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

Ramona Villarreal 2102 McKenna Blvd. Madison, WI 53711 Complainant vs. Madison Metropolitan School District 545 West Dayton Street Madison, WI 53703 Respondent	DECISION AND ORDER Case No. 21122

The Madison Equal Opportunities Commission (Commission) met on June 9, 1994, to consider the Respondent's appeal of the Commission Hearing Examiner Sheilah Jakobson's Recommended Findings of Fact, Conclusions of Law and Order in the above-captioned matter. Present and participating in the Commission's decision were: Commissioners Johnson, Anderson, Houlihan, Miller, Verridan and presented by Commissioner Greenberg.

DECISION ON APPEAL

The Commission, after fully considering the record submitted herein, including legal briefs, transcripts and exhibits, Denies Respondent's motion to dismiss on the grounds that the Commission does not have jurisdiction to hear employment discrimination matters involving the Madison Metropolitan School District, and Reverses the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order, and hereby dismisses the entire complaint with prejudice.

BASIS FOR DECISION

The Commission voted unanimously to adopt the Recommended Decision as proposed by Commissioner Greenberg and as set forth in the attached document. This document sets forth the Commission's basis for its unanimous decision in this matter and is incorporated by reference.

ORDER

The Respondent's appeal of the jurisdictional question of whether the MEOC has jurisdiction over the MMSD in employment discrimination cases is dismissed and the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order is hereby reversed and this case is dismissed.

The above Commissioners all join in entry of this order.

Signed and dated this 28th day of June, 1994

EQUAL OPPORTUNITIES COMMISSION

Andrea Houlihan
Vice President

AH:403

EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING JR., BLVD.
MADISON,WI

RAMONA VILLARREAL,

Complainant,

v. EOC Case No. 21122

MADISON METROPOLITAN SCHOOL DISTRICT,

Respondent.

RECOMMENDED DECISION TO COMMISSION

This case is on appeal from a Recommended Findings of Fact, Conclusions of Law and Order entered herein by Commission Hearing Examiner Sheila Jakobson on December 27, 1993. The Hearing Examiner found and concluded that the Respondent discriminated against the Complainant by failing to hire her for a physical education teaching position in its 1988-89 hiring process because of her race, color and ancestry in violation of sec. 3.23(7), M.G.O.. The Hearing Examiner did not find that Respondent discriminated against the Complainant on the basis of her sex or in retaliation for filing an internal complaint of discrimination in July, 1988. The Respondent filed a timely appeal, objecting to these findings and conclusions of law and order and is requesting dismissal of all claims. The Respondent also makes several legal and constitutional arguments relative to the Commission's jurisdiction. The Complainant did not appeal the adverse decisions based on sex and retaliation, and therefore those issues are not before the Commission.

The issues before the Commission are:

1. Does the MEOC have jurisdiction to hear and rule upon employment discrimination complaints filed against the Madison Metropolitan School District (MMSD);

2. Did the Complainant fail to meet her burden of proof of showing pretext for discrimination for the reasons offered by MMSD for failing to hire her in July, 1988;

3. Does the MEOC ordinance vest MEOC with judicial powers in violation of Wisconsin's constitution;

4. Has the Complainant failed to mitigate her damages;

5. Did the Complainant earn more while employed with the River Valley School District during the 1992-93 school year than she would have earned had she been hired by MMSD in August 1988; and

6. Is the Complainant entitled to compensatory damages based on the evidence in the record?

RECOMMENDATION

For the reasons set forth below I recommend that the Commission adopt the following:

1. The MEOC has jurisdiction to hear employment discrimination claims filed against the MMSD; and

2. Reverse the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order regarding the finding of discrimination on the basis of the Complainant's race, color and ancestry, and to dismiss the complaint in its entirety.

Should the Commission adopt the above recommendations it will not be necessary to address issues 3-6 as stated above.

BASIS FOR RECOMMENDATION

Jurisdiction

Respondent makes various arguments about why the Commission does not have the legal authority to hear and make decisions on employment discrimination complaints filed against the MMSD. Most of these arguments are not new. Early on in these proceedings Respondent made these arguments before the Commission. By an Order entered into on January 22, 1993, Commission Hearing Examiner Clifford E. Blackwell, III, ruled against Respondent's jurisdictional arguments finding that the Commission does have jurisdiction over MMSD in employment discrimination cases. (A copy of the Order is attached). It is recommended that the Commission adopt those portions of Hearing Examiner Blackwell's Decision and Order entered on January 22, 1993 relative to whether the MEOC has jurisdiction over the MMSD. I believe Hearing Examiner Blackwell's Decision is a correct statement of the law and

recommend its adoption.

Decision on the Substantive Merits

Substitute Teaching Positions

The Complainant claimed that the Respondent discriminated against her by failing to hire her as a substitute teacher during the period of 1984-87. The Complainant has failed to establish a *prima facie* case that she was discriminated against in this regard and Hearing Examiner Jakobson erred by finding that the Complainant taught from 1984-87 as a substitute teacher.

Prima Facie Case

In employment discrimination cases a complainant has the burden of proof to establish what is known as a *prima facie* case of discrimination. To do that she must establish that (1) she is a member of a protected class (classes); (2) she applied and was qualified for the positions in question; and (3) she was rejected by the employer-respondent under circumstances that give rise to an inference of unlawful discrimination. What is assumed under the second step is the availability of the position for which the complainant applied. The complainant in this case has failed to establish the conditions set forth in the second step.

The Complainant has failed to prove the availability of any substitute teaching positions with the MMSD during the period of 1984-87. The record is devoid of any proof of the availability of physical education/health substitute teaching positions. The Respondent has not provided any real reason for failing to offer the Complainant any substitute teaching opportunities, but the Complainant has not carried her burden of proof showing that any postions were actually available.

In addition, even if the Complainant had established the availability of substitute teaching positions during this period, she has failed to prove that offers were made to others not of her protected class and that she was qualified for the job.

The crux of Complainant's proof is that she submitted applications for employment as a physical education or health substitute teacher with the MMSD; that she was not contacted by MMSD regarding available positions; and that upon inquiring of the MMSD as to why they never contacted her they did not have a reasonable response. This is not enough. The Complainant must show that the positions actually existed, that others not of her protected class were offered the jobs and were hired, and that these individuals were as qualified or less qualified than she. Having have failed to prove any of these elements this part of her complaint must fall.

