message.

17. Complainant's June 24, 2015 message was transmitted as a "MMS" message rather than as a "SMS" message.

18. On June 25, 2015, Complainant accepted two driving assignments with AJ Prestige, LLC and worked 11.49 hours that day.

19. On June 26, 2015, Complainant declined a job assignment with AJ Prestige, LLC.

20. On June 27, 2015, the Complainant accepted a driving assignment with AJ Prestige, LLC for a transport from Chicago to Middleton.

21. On June 29, 2015, the Complainant was terminated by the Respondent.

22. During the period of her employment, the Complainant was paid approximately $550.00 per week.

23. Subsequent to her termination, the Complainant received unemployment compensation payments of approximately $250.00 per week until she found new employment on October 12, 2015.

24. During the period in which the Complainant received unemployment compensation payments, she sought alternative employment as required by the unemployment compensation program.

25. On October 25, 2015, Complainant began employment at Savers making approximately $330.00 per week until she received a wage increase in May of 2016.

26. The Complainant's new wage paid her approximately $345.00 per week.

27. The Complainant abandoned seeking new employment around July 1, 2016.

28. The Complainant experienced periods of emotional distress typified by the inability to sleep and periods of crying. These periods of distress were eventually replaced by the need to care for her family.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class sex (female) and is entitled to the protections of the City of Madison Equal Opportunities Ordinance 39.03.

2. The Complainant is protected from retaliation (termination) due to her exercise of a right protected by the City of Madison Equal Opportunities Ordinance 39.03.

3. The Respondent is an employer within the meaning of the City of Madison Equal Opportunities Ordinance 39.03 and is subject to its terms and conditions.

4. The Respondent did not discriminate against the Complainant on the basis of her sex in terminating her employment with the Respondent in violation of the Equal Opportunities Ordinance.

5. The Respondent did retaliate against the Complainant for the Complainant's objection to discriminatory behavior protected by the Equal Opportunities Ordinance when it terminated the Complainant's employment in violation of the Equal Opportunities Ordinance.

6. The Complainant did suffer economic loss as a result of her retaliatory termination of employment with the Respondent.

7. The Complainant did suffer a compensable loss for humiliation, embarrassment and emotional distress due to the Respondent's retaliatory termination of her employment.

ORDER

1. No later than 30 days from the date upon which this Order becomes final, the Respondent shall pay Complainant $10,000.00 as compensatory damages for the Complainant's emotional distress.

2. No later than 30 days from this Order's becoming final, the Respondent shall pay to the Complainant the sum of $11,072.00 for her wage loss from June 29, 2015 to July 1, 2016.

3. No later than 45 days from the date upon which this Order becomes final, the Complainant shall submit a petition along with supporting documentation of her costs and fees, including a reasonable attorney's fee. The Respondent may object to the Complainant's petition within 15 days of receipt of the Complainant's petition.

MEMORANDUM DECISION

In her complaint, filed on June 29, 2015, MEOD Case No. 20152133, the Complainant alleges that the Respondent discriminated against her on the basis of her sex (female) in the terms and conditions of her employment (harassment and discharge), and in retaliation for making a complaint when the Respondent terminated her employment in violation of MGO 39.03. The Initial Determination by the City of Madison Department of Civil Rights found that there was probable cause to believe that discrimination occurred concerning the Complainant's termination because of her sex, and in retaliation for making a complaint.

Cases of discrimination can be proven by either the direct or the 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 apply 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 if the Complainant has established a *prima facie* claim of discrimination. A complaint of discrimination on the basis of sex in the terms and conditions of employment must meet the *prima facie* standard.

In order to establish a *prima facie* case of discrimination in the form of termination on the basis of sex, the Complainant must show that 1) she is a member of a protected class, 2) she was performing her job satisfactorily, 3) she suffered an adverse action, and 4) the adverse action suffered was, at least in part, causally connected to her protected class. In order to establish a *prima facie* claim of retaliation, the Complainant must show that, in addition to the elements listed above, she exercised a right protected by the Ordinance.

The Complainant must prove each element of the *prima facie* claim by a preponderance of the evidence. The burden to prove a claim of discrimination lies with the Complainant.

Presuming the Complainant meets this burden of proof, the burden then 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 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 motive.

