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

Kathleen Gardner 2024 Overlook Pass, # 2 Middleton WI 53562 Complainant vs. Wal-Mart Vision Center 7202 Watts Rd. Madison WI 53719 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER Case No. 22637

The complaint in this matter came on for a public hearing on the merits of the complaint on November 4, 1998 before Hearing Examiner Clifford E. Blackwell, III. The Complainant, Kathy Ann Gardner, appeared in person and by her attorney, Sabin Peterson. The Respondent appeared by its corporate representative, Michael Mapes, and by its attorney Brian Price of Gonzalez, Saggio, Birdsall and Harlan, S.C. The Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order as follows:

RECOMMENDED FINDINGS OF FACT

1. The Complainant is a woman who at the time of hearing was over 40 years of age. She began employment in the Vision Center for the Respondent on or about July 24, 1995.
2. The Respondent is a corporation doing business within the City of Madison.
3. On February 26, 1997, the Complainant, while leaving for her lunch break, took a can of soup from the stock in the Respondent's store. As she checked out, she realized that she did not have sufficient funds to fully pay for the soup. The Complainant urged the cashier, a Vision Center employee named Jessie Lazo, to accept an IOU until she could get sufficient funds from her car in the parking lot.
4. The transaction had already been entered into the cash register and only certain employees could authorize voiding of the transaction. None of the persons who could authorize voiding of the transaction were available. Lazo agreed to accept the Complainant's IOU, though he did not wish to do so. The Complainant went to her car and immediately returned to the store to pay the shortfall.
5. Alex Tellez, an Assistant Manager in the Vision Center, observed the end of the transaction, but did not take any immediate action with regard to the incident. When the Complainant returned with the full payment, she gave the money to Tellez. He placed the money in the cash register and removed the IOU. Tellez then informed Michael Mapes, the Manager of the Vision Center, of the incident.
6. Eventually, Ryan Short, the Respondent's District Loss Prevention employee was informed of the incident. Short conducted an investigation including interviews of the Complainant, Lazo and Tellez.

7. Short determined that Lazo and Tellez were relatively innocent of wrongdoing in the incident and decided not to impose or recommend any form of discipline with respect to them. With respect to the Complainant, Short referred the facts of the incident to Randy Slater, the Regional Human Resources Director for the Respondent. After having the incident explained to him with only reference to the Complainant, Slater approved the Complainant's termination. Short did not tell Slater of either Tellez's or Lazo's involvement in the incident.
8. The Complainant's employment was terminated on March 3, 1997. The reason given for her termination was removal of the Respondent's property without having fully paid for it. The Complainant's termination was motivated, at least in part, by her age and sex.
9. Neither Lazo nor Tellez were disciplined as a result of the incident.
10. At the time of her termination, the Complainant worked 30 hours per week at an hourly wage of $10.15 for the Respondent. She also worked an average of 15 hours per week at an hourly rate of $8.50 for Dr. Dorsey. When terminated, the Complainant lost her income from the Respondent and lost the opportunity to invest or spend that money as she wished.
11. While the Complainant worked for the Respondent, she also worked an average of 15 hours per week for Dr. Dorsey. When terminated, she added an additional 5 hours per week working for Dorsey. At the time of her termination by the Respondent, the Complainant was making $10.15 per hour. She made $8.50 per hour working for Dorsey.
12. The Complainant did not make any effort to obtain additional employment beyond her work for Dorsey until after August of 1998. At that time, she applied for two or three jobs. She wishes to leave the eye care field and to become a Veterinarian's Assistant.
13. The Complainant was ashamed and humiliated by her termination and treatment by the Respondent. She was embarrassed and did not want to tell others including her husband of the reasons for her termination. She was not permanently injured by her termination and did not suffer any extraordinary level of emotional injury.
14. While employed by the Respondent, the Complainant participated in a company sponsored stock purchase plan. The Complainant did not explain the details of the plan or offer an estimate of her losses resulting from her inability to continue to participate in the plan.

CONCLUSIONS OF LAW

15. The Complainant is a member of the protected class "sex" and is entitled to the protection of the ordinance.
16. The Complainant is a member of the protected class "age" and is entitled to the protection of the ordinance.
17. The Respondent is an employer within the meaning of the ordinance and is subject to the ordinance's requirements.
18. The Respondent discriminated against the Complainant on the bases of sex and age when it terminated her employment on March 3, 1997 in violation of the ordinance.
19. The Complainant is entitled to damages under the ordinance to redress the injuries done to her.
20. The ordinance does not provide for punitive damages arising from violations of the ordinance.
21. The Complainant is entitled to her costs and fees including a reasonable attorney's fee.

ORDER

A. The Respondent shall cease and desist from discriminating against the Complainant on the bases of sex and age.
B. The Respondent shall not retaliate against the Complainant for her bringing of this complaint.

C. The Respondent shall pay to the Complainant the sum of $2,620.00 in back pay less any usual deductions for employment taxes. Payment shall be made within 30 days of this order's becoming final.
D. The Respondent shall pay the Complainant pre-judgment interest on her award of back pay at the rate of 5% compounded annually.
E. The Respondent shall pay to the Complainant the sum of $2,500.00 as compensation for her emotional distress. Payment shall be made within 30 days of this order's becoming final.
F. The Complainant shall submit a petition for the costs and fees of this action including a reasonable attorney's fee within 21 days of this order's becoming final. The Respondent shall have 15 days to respond to the petition and the Complainant shall have 10 days to reply to the Respondent's response. Additional hearings on costs and fees will be scheduled only if necessary.

MEMORANDUM DECISION

This complaint arises from an incident occurring on February 26, 1997 at the Complainant's work site. The Complainant, an employee in the Respondent's Vision Center, was running late at her lunch break and quickly grabbed a can of soup from the Respondent's stock for her lunch. It is not entirely clear on this record whether the Complainant was "on the clock" when she picked up the can. She took the can of soup to the check out station to pay. Once the transaction was entered, the Complainant discovered that she did not have sufficient cash to pay for the soup.

The clerk staffing the cash register, Jessie Lazo, was a relatively new employee in the Vision Center and was being trained by the Complainant. Lazo insisted that the Complainant fully pay for the soup. The Complainant urged Lazo to accept an IOU for the soup. Lazo wished to vacate the transaction, but there was no Manager available to approve the voiding of the transaction. Reluctantly, Lazo accepted the Complainant's IOU for the amount by which she was short.

The Complainant promptly went to her car and obtained the small amount necessary to clear the IOU. She returned to the store to give Lazo the money.

Alex Tellez, the Assistant Manager in the Vision Center, observed the end of the transaction and received from the Complainant the amount that she was short. Tellez did not intervene to stop the incomplete transaction, but did report the incident to Michael Mapes, the Vision Center Manager. Mapes reported the incident to Ryan Short, the Respondent's District Loss Control Representative. Short investigated the report by interviewing those involved. He determined that of the three employees involved in the incident, the Complainant, Lazo and Tellez, that only the Complainant's actions warranted discipline. Short referred his investigation to the Regional Human Resources