Hearing Examiner Error

The Hearing Examiner also erred by finding that the Complainant had taught from 1984-87 as a substitute teacher when the record clearly establishes that she was not available during her employment with Head Start and then with the Cudahy School District as a full time teacher. In addition, the record firmly establishes that the Complainant did not file a substitute teacher application for the 1987-88 school year with the MMSD. The record is equally clear that Complainant's first substitute teaching experience was gained during the first quarter of 1987, not any sooner as the Hearing Examiner has concluded.

Based on the above I recommend that the Complainant's complaint of discrimination be dismissed relative to MMSD's failure to hire her for any substitute teaching positions.

Pattern and Practice Claim

Substitute Teaching Opportunities

The Complainant filed an amended complaint stating that "the denials of job application in 1984 and prior to the 1986-1987 school year as described in this complaint and (in the internal complaint filed with the MMSD) constitutes a continuing pattern and practice of discrimination against the complainant which has at all times been ongoing and persistent in nature." By its broad language this would include her applications for substitute teaching. Based on what is discussed above I recommend dismissal of this claim relative to the substitute teaching applications.

Full Time Teaching Positions

Similar to the substitute teaching positions the Complainant has failed to establish a *prima facie* case relative to her full time teaching applications filed in 1984, 1985, and 1986.

The Complainant submitted an application of employment with the MMSD on July 12, 1984. The record established that although she had not yet received her teaching certification, she was eligible to receive an emergency certification from the state should she receive an offer of employment. Based on her grades as indicated by her transcript, information set forth in her application, and letters of references the Complainant was given a credit rating of 3.6. The record also established that the Respondent as a matter of policy and practice does not refer applicants to the initial interview stage who are given credit ratings below 4.0. The Complainant does not claim that the 3.6 credit rating was discriminatory.

The Complainant fails in her initial burden of proof in several ways: (1) The record contains no proof that any full time physical education teaching positions were available for the 1984-85 school year; (2) Complainant fails to establish that she was qualified for the positions available for the 1985-86 and 1986-87 school years based on her low 3.6 credit rating, and that even if she was qualified she failed to establish that she was at least as qualified as the individuals offered the physical education teaching positions; and (3) Complainant submitted her re-enrollment form for a full time teaching position for the 1986-87 school year after all physical education teaching positions were filled and she has not shown that other full time physical education teaching positions were available and filled during this same school year.

Failure to State A Claim

Hearing Examiner Jakobson found that an inference of discrimination is raised, in part, by the fact that over a period of approximately 5 years (1984-89) the Respondent failed to hire her. The Hearing Examiner ignored the clear fact that the Complainant did not state a claim in her original complaint or in her amended complaint regarding failure to hire her for the 1987-88 school year. In addition, neither the complaint nor the amended complaint state any claim for acts taken after the July, 1988 hiring process. Any reference to the period following the July, 1988 hiring process should be ignored.

Accordingly, based on the above-stated reasons I recommend that the amended complaint claiming pattern and practice discrimination be dismissed.

Failure to Hire in July, 1988

On July 18, 1988 the Respondent rejected the Complainant's application for a full time physical education teaching position. The Complainant had received an upgraded credit rating of 4.0 which made her eligible for the second step in a three step hiring process. The second step involved an interview with John Olson, who rendered an interview rating of 3.8 which made her ineligible for step three, interviews with principles of schools with the vacant positions. All individuals who were referred onto the third step received interview ratings of 4.0 and above. The Complainant was the only minority in the second step interview pool and was not referred on.

The record clearly establishes that the Complainant was one of the last persons to participate in step 2 because she did not contact the school district regarding a full time physical education teaching position until it was late in the process. Although she had submitted a re-enrollment application earlier in the year for the 1988-89 school year, she had not submitted enough additional information for the Respondent to upgrade her initial 3.6 credit rating. However, the Respondent did upgrade her crediting rating from 3.6 to 4.0 after she submitted additional information. Since the

Complainant did not contact the Respondent until it was late in the process she was one of the last persons interviewed by John Olson.

The Hearing Examiner makes much out of the fact that the Complainant was one of the last persons interviewed by Mr. Olson. This concern is unfounded and does not give any inference to unlawful discrimination.

It is clear by the record that the Complainant met her initial burden of proof relative to this position. The next question is, therefore, has the Respondent shown a legitimate business reason for failing to hire her. The answer is yes.

It is important to state that the Complainant has made no claim that the standards developed and identified by the Respondent to determine whether one is qualified as a physical education teacher was discriminatory. Indeed, it is not appropriate for the MEOC to second-guess the school district on its hiring standards. The MEOC could review the standards only when a claim is made that they are not job-related and that they have a disparate impact on members of the protected classes. Since such a claim has not been made here it would be inappropriate for this Commission to review MMSD's standards.

The Respondent has established a legitimate business reason for not hiring the Complainant during the July, 1988 hiring process. Although the record establishes, and the Respondent admits, that the Complainant was qualified to perform the necessary functions of the job in question, the Respondent has also submitted sufficient unrebutted information that the 10 white individuals hired were more qualified. The Complainant states that she was at least as qualified as those hired, especially Thomas Bakken, a nephew of John Olson. However, Complainant bases her position on the fact that she has more teaching experience than Bakken. The Respondent testified that the number of years of teaching experience is not weighed as a factor in determining qualifications. Rather, the knowledge, skills and abilities that one obtains by experience or otherwise is assessed from answers given during the interview with John Olson. In addition, an applicant's transcript and letters of reference are assessed to determine qualifications.

John Olson assessed the Complainant during the interview as weak in the areas of her understanding about assessing students with special needs and relative to safety requirements in certain physical activities. The Commission cannot second guess Mr. Olson's assessment, especially since we were not involved in any of the interviews. Additionally, notes maintained by Mr. Olson during each applicant's interview support his position and render him credible on this issue. Because we cannot second guess Mr. Olson's assessment of the Complainant's interview and the interviews of other applicants, we must accept his ratings. We then must consider whether he applied his standards uniformly and equally. The record has established that he did. Furthermore, the Complainant does not claim that he did not.

The other part of the Complainant's claim is that Mr. Olson violated the Respondent's nepotism policy by interviewing his nephew, Mr. Bakken. By this act, an inference of unlawful discrimination should be found. The record supports the conclusion that Mr. Olson did not violate the Respondent's nepotism policy because Bakken was interviewed by someone else. Although two exhibits were submitted stating that Olson did interview Bakken, the uncontradicted testimony establishes that Bakken was interviewed earlier by someone else and that neither Olson nor anyone else interviewed Bakken a second time. No inference of unlawful discrimination can be established by this claim.