It is not disputed that the Complainant is a member of the protected class sex (female) and is subject to the protections in MGO 39.03. The Complainant suffered an adverse action, when, on June 29, 2015, she was terminated from her employment with the Respondent, AJ Prestige, LLC. The Complainant has established two of the elements of a *prima facie* claim. In order to prove discrimination on the basis of sex, it is now incumbent upon the Complainant to show that she was performing her job satisfactorily, and that her termination was as a result of her sex.

The Complainant, Amber Franklin, was hired by AJ Prestige, LLC on March 9, 2015 after interviewing with Alexandr Letavin, owner of AJ Prestige, LLC. Ms. Franklin testified that at her interview, Mr. Letavin stated that he had never hired a woman before. Mr. Letavin described this comment in the context of a conversation about the Complainant's uniform requirements, and that he had not considered what those requirements might be for a woman. Ms. Franklin was hired as AJ Prestige's only full-time driver. Ms. Franklin had never been a driver or chauffeur before, and had no professional driving experience. Ms. Franklin's training consisted of an email to her from Mr. Letavin that included an AJ Prestige, LLC Chauffeur Certification Manual, Employee Manual, and instructions on how to use the Driver Anywhere smartphone application AJ Prestige used to maintain its driver's schedules and send assignments.

In order to view her upcoming assignments, Ms. Franklin would need to log on to the Driver Anywhere app with her unique user name and password. Once logged in, Ms. Franklin would be able to view her scheduled assignments and accept or decline assignments. Once an assignment was declined, it would no longer appear on Ms. Franklin's application. AJ Prestige, LLC did not offer any evidence at hearing that it maintained any written policy pertaining to declining assignments. Mr. Letavin testified that unless a full-time driver had requested a day off in advance, they were not allowed to decline a job, and that he expected his full-time employees to be available at any time that had not previously been requested off to take assignments. Mr. Letavin was unable to point to any written policy to support his testimony.

Ms. Franklin was AJ Prestige, LLC's only full-time driver, and admitted that the beginning of her employment was a little rocky. Ms. Franklin was subject to a 90-day probationary period at the beginning of her employment. During that time, Mr. Letavin documented five separate occasions of performance issues with Ms. Franklin. On March 11, 2015, two days after her first day of employment, Ms. Franklin was late for a scheduled pick up. The reason listed on the performance log was "didn't check the flight status." The other issues noted on Ms. Franklin's driver performance log were as follows: April 8, 2015 late for a pickup, overslept; April 13, 2015 didn't pick up the passenger, didn't know where to look up passengers list and didn't ask; May 11, 2015 didn't pick up the passenger, overslept; and June 26, 2015 refused assignment, refused to pick up passenger because taking kids to the pool.

Following her failure to pick up a passenger on May 11, 2015, Ms. Franklin was concerned she would be terminated, but pleaded for her job, and despite her previous performance issues, was permitted to remain employed. Mr. Letavin testified that it was her refusal of an assignment on June 26, 2015 that was the cause of her termination, and in light of her previous performance issues, was the "straw that broke the camel's back".

Ms. Franklin asserted that it was not her refusal to accept an assignment, but rather her sex, that caused her to be treated differently than similarly situated employees, and was therefore, the reason for her termination. Ms. Franklin testified that during her employment, there were three instances during which she specifically recalled Mr. Letavin making disparaging remarks about women. The first was during her interview. Mr. Letavin remarked that he had never hired a woman before. The second instance occurred when Ms. Franklin inquired during her employment whether or not there were other employment opportunities available with AJ Prestige, as a friend of hers was interested in employment. In response, Mr. Letavin remarked, "I don't know if I can handle another one of you." The third instance happened three days prior to her termination when Ms. Franklin met Mr. Letavin at an AJ Prestige, LLC garage where Mr. Letavin was orienting another male employee. Mr. Letavin asked Ms. Franklin for a parking receipt from a job she had driven the day before. When she indicated that she was unable to locate the receipt, Mr. Letavin commented, "That's what you get for hiring a woman." The new male employee at the facility with Mr. Letavin made a non-verbal indication that he had heard the comment made by Mr. Letavin.

Ms. Franklin was upset by this comment, and afterward, sent Mr. Letavin a text saying, "Alex, me of all [people] know that women and men are different, so when someone says something about how a woman acts it doesn't bother me. When it comes to you and my job, I try my very best to be great in your eyes. When you make comments like you do I realize men can have their opinions and that is fine because it is the truth but it makes me feel bad. Cause [sic] it makes me feel like YOU think you made a mistake hiring me, or that I'm not good enough."