It is important to note here that the law does not require the Respondent to hire members of the protected classes simply because they are qualified for a job. If the other candidates are more qualified than the applicant(s) who are members of the protected classes, the law permits the Respondent, and other employers, to hire the most qualified. However, it is apparent to this Commissioner that although there is no evidence that the MMSD violated its affirmative action plan, (and even if it did, one cannot establish discrimination by this fact alone) it is clear that the MMSD could have hired the Complainant in order to meet its stated affirmative action goals. I question the District's commitment to affirmative action by its failure to hire Ms. Villarreal at a time when there was a severe absence of qualified minority candidates. By its own admission Ms. Villarreal was qualified; just not as qualified as other applicants. However, the MMSD did not violate the law nor its affirmative action plan by failing to hire the Complainant.

Once a Respondent establishes a legitimate business reason for failing to hire a member of the protected classes, the burden shifts to the Complainant to establish that the offered reason was pretext for discrimination. The Complainant fails to provide such proof.

As stated above the record does not support the Complainant's claim that the Respondent violated its own nepotism policy. While it is possible that the wheels may have been greased for Mr. Bakken, no clear violation was made. In addition, simply because the wheels may have been greased does not in of itself establish discrimination. Other applicants not of the Complainant's protected classes were also hurt by the possibility that the wheels may have been greased for Mr. Bakken. I make no finding that any special treatment was afforded Mr. Bakken. But even if he did receive special treatment the Complainant was not alone in its impact.

As stated above Olson's ratings were not inappropriate; no credence or significance should be given to the fact that Complainant was not interviewed until most of the referrals were made to the schools; and we cannot second guess Mr. Olson's evaluation, although it may have been subjective. (What interview evaluations are not subjectively based?)

Based on the above I recommend that the Commission dismiss this part of the complaint.

SUMMATION

It is recommended that this Commission find that it has jurisdiction over the MMSD in employment discrimination cases. It is also recommended that the Complainant's case be dismissed in its entirety on the basis that she has failed to establish a *prima facie* case that she was discriminated against when the Respondent failed to appoint her as a substitute teacher. The Complainant has also failed to establish a *prima facie* case with regards to her pattern and practice claim for the substitute and full time positions for the period of 1984-1987. The Complainant has failed to prove that the Respondent's reasons for not hiring her during the July, 1988 process was pretextual.

Since the above recommendations would dispose this case, it is recommended that the Commission not consider the other arguments pertaining to the constitutionality of the Commission's authority to award compensatory damages and any arguments pertaining to testimony regarding the alleged offers of settlement.

Dated this 6th day of June, 1994.

Recommendation Made By:

Bruce Greenberg PH

Bruce Greenberg, Commissioner
Madison Equal Opportunities Commission

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

Ramona Villarreal 2102 McKenna Blvd Madison, WI 53711 Complainant vs. Madison Metropolitan School District 545 West Dayton Street Madison, WI 53703 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 21122

On March 18, 1989, the Complainant, Ramona Villarreal, filed a complaint of employment discrimination with the Madison Equal Opportunities Commission (M.E.O.C.) against the Respondent, the Madison Metropolitan School District (District) for failure to employ her as a physical education teacher in 1988 and in several prior years because of her sex, race, color and in retaliation for filimg an internal complaint with the Affirmative Action office of the Respondent, all in violation of sec. 3.23, Madison General Ordinances (M.G.O.). On December 24, 1990, when the M.E.O.C. complaint of March 18, 1989, was still pending, the Complainant filed an amended complaint charging the Respondent with a continuing pattern of discrimination in its failure to hire her in the years 1984-88 despite her applications for employment in each of those years. She also included her national origin/ancestry as a basis for the Respondents alleged discrimination against her.

Pursuant to the Complaint, an investigation was conducted by an M.E.O.C. Investigator/Conciliator. Following the investigation, an Initial Determination was issued on January 18, 1991, wherein the Investigator concluded that there is no probable cause to believe that the Respondnent discriminated against the Complainant because of her sex, race, color and national origin/ancestry or retaliated against her in violation of sec.3.23(8)

of the Madison General Ordinances. The Complainant timely appealed the Initial Determination. Upon review by the M.E.O.C. Hearing Examiner, the Initial Determination of no probable cause to believe that discrimination or retaliation against the Complainant had occurred. as charged was reversed and the matter was transferred for conciliation.

Conciliation was attempted on two separate occasions but was unsuccessful and the case was certified for hearing which was then scheduled for March 16, 1993. Through a series of misperceptions which took place during a final attempt at conciliation prior to the commencement of the hearing, the M.E.O.C. Hearing Examiner recused himself from further proceedings in this case upon a motion by the Respondent.

A hearing on the merits was finally held before a second Hearing Examiner on September 20th, 21st, 22nd, and 23rd, 1993. The Complainant appeared in person and was represented by Attorney Robert J. Gingras. The Respondent appeared by its now retired Assistant Director of Human Resources, Phillip Ingwell, and by Attorney David Rohrer of Lathrop and Clark.

Having reviewed the hearing evidence and considered the post-hearing briefs filed by the parties, I now make the the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant is a black, adult female of Hispanic ancestry who has been qualified and licensed as a physical education, health and recreation teacher in Wisconsin for grades kindergarten through twelve (K-12) since 1984. She is bilingual (English and Spanish).

2. The Respondent is a public school district (District) which employs numerous teachers at all grade levels in the Madison metropolitan area.

3. The Complainant first applied for a teaching position with the Respondent in 1984 after completing her studies for a B.A. degree in physical education but was not called for an interview by the Respondent. She reapplied to the Respondent each year thereafter through 1989 without success in obtaining a teaching position in the District.

4. The Complainant hoped to get a teaching job in her field with the Respondent and ultimately teach physical education at East High School

in Madison from where she had graduated. She also wished to teach in Madison to be near her large family there.

5. At all times relevant herein, the Respondent had a three step hiring process for teachers as follows: (l) Applicants' credentials (licenses, transcripts, evaluations, letters of reference) were reviewed by the Assistant Director of Human Resources, Phillip Ingwell, now retired, and were given a numerical rating on a scale of 1- 5, 5 being the highest rating. Generally, those applicants receiving a credential rating of 4 or better were referred to a district coordinator in the relevant field of study (in this case physical education) for an interview on the methods and substance of teaching physical education. The credential ratings were based on the experienced judgement of Mr. Ingwell. The Complainant's initial credential rating was 3.6 which was changed to 4.0 in June l988 upon receipt by the Respondent of very positive evaluations of the Complainant from the principal of Cudahy West school where the Complainant was teaching at that time. (2) The candidates referred to the district coordinator (John Olson for physical education) were interviewed by Dr. Olson using the same questions in the same order for each candidate. Again, a numerical rating on a scale of l-5 was assigned by Dr. Olson to each interview. Successful candidates were selected by Dr. Olson for referral to principals of schools with vacant physical education positions. (3) School principals interviewed candidate(s) referred to them and made the final hiring decision.

6. The Respondent had a 5 year Affirmative Action Plan in effect between l987 and l992. One of its stated goals was to recruit and hire more available, qualified minority teachers. In the first quarter report on the Affirmative Action plan (July l, l988 - September 30, l988) the under utilization of available, qualified minority teachers was identified as a problem area .

7, In the Affirmative Action Plan first quarter report referred to above, Phillip Ingwell, then Assistant Director of Human Resources who did the credential ratings of teacher applicsnts, is listed as having been directly involved in recruitment of minorities.

8. The Complainant worked as a home/classroom teacher in the Madison Head Start program for approximately one and a half years (1985-86). She received very positive evaluations for her work there but she decided to leave that job to advance her career. She still hoped to secure a physical education teaching job with the Respondent in Madison but was not successful in doing so.

9. The Complainant taught as a substitute physical education teacher in several schools outside Madison between 1984 and 1987 (Verona, Middleton, Cross Plains). She had also applied for substitute teaching to the Respondent for the 1986-1987 school year but was never contacted or called to teach.

10. In 1987 the Complainant was hired to teach physical education, health and recreation for 7th, 8th and 9th grades at the Cudahy West school in the Milwaukee area. She held that position for two school years (1987-1989). She resigned in July, 1989, mainly to pursue her teaching career goals in Madison again after two years of teaching experience under contract and also because the Cudahy environment was "rough" and she had been sexually assaulted on the school grounds. The Complainant's classroom evaluations by the principal of Cudahy were excellent.

11. During her tenure at the Cudahy school, the Complainant maintained her residence in Madison at 2102 McKenna Boulevard and also kept an apartment in Cudahy. She commuted irregularly between Madison and Cudahy, sometimes remaining in Madison overnight, a few days or longer and sometimes commuting daily or on weekends only.

12. Around 1987, the Complainant began to ask at the Respondent's offices in Madison why she had never been called for an interview for vacant physical education positions since 1984. She was told only that her credentials were in order.

13. In June 1988, the Complainant again visited the Respondent's offices to ask why she had never been called to interview for a teaching position. She was then referred to Phillip Ingwell who could give no reason to the Complainant as to why she had never been called by the Respondent since she began applying for a teaching position in 1984. He did, however, inform her that a hiring process was in progress for some 8 or more physical education vacant teaching positions and an interview with John Olson was arranged for her for June 22, 1988.

14. The Complainant was the last applicant and only minority member to be interviewed by Dr. Olson on June 22nd in the June 1988 hiring process for the vacant positions. Of 14 applicants interviewed and referred to principals, none was a member of a minority. Ultimately 10 of those were hired by the principals. All of the candidates referred to school principals were given interview ratings of 4.0 or better by Dr. Olson with most falling between 4.0 and 4.5. The Complainant's interview rating by Dr. Olson was 3.8. She was never informed of her interview rating by Dr. Olson and only learned of it after inquiring about it from Mr. Ingwell on

July 18, 1988. She was told by him that she was not referred for any of the vacancies.

15. At least two of the candidates referred to school principals and hired by them for the1988-89 school year had no previous teaching experience under contract (Thomas Bakken, Lisa Peterson) while the Complainant had experience under contract at Cudahy and had received excellent evaluations from the principal there.

16. One of the candidates hired by a school principal was Thomas Bakken who is a nephew of Dr. Olson. He received his B.A. degree in May 1987, had no teaching experience under contract and was interviewed for a teaching position by the assistant principal of West High in the second step of the hiring process in October 1987 to comply with the Respondent's anti-nepotism policy. Eight months later, in June 1988, Mr. Bakken 's referral to the principal of Randall Elementary school was based on his interview with the assistant principal of West High in October 1987. No more recent second step interview was held for him.

17. Shortly after talking with Mr. Ingwell on July 18th, the Complainant met with the Respondent's Affirmative Action Coordinator, Sylvester Hines, and filed an internal complaint of discrimination on July 24, 1988.

18. In pursuing an investigation of the Complainant's internal complaint, Mr. Hines met with John Olson who told him that he liked the Complainant in the interview and wanted her in the District; that she had hands-on experience and a good background in health. Among her weaknesses he mentioned was his perception that she was unable to adequately explain the M-team concept (the multidisciplinary team that assesses the needs of special education children and their readiness to participate in various programs). He also found her inadequate in answering a question about movement for grades K - 5. His observation was that in the final analysis, the Complainant did not "measure up" to the other candidates although she had experience with special needs children in her Head Start position.

19. On September 22, 1988, the Respondent's Affirmative Action Coordinator, Sylvester Hines, traveled to the Cudahy school where he met with the Complainant and offered her a conditional settlement of her claim against the Respondent. The offer was rejected by the Complainant.

20. Between August and November 1988 the Complainant asked Mr. Hines on numerous occasions for a copy of the investigative report of

her internal complaint which he assured her was underway and would be forthcoming but never was.

21. In early January 1989 a physical education position became vacant at Marquette Middle School in Madison. The Complainant was placed on the referral list for a second step interview along with six other applicants. On January 17, 1989, Mr. Ingwell instructed his secretary to contact the seven persons on the list to schedule immediate interviews with them. Six of the applicants were quickly reached and scheduled for an interview. Only the Complainant was not reached by the secretary, Carol Bryan, despite three attempts by her to contact the Complainant at the Madison phone number listed in her record. No attempt was made to contact her in Cudahy where Mr. Ingwell, Dr. Olson and Mr. Hines all knew she was working. Nor was her attorney in Madison contacted for a Cudahy phone number for her or to convey the urgent message regarding scheduling an interview. Consequently, the Complainant could not participate in the hiring process for the Marquette vacant position in January 1989. She was not accorded the same consideration in this matter as was Thomas Bakken in June 1988 which would have been to use her June 1988 interview with Mr. Olson for a possible January 1989 referral to the Marquette principal.

22. During the second semester starting in January 1989 the Complainant was on the referral list for physical education teaching positions at several elementary schools in Madison for both part time and full time positions but was not hired by any of them. Some reasons given by school principals on the unsuccessful candidate form were nonspecific. For example, "I hired a candidate with better credentials (but) Ramona is a very articulate and strong candidate who has many strengths and wide-ranging experiences to offer and will certainly be an asset if hired in the (District)".