During Ms. Franklin's employment, AJ Prestige, LLC also employed three part-time drivers, Christina Bocan (female), Brad Lane (male) and James Raschke (male). Both Ms. Bocan and Mr. Lane had refused or declined assignments on the Driver Anywhere app. Both Ms. Bocan and Mr. Lane's driver performance logs, offered into evidence at the hearing, were devoid of any mention of this, or any other performance issues. In fact, Ms. Bocan testified that while Mr. Letavin was unhappy, and verbally reprimanded her for declining a job, she was unaware of any policy of termination for refusing an assignment.

Mr. Lane had also refused an assignment while he had been employed with AJ Prestige, LLC. Mr. Letavin testified at trial that he had written a reprimand intended for Mr. Lane, but Mr. Lane never returned to his employment following the refusal of the job, and therefore constructively resigned, effectively rendering the written reprimand moot. No such written reprimand was produced at hearing and no evidence of any reprimand was noted in Mr. Lane's driver performance log.

Ms. Franklin testified that she had refused an assignment prior to the June 26, 2015 assignment, and had not been terminated.

Ms. Franklin argues that Mr. Lane and Ms. Bocan were similarly situated employees for the purpose of determining disparate treatment. Ms. Franklin was the only full-time employee of AJ Prestige, LLC. In fact, while Ms. Franklin was employed with AJ Prestige, LLC, the total employees, at varying intervals during her employment, included herself, Ms. Bocan (female, part-time), Mr. Lane (male, part-time) and Mr. Raschke (male, part-time). The Respondent argues that there were no similarly situated employees with which Ms. Franklin could compare herself. The basis for the Respondent's argument is that part-time and full-time employees cannot be "similarly situated". For the purposes of this case, the Hearing Examiner finds that argument to be without merit. It would be unreasonable and illogical to assume that employees must be so identically situated, as the Respondent seems to suggest, in order to analyze disparate treatment. In the present matter, the terms and conditions of employment for full- and part-time employees of AJ Prestige, LLC were substantially similar, save for the number of hours they were expected to be available to work.

The Hearing Examiner does not find that the Respondent discriminated against the Complainant on the basis of sex when it terminated her employment. The Complainant argues that she was treated differently than similarly situated employees on the basis of her sex. The two employees Ms. Franklin points to in order to show disparate treatment are one female part-time employee and one male part-time employee. In the instance of each of these employees, the Respondent testified that they had both refused an assignment, and that Ms. Bocan had at least been verbally reprimanded. The Hearing Examiner finds it noteworthy that Ms. Bocan had been employed for a little more than a year with the Respondent, and testified that she had never experienced, nor heard or witnessed, any negative behavior from Mr. Letavin toward herself or Ms. Franklin as the two female employees.

The Hearing Examiner does not doubt that Mr. Letavin made the remarks Ms. Franklin testified to. However, the three remarks made by Mr. Letavin, while ignorant and in poor taste, do not rise to the level of illegal discrimination.

The Hearing Examiner does find, however, that while Ms. Franklin did have some performance issues, and that her employment with AJ Prestige, LLC got off to a rocky start, that her termination was unlawfully retaliatory following a text message, opposing what she believed to be discriminatory behavior, sent to Mr. Letavin on June 24, 2015. The Respondent argues that not only did Mr. Letavin not receive Ms. Franklin's text message, but that even if he did, it did not indicate any opposition to discriminatory behavior. The Hearing Examiner finds that both of these arguments are not supported by the record.

There was much dispute during the hearing about evidence of SMS versus MMS messages received by Mr. Letavin on June 24, 2015. Mr. Letavin testified that he never received Ms. Franklin's text message, and that if he did, he would have been unable to delete only that text message in a series of text messages from Ms. Franklin. The Respondent provided a record of incoming and outgoing text messages from Mr. Letavin's phone for the date in question. The Complainant argues that the records were not properly certified and are, therefore, inadmissible. While the Hearing Examiner does not find reason to exclude the evidence from Mr. Letavin's service provider of SMS messages received by Mr. Letavin, it is troubling that the Respondent did not produce records of all messages received on the day in question, including both MMS and SMS messages. The testimony at hearing was that Ms. Franklin's message to Mr. Letavin went through as a "MMS" message, but did not appear any differently on her phone than any other message. Mr. Letavin testified that he never received the message and that even if he had, he would not have been able to erase the message. This

was proven false at hearing. Both counsel for the Complainant and Respondent were able to send Mr. Letavin a verbatim copy of the Complainant's original June 24, 2015 message, and both messages were received by Mr. Letavin. Further, counsel was able to erase just one in a series of messages from Mr. Letavin's phone. The Hearing Examiner finds Mr. Letavin's testimony and evidence at hearing regarding receipt of the text message at issue to be wholly unreliable and potentially untruthful.