23. In the fall of 1989 the Complainant was hired by the River Valley school district headquartered in Spring Green to teach Spanish part time. Subsequently, she became a physical education teacher in the River Valley district where she remains as a full time teacher at a current salary in excess of $32,000.00 per year.for the 1993-94 school year.

24. After her experience in the Respondent's 1988-89 hiring process for physical education teachers, the Complainant felt that she had been treated unfairly by the Respondent. She felt cheated and frustrated about not getting a job in the District when she had applied for one year after year. She felt increasingly emotionally distressed after her conversations with Sylvester Hines who told her of examples of how the

Respondent discriminated against minorities. She couldn't sleep, was exhausted and depressed and felt her self esteem was destroyed; her hypertension, which she has had for a number of years, increased as her feelings of stress mounted. She has sought the services of a psychotherapist in connection with her experiences with the Respondent over a period of several years.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a black, adult female of Hispanic ancestry who applied to the Respondent for physical education positions for which she was qualified. She is a member of several protected classes under sec.3.23 (7), M.G.O. which prohibits discrimination against any individual because of his/her sex, race, color and/or ancestry, among other categories.

2. The Respondent is a public school district and is an employer subject to the provisions of Sec.3. 23(7), M.G.O.

3. The Respondent discriminated against the Complainant when it failed to hire her for a physical education teaching position in its 1988-89 hiring process because of her race, color and ancestry in violation of sec. 3.23(7), M.G.O.

4. The Respondent did not discriminate against the Complainant because of her sex or in retaliation for filing an internal complaint of discrimination in July 1988.

RECOMMENDED ORDER

IT IS HEREBY ORDERED

1. That the Respondent shall pay the Complainant the sum of Twenty-five Thousand Eighthundred Sixty dollars ($25,860.00) for lost wages.

2. That the Respondent shall pay the Complainant the sum of Twenty-five Thousand dollars ($25,000.00) in compensatory damages for emotional distress.

3. That the Complainant is awarded costs and reasonable attorney's fees. She shall file a petition for the same with the M.E.O.C. together with all supporting affidavits and documents and serve copies of the same upon the Respondent within thirty days of the date of this Order.

4. That those portions of the complaint charging the Respondent with sex discrimination and retaliation are dismissed.

MEMORANDUM DECISION

This is a discrimination in employment case in which the Complainant charges that the Respondent violated sec. 3.23(7), M.G.O. by failing to hire her as a full time physical education teacher despite the fact that she is and was a Wisconsin licensed, qualified physical education teacher for grades K - 12 and had applied to the Respondent every year for 5 years beginning in 1984.

The Complainant further charges that the Respondent retaliated against her in January 1989 in violation of sec. 3.23(8), M.G.O. because she filed an internal complaint of discrimination in July 1989.

Under the federal Title VII analysis followed by the M.E.O.C. in employment discrimination cases, the Complainant has the initial burden of establishing a prima facie case by showing that (1) she is a member of a protected class(or classes); (2) she applied and was qualified for the positions in question; and (3) she was rejected by the Respondent under circumstances that give rise to an inference of unlawful discrimination. Larson v. DILHR (Wis. Personnel Comm., 8/24/89). If the Complainant succeeds in establishing a prima facie case, the burden of rebutting her claims shifts to the Respondent. The Complainant must then show that the reason(s) proffered by the Respondent for failure to hire her for a vacant position(s) was a pretext for discrimination.

There is no dispute that the Complainant is a member of several protected classes (including sex, race, color, ancestry) under sec. 3.23, M.G.O. Nor is it in dispute that she had all the requisite credentials that qualified her to hold a position as a licensed physical education teacher in the state of Wisconsin and more specifically, in the Respondent's district. An inference of unlawful discrimination on the basis of race, color and ancestry is raised by the fact that over a period of approximately 5 years (1984-89) in which she applied annually for a physical education teaching position, the Respondent failed to hire her each year, notwithstanding that its 5 year (1987-92) Affirmative Action Plan noted an under utilization of qualified, available minority teachers and called for increased recruitment and hiring of such teachers. Nevertheless, in 1988 and 1989 the Respondent again failed to offer the Complainant a teaching position. The Complainant has thus met the requirements for establishing a prima facie case of employment discrimination based on her minority status. There is no evidence that discrimination on the basis of sex is relevant in this case as overall, the majority of teachers hired by the Respondent have been women.

In June 1988, on a chance visit to the Respondent's offices to again inquire as to why she had never been called for an interview or referral for a teaching position since she had been told that all her credentials were in order, she was unsuccessful in getting the explanation she sought but she was informed by Phillip Ingwell that a hiring process for several physical education teaching positions was in progress and she was given an appointment for an interview with Dr. John Olson for June 22, 1988. By that time more than 10 successful candidates had already been referred to principals for hiring. All of the candidates interviewed and referred to principals were assigned interview ratings of 4.0 or better by Dr. Olson, with most falling between 4.0 and 4.5. The Complainant's interview rating assigned by Dr. Olson was 3.8, insufficient to qualify her for a referral to a school principal. At the time of her interview with Dr. Olson, the Complainant had one year of contract physical education teaching experience at Cudahy, as compared to at least two of the successful candidates who were referred to principals for hiring and had no contract teaching experience . The Complainant was the only interviewee who is a member of a minority. All of those referred to school principals were white.

In his testimony, Dr. Olson acknowledged that although the interviews with applicants were formally structured (i.e. the same questions in the same order were asked of interviewees) there is an element of subjectivity in all interviews of the kind conducted by him. Accordingly, the Complainant's interview rating of 3.8 as opposed to 4.0 was not entirely objective. Additionally, his observation was that while the Complainant was qualified for a teaching job, she did not "measure up" to those candidates who were referred by him to principals. Given the stated Affirmative Action Plan goal of eliminating the under utilization of qualified, available minority teachers, the Respondent's failure to respond in any way to the Complainant's yearly applications for 4 years, to then interview her in June 1988 for possible referral to principals with vacant positions after most, if not all, of the referrals had already been made, and to assign an interview rating 0.2 less than successful white candidates with ratings of 4.0 is strongly supportive of the Complainant's assertion that the reasons proffered by the Respondent for not hiring or referring her for interviews for teaching positions were pretextual and mask discrimination against her on the basis of her minority status.

The Respondent's failure in January 1989 to reach the Complainant by phone or otherwise to schedule an interview for a mid-year vacant teaching position at Marquette school in Madison with a 2-3 day notice while she was teaching in Cudahy is not, by itself, evidence of

retaliation for her filing of an internal complaint in July 1988. It is consistent with the Respondent's pattern of failure to respond to her in any constructive way to achieve the stated goals in its Affirmative Action Plan regarding minority teachers. I find that this last failure by the Respondent is an extension of its pattern of discrimination against the Complainant based on her minority status.