Given the belief that the Respondent did receive Ms. Franklin's text message, and that she was terminated shortly thereafter, the Hearing Examiner finds that Ms. Franklin's termination was retaliatory. Employees similarly situated to Ms. Franklin were not terminated after refusing an assignment. Indeed, Ms. Franklin herself had not been terminated prior to her June 24, 2015 text message to Mr. Letavin for refusing an assignment. It was not until after she complained about the comment made by Mr. Letavin about her sex that her refusal to accept an assignment resulted in termination. While Mr. Letavin may not have discriminated against Ms. Franklin on the basis of her sex, she is the only employee that was terminated after declining an assignment, and she was the only employee who opposed what she legitimately believed to be discriminatory behavior on the part of Mr. Letavin.

Having determined that the Complainant was the victim of retaliation, the question becomes to what damages is she entitled that will make her whole again. The Complainant requests an award of economic damages for her lost wages and for compensatory damages for the emotional distress she experienced subsequent to her termination. Both forms of damages are recognized by the Equal Opportunities Ordinance and the Hearing Examiner has made awards of both.

With respect to the Complainant's economic losses, the record indicates that the Complainant's weekly wage while employed by the Respondent was approximately $550.00. When the Complainant was terminated, she needed to replace her lost wages and sought to receive unemployment compensation insurance payments through the State. She did receive these payments and the Complainant estimated that she received approximately $250.00 per week leaving her with a weekly shortfall of approximately $300.00. On this record, it is not clear for how long the Complainant received unemployment compensation payments, but it seems as if the testimony is that she received those payments until she began work at Savers on October 12, 2015.

During the period for which the Complainant received unemployment compensation payments, she complied with the requirement to seek other forms of employment. She believes she was required to apply for four jobs per week. The Complainant testified that she complied with this requirement, but did not seek work beyond that required to receive unemployment compensation payments.

On October 12, 2015, the Complainant found work at Savers. This work was part-time and again paid less than what she was paid for a week's worth of work with the Respondent. In May of 2016, the Complainant received an increase in wages at Savers from $11.02 per hour to $11.52 per hour. At all times during her employment at Savers, which included the time up to the date of hearing, the Complainant worked approximately 30 hours per week.

The Complainant is required to make a reasonable attempt to mitigate her economic losses and to replace her lost income. Mitigation of her wage loss includes working at a job that pays less than what she was being paid before she was terminated by the Respondent. 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 atty. fees: Comm. Dec. 2/27/95, Ex. Dec. 8/8/94), Cronk v. Reynolds Transfer & Storage, MEOC Case No. 20022063 (Comm. Dec. 3/5/2007; Ex. Dec. 8/29/2006; Comm. Dec. 2/28/2005; Ex. Dec. 9/13/2004, Reynolds Transfer & Storage, Inc. v. City of Madison Department of Civil Rights, Equal Opportunities Commission, 2000 CV 1100 (Dane Cty. Cir. Ct. 10/19/2007)).

While working at a position for less pay can be considered as mitigation for some period of time, if one stops seeking employment that would replace one's lost income, they are no longer attempting to mitigate their damages and the Respondent has no further obligation to pay the Complainant for lost wages. Cronk, supra. Under the circumstances set forth in this record, the Hearing Examiner finds that the Complainant abandoned her effort to find comparable pay approximately one year after her termination. The fact that the Complainant found work, stayed with it, and received a raise indicate that the Complainant had taken steps to replace her lost wages. However, after she received her raise, at some point, she seemed content to stay with her current employment even though it did not fully replace her wages with the Respondent. There was no testimony that the Complainant was actively, or even passively, seeking other employment that would replace her lost wages with the Respondent. Subsequent to her raise in May of 2016, the Hearing Examiner finds that is reasonable to wait to look for additional work for some period of time while one sees if further wage increases may come forth. However, after two months, there is a reasonable inference that the Complainant has found her current employment sufficiently acceptable that she is willing to forego further employment searches in favor of the status quo.