Lost Wages

Victims of employment discrimination are entitled to lost wages. Sec.3.23(9)2b, M.G.O.. The Complainant had a duty to mitigate the damages she is claiming while the Respondent has the burden of proof on questions of mitigation. It is the Respondent's position that because the Complainant voluntarily resigned from her full time teaching job in Cudahy in 1989, that she has not properly mitigated her lost wages damages However, it was not unreasonable for the Complainant to leave the "rough" environment of Cudahy to return to Madison to pursue her goal of getting a full time teaching position in Madison. Accordingly, based upon the salary schedule of the Respondent for the years 1989-92 minus the Complainant's income for those years, she is entitled to lost wages of $25,860. 00.

Compensation for future wage loss is inappropriate in this case. All the factors used in determining it are variable and there is no known physical limitation of the Complainant such as is to be found in a negligence case, for example.

Compensatory Damages

The Equal Opportunities Ordinance (E.O.O.) provides that where the Commission finds that discrimination has occurred, "it shall order such action by the Respondent as will redress the injury done to the Complainant in violation of this ordinance..." sec 3.23(9)(c)2b, M.G.O.,E.O.O.

Rule 17 expressly authorizes compensatory damages for discrimination as follows:

> Compensatory losses, reasonable attorney's fees and costs may be ordered along with any other appropriate remedies where the Commission finds that a Respondent has engaged in discrimination.
>
> This rule does not- by express references to compensatory losses, attorney fees and costs - limit in any way the

Commission's authority to order any other remedies permitted or required under sec. 3.23, M.G.O., E.O.O.

An award of compensatory damages for emotional distress is considered to be within the broad language of the E.O.O.'s relief provision along with awards for housing discrimination. Chomicki v. Wittikind, 128 Wis.2d, 188 (1985). In Chomicki the testimony of the victim of discrimination alone was sufficient to establish emotional distress. Id. at 201.

The Complainant is seeking compensatory damages for the emotional distress she experienced over the 5 years after the Respondent's June 1988 hiring process for physical education teachers. She felt cheated and frustrated about not getting a position in the District after having applied for one over a number of years. She was distressed over the conversations she had with Sylvester Hines about the discriminatory actions of the Respondent. She had difficulty sleeping, was exhausted and depressed and felt that her self esteem was destroyed. She sought the services of a psychotherapist in connection with her negative experiences with the Respondent. Accordingly, in consideration of her emotional distress over a period of several years, an award of $25,000.00 as compensatory damages is appropriate.

Punitive Damages

The Complainant also is seeking punitive damages which may be awarded when a Complainant shows, by clear and convincing evidence, that the Respondent's conduct was willful or wanton in reckless disregard of the Complainant's rights or interests. Brown v. Maxey, 124 Wis 2d,426(1985). Complainant's evidence that the Respondent's conduct toward her was willful or wanton was less than clear and convincing. Consequently, the Complainant is not awarded punitive damages.

Dated at Madison, Wisconsin this 27th day of December, 1993

EQUAL OPPORTUNITIES COMMISSION

Sheilah O. Jakobson

Sheilah O. Jakobson
Hearing Examiner

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

Ramona Villarreal 1212 N. Chicago Street, Apt. 5 South Milwaukee, WI 53172 Complainant vs. Madison Metropolitan School District 545. West Dayton Street Madison, WI 53703 Respondent	DECISION AND ORDER ON JURISDICTION Case No. 21122

On March 18, 1989, the Complainant, Ramona Villareal, filed a complaint of discrimination against the Respondent, the Madison Metropolitan School District, claiming that she had been discriminated against in her attempt to gain employment with the Respondent on the basis of sex, race, color and national origin/ancestry. The complaint arose initially from her failure to be hired in 1988. The Complainant filed an amended complaint alleging additional failure to hire her by the Respondent dating back to 1984 and stating that these failures formed part of a pattern and practice of discrimination on the part of the Respondent. Her amendment also added a claim for retaliation on the part of the Respondent allegedly for her filing of an internal complaint of discrimination as well as the complaint filed with the Commission. The Investigator found in his Initial Determination that there was no probable cause to believe that discrimination had occurred with respect to any of the Complainant's claims. The Complainant timely appealed the Initial Determination's findings of no probable cause. The Hearing Examiner reversed the Investigator's conclusions and transferred this matter to conciliation. Conciliation proved to be unsuccessful and the complaint was returned to the Hearing Examiner for the holding of a public hearing.

This complaint was set for a public hearing to commence on February 9, 1993. On October 26, 1992, the Respondent filed several Motions to Dismiss for Lack of Jurisdiction. The Complainant submitted a responsive brief and the Respondent filed a reply brief. Based upon these arguments and the Hearing Examiner's research, the Respondent's Motions are denied.

MEMORANDUM DECISION

The Respondent states several grounds for its Motion to Dismiss. Three of these grounds are premised upon the operation of Section 893.80 Wis. Stats. This statute sets forth the conditions under which municipal corporations and other governmental entities may be sued. The Respondent dropped the third of these grounds in its reply brief after discovering additional facts during preparation of this case. In addition to these statutory reasons, the Respondent sets forth two constitutional arguments. First, it argues that the Equal Opportunities Ordinance unconstitutionally vests judicial power in the Commission. Second, the Respondent contends that the Ordinance and Commission procedures violate its constitutional rights to a jury trial, particularly with respect to the issue of damages. The

Respondent further contends that portions of the Complainant's claim are untimely in that the incidents complained of occurred prior to three hundred (300) days before the filing of the complaint.

The Respondent's first statutory argument is that Section 893.80(4) protects units of government, such as the Respondent, from suit or action for intentional torts and that the claim of the Complainant is either an intentional tort or at least its functional equivalent. In support of this contention the Respondent cites a general definition of "tort." The essence of this definition seems to be that the area known as tort law is a large residual field of law that is left when one removes contract and criminal law. The Respondent argues that the Complainant's claim fits this definition because it is a claim seeking to recover damages for a wrong personal to her. The Respondent asserts that the allegations of the complaint necessarily involve intentional conduct on the part of the Respondent. For this combination of factors, the Respondent believes that the provisions of 893.80(4) regarding intentional torts operates to bar the complaint.