Given the above record, the Hearing Examiner calculates the Complainant's wage loss as follows; for the period from June 29, 2015 to October 12, 2015, $300.00 per week for 15 weeks for a total of $4,500.00. Next, the Hearing Examiner looks at the period from October 12, 2015 to May 1, 2016 during which the Complainant worked 30 hours per week at a pay rate of $11.02 per hour, which the Complainant testified was approximately $330.00 per week, leading to a wage loss of $3,462.00 for that period. Finally, for the period from May 1, 2016 to July 1, 2016, the Complainant worked 30 hours per week at a pay rate of $11.52 per hour for approximately 9 weeks at $345.00 per week, for a total wage loss of $3,110.00 for that period. Adding the wage loss for these three periods together, the Hearing Examiner comes to a total wage loss of $11,072.00. In all cases, the Hearing Examiner uses the Complainant's testimony that she was being paid approximately $550.00 per week during her employment with the Respondent to represent her maximum wage potential. The total wage loss represents her maximum wage potential less her testified wage and other amounts actually received.

The Complainant did not seek an adjustment of lost wages by application of pre-judgement interest and there is nothing in this record that would permit the Hearing Examiner to calculate a reasonable rate for pre-judgement interest. The Hearing Examiner cannot speculate about what an appropriate rate of pre-judgement interest might be and declines to make such an award.

The Complainant also seeks an award for compensatory damages for the emotional distress, pain and humiliation resulting from her termination. The Complainant's testimony was emotional though somewhat short on details. She stated that she cried a lot and was somewhat paralyzed with the shock and stress of having to care for four children and to accomplish a move that she had undertaken to be closer to her employment. She stated that she did not have a long time to deal with her loss and stress, as she needed to get back to the ordinary care of her family.

It is the Complainant's burden to prove the amount of compensatory damages to which she claims to be entitled. As is often the case, the testimony in this regard, as in this case, is emotional, but lacks details that help the Hearing Examiner in making these assessments. The Hearing Examiner has followed the lead of Chomicki v. Wittekind, 128 Wis. 2d 188, 381 N.W.2d 561 (Wis. App. 1985) in several cases in permitting the Complainant to assess his or her own damages, and to testify to the extent of those emotional injuries. Cronk, supra, Nichols v. Buck's Madison Square Garden Tavern, MEOC Case No. 20033011 (Ex. Dec. 10/14/03; Ex. Dec. 11/08/05; Comm. Dec. 05/22/06; aff'd Daily dba Buck's Madison Square Garden Tavern v. EOC, City of Madison, 06CV1931 (Dane County Cir. Ct. 03/30/07)), Laitinen-Schultz v. TLC Wisconsin Laser Center, MEOC Case No. 19982001 (Ex. Dec. 7/1/2003), Carver-Thomas v. Genesis Behavioral Services, Inc., MEOC Case No.19992224 and 20002185 (Ex. Dec. 1/25/06).

Unlike the Cronk and Nichols cases, the Complainant does not make a request a specific amount of damages. Rather, this case is more similar to Laitinen-Schultz and Carver-Thomas. In both of these latter cases, the Complainants testified to an initial strong emotion reaction and injury that was followed by a fairly quick return to regular activities and emotional stability. In both of these cases, the Hearing Examiner awarded the Complainants $15,000.00 for their emotional distress. In the present matter, the Hearing Examiner cannot find that the Complainant's testimony demonstrates the same level of distress or injury as in those cases. The Hearing Examiner finds that due to the Complainant's fairly quick return, of necessity, to the demands of her daily life, that $10,000.00 will make the Complainant whole.

In the present matter, it would have been helpful for the Complainant to describe some period of time that her distress hampered her ability to cope with the demands of caring for her children or to produce a corroborating witnesses testimony about his or her observations of the impact upon the Complainant of her termination. Unfortunately, such additional testimony was not provided.

Finally, in order for the Complainant to be made whole, she must receive an award of the costs and fees expended in bringing her case to the Department of Civil Rights and going through the process of hearing and resolving this complaint. It has long been recognized that for a successful Complainant to bear his or her own costs of bringing such an action likely leaves a Complainant worse off than if he or she had not brought the case in the first place. The Department and society recognize the social good done through the enforcement of rights in this manner, and to encourage attorneys to undertake the representation of individuals in cases that might not result in a large award of damages, it is necessary to permit those attorneys and parties to receive these costs, including a reasonable attorney's fee.

For the foregoing reasons, the Hearing Examiner finds the Respondent did retaliate against the Complainant when it discharged her in retaliation for opposing what she reasonably believed to be a discriminatory practice.

Signed and dated this 11th day of May, 2020.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Colin B Good
Jessica M Kramer