While an action under the Ordinance shares some of the characteristics of a tort action, it is not an action for an intentional tort. As the quotation from Prosser and Keeton cited by the Respondent points out, the essence of a tort action is to redress a wrong done to an individual. Though the wrong to be redressed in an action under the Ordinance is primarily that done to the individual Complainant, the Ordinance acts also to redress the wrong done to the community as a whole by an act of discrimination. MGO 3.23(1) demonstrates the City Council's concerns and purposes in adopting the Ordinance. These purposes address the harm to society in general resulting from discrimination and setting forth the intent of the City Council to improve the general welfare by eliminating discrimination.

Enforcement of the Ordinance is through a complaint process. Complaints may be brought by the Commission or by an individual. When an individual brings the complaint, in addition to redressing the wrong done to them, they are acting as a private attorney general to enforce the rights of the community at large, as well as their own claims. Courts have clearly stated that the ordinance does not nor can it provide for a private right of action, Althouse v. Goulette, Dane Cty. Cir. Ct. No. 2164 12/8/76. Additionally, the end product of a complaint under the Ordinance is an order of the Commission. That order may be enforced judicially but it is the Commission's order, not a judgment received by an individual Complainant that is being enforced. It is because of the overriding public interest to be satisfied through the complaint process that the Hearing Examiner finds that Section 893.80(4) protections against suits for intentional torts do not apply to a complaint brought before the Commission.

Additionally, the Hearing Examiner believes that the exemption for other remedial statutes found in Section 893.80(5) applies to an action under the Ordinance. The Respondent contends that because that section refers to "statute" and not to "ordinance" only a law adopted by the state legislature qualifies. Black's Law Dictionary, 5th Edition pp. 1264-1265 defines "statute" as: "An act of the legislature declaring, commanding or prohibiting something; a particular law enacted and established by the will of the legislative department of government . . .This word is used to designate the legislatively created laws in contradistinction to court decided or unwritten laws." The same dictionary at p. 989 defines "ordinance" as: "A rule established by authority; a permanent rule of action; a law or statute." These definitions indicate that there is no meaningful distinction between "statute" and "ordinance." The Equal Opportunities Ordinance is a rule or law enacted or established by the legislative department of the City of Madison. It is a law that is specifically authorized by Sec. 62.115 Wis. Stats. and is enforceable in various ways. The Respondent provides no authority for its restrictive definition of the word "statute." The Respondent's limitation is contrary to the plain meaning of the word.

Section 893.80 is a portion of the provisions that set forth statutes of limitation for general areas of claims or civil actions. Section 893.80(5) is intended to establish similar limitations when the defendant or respondent is a political corporation or local governmental unit such as the Respondent in this case. Sections 893.80(1) through 893.80(4) set forth generally limiting conditions. Section 893.80(5) grants exclusivity to the preceding provisions except in the circumstance where there is an alternate limitation or condition set forth in any separate "statute" or law that provides for rights and remedies. The Equal Opportunities Ordinance sets forth legal rights and remedies for the violation of those rights and establishes a three hundred (300) day statute of limitation for the filing of complaints as does the Fair Employment Act, Wis. Stats. 111.31 et seq., at the state level. Both the Fair Employment Act and the Equal Opportunities Ordinance represent the type of more specific law that was intended to trigger the exception of Section 893.80(5). This would be consistent with the general principle that one should apply the more specific provision over the more general one. It would seem that is the operating principle behind the exception in Section 893.80(5). Not to recognize this effect of the Ordinance would frustrate this principle as the result of an arbitrary definition of the word "statute."

The second statutory ground proposed by the Respondent for dismissal of the complaint is also found in Section 893.80(4). In a separate provision from that of intentional tort immunity, Section 893.80(4) provides that an entity such as the Respondent may not be sued over the quasi judicial activity of its officers, employees or agents. Hiring is admittedly a quasi-judicial activity within the contemplation of the provision. However, Section 893.80(5), as discussed above, provides an exception to the immunity from suit where there is another statute that provides rights and remedies. For the reasons previously stated, the Hearing Examiner holds that the Equal Opportunities Ordinance falls within the coverage of Section 893.80(5) and acts to remove this action from the operation of Section 893.80(4).

The Respondent's third statutory ground for dismissal relates to the Complainant's alleged failure to file a notice of claim required by Section 893.80(1) prior to filing her claim with the Equal Opportunities Commission. The Respondent withdrew this defense in its reply brief. Further examination of the Respondent's files revealed that the Complainant had indeed submitted a notice of claim to the Respondent.

The Respondent next puts forth two constitutional arguments that it contends require the dismissal of this action. The first ground is that the Ordinance as applied by the Commission in its hearing process represents an unconstitutional vesting of judicial power in an administrative agency. The second attack on the Ordinance is that it unconstitutionally deprives the Respondent of its right to a trial by jury. These arguments place the Commission in a somewhat difficult position. The Respondent cites the case of Wendlandt v. Industrial Commission, 256 Wis 62, 39 N.W.2d 684 (1949) in support of its first contention. This case states that an administrative agency may not make determinations of constitutionality as that is a power reserved to the judiciary. Since any determination of the issues in this case is eventually subject to judicial review, the Respondent is not denied the opportunity to have its constitutional claims heard. On this basis, the Hearing Examiner will make an initial determination of constitutionality.

Administrative agencies may exercise some judicial-like powers where it is necessary in furthering the delegated responsibilities of the agency. Forest County v. Langlade County, 76 Wis 605, 45 N.W. 598 (1890); Borgnis v. Falk Company, 147 Wis. 327, 133 N.W. 209 (1911); International Union v. Wisconsin E. R. Board, 258 Wis. 481, 46 N.W.2d 185 (1951); State ex rel. Strykowski v. Wilkie, 81 Wis.2d 491, 261 N.W.2d 434 (1978) There are some areas that are specifically withdrawn from administrative agencies such as deciding constitutional matters: Wendlandt, supra, title to land: Lakelands, Inc. v. Chippewa & Flambeau Imp. Co., 237 Wis. 326, 295 N.W. 919 (1941); Brothertown

Realty Corporation v. Reedal, 200 Wis. 465 (1936), and issues outside of their area of delegated authority: Town of Holland v. Village of Cedar Grove, 230 Wis. 277, 282 N.W. 111 (1938) dissent. The test of whether an administrative agency has been improperly vested with judicial powers is 1) whether the agency has been delegated a specific or limited area of concern and 2) whether there is judicial review of the agency's decisions. International Union, supra at 494, Borgnis, supra.

The Commission has received a limited grant of administrative authority. The Commission is charged with the responsibility of enforcing the City of Madison's Equal Opportunities Ordinance. This Ordinance was adopted to identify, prevent and remedy discrimination in housing, public places of accommodation, credit, employment and the provision and use of City of Madison facilities. The Ordinance protects people on the bases of race, color, sex, national origin and a number of other protected categories. The Ordinance also proscribes retaliation against a person who has attempted to enforce rights protected by the Ordinance. The Commission is only authorized to act in these limited areas. It may not enforce other City Ordinances. It may not decide disputes between parties unless discrimination is charged. It may not make an award to any party that is not necessary to fulfill the purposes of the Ordinance. The Commission may not require the adoption of an affirmative action plan. While the Commission's authority is broad within the limited area of discrimination, it is strictly limited to the area of discrimination in the areas designated by the Ordinance. The awarding of compensatory and punitive damages is incidental and necessary to those responsibilities delegated to the Commission. The Commission is charged with remedying and preventing discrimination. MGO 3.23(9) requires the Commission to make such awards as will make the Complainant whole and will fulfill the purposes of the Ordinance. Given the nature of discrimination and its assault on the dignity of the victim, it is essential that any remedy address this specific injury if the victim is to be made whole. Similarly with punitive damages, the Commission is to prevent or deter discrimination or violation of the Ordinance. Deterrence or prevention is one of the primary purposes to be served by an award of punitive damages. Awards of such emotional and punitive damages are entirely incidental and necessary to the delegated authority of the Commission.

The Commission's actions are not "final." While a decision of the Commission represents a final administrative action, the Commission's decisions are reviewable by the Dane County Circuit Court. Section 3.23(9)(c)(4) provides that final orders of the Commission may be appealed or reviewed by whatever means are provided for by law. The Commission has no authority to limit the type or manner of review sought by a party. Generally speaking, review has been by Writ of Certiorari, though the Ordinance does nothing to limit a party to this manner of review.

The Respondent's second constitutional claim is that the Ordinance unconstitutionally deprives the Respondent of its right to a jury trial. It makes such claim with regard to the Federal as well as the State constitutions. While the right to a trial by jury is indeed one of a lawyer's most cherished rights, it is not universal. For example, there is no right to a trial by jury in a claim under the Worker's Compensation Act or under the Federal Tort Claims Act to name but two. In support of its claim, the Respondent cites the case of Curbs v. Loether, 415 U.S. 189, 94 S.Ct. 1005 (1974). This case found that in order to be constitutional an action under the Federal Fair Housing Act, 42 U.S.C. 3601 et seq., had to imply a right to a trial by jury. This case is limited to the Federal context however. As, a part of the Bill of Rights, the right to a trial by jury provided in the 7th Amendment has never been imposed upon the states by incorporation through the 14th Amendment. L. Tribe, American Constitutional Law sec. 11-2 at 568 (1978). Without this incorporation there is no federally mandated requirement that states provide a trial by jury on the same basis as required at the Federal level. Similarly the protections of a right to a trial by jury in the Wisconsin constitution do not apply here. The provision for a trial by jury is found in Art. I, sec. 5. This provision applies to causes of action recognizing a

right to a jury trial at the time of adoption of the state constitution in 1848. Upper Lakes Shipping v. Seafarers' International Union 23 Wis. 2d 494, 128 N.W.2d 73 (1964). It does not extend automatically to causes of action developed after that point. Clearly a cause of action for discrimination did not exist at the time the Wisconsin constitution was adopted and no right of jury trial could have attached. Even more specifically, the general field of administrative law did not exist at that time. Since the enforcement provisions of the ordinance were not adopted until 1975, they fall outside of the coverage of Art. I, sec. 5.

The Respondent attempts to demonstrate its point by reference to Title VII of the Civil Rights Act of 1964, The Fair Housing Act (Title VIII) and the Wisconsin Open Housing Act which is part of Sec. 101.22 Wis. Stats. The argument seems to be that because the administrative remedies in these laws do not specifically contemplate awards of the damages found objectionable by the Respondent that such lack must be because of some constitutional defect feared by the adopters. The Respondent provides no support for its supposition. With respect to the Wisconsin Open Housing law, the provision for an election to remove an administrative action to Circuit Court was adopted to track similar provisions of the Federal Fair Housing Amendments Act of 1988, 42 U.S.C. 3601 et seq. In the case of the Federal law, the "opt out" provision was adopted as part of a political compromise, not because of fears of an unconstitutional grant of judicial powers to an administrative agency or because of a fear that granting an administrative agency power to make such awards might work an unconstitutional deprivation of someone's right to a jury trial. The Respondent's arguments by analogy fall without support.

The Respondent casts its constitutional arguments specifically in the context of the Commission's power to award compensatory damages for emotional injuries stemming from discrimination and punitive damages relating to discrimination. The case law applies more broadly than to just these issues. The Commission's powers have been challenged on constitutional grounds before and the Ordinance has stood the challenge. Though the specific claims of the Respondent have not been tested by the courts, there is little or no support for these new claims. As noted in the briefs of both parties, the Commission has determined that the types of damages challenged by the Respondent are awardable by the Commission in appropriate cases. Based upon the above arguments and the Commission's prior holdings, the Hearing Examiner will continue to recommend orders that require the payment of such damages until either a compelling reason is set forth or he is ordered to cease from such orders.

The Respondent also requests dismissal of that portion of the Complainant's complaint that seeks to impose liability for failure to hire the Complainant as early as 1984. The grounds upon which the Respondent seeks dismissal are that the incidents prior to 1988 fall outside the Ordinance's three hundred (300) day limit and represent individual allegations of discrimination rather than a pattern and practice of discrimination as alleged by the Complainant. The Commission's pleading practice is admittedly flexible and follows more or less the principles of notice pleading. The Respondent has been placed upon notice that the Complainant alleges a pattern and practice of discrimination and knows of the facts upon which the Complainant relies. Given the Hearing Examiner's interim decision in Rhone v. Marquip MEOC Case No. 20967, it is not appropriate to dismiss the Complainant's claim of pattern and practice discrimination prior to hearing. While the facts before the Hearing Examiner are admittedly sketchy on the issue of pattern and practice, it is the policy of the Commission to give both sides to a complaint their day in court and not to dismiss claims in the manner of a Motion for Summary Judgment unless such motions are jurisdictional in nature. In order to rule in favor of the Respondent on this claim, the Hearing Examiner would need to hold a fact finding hearing prior to the hearing on the merits and the rules and practice of the Commission are not to hold such hearings. The

Hearing Examiner declines to dismiss the allegation of pattern and practice discrimination but will hold the Complainant to demonstrating the relevance of any evidence offered at the time of hearing.

For the above reasons, the Respondent's motion to dismiss is denied.

Signed and dated this 22nd day of January, 1993.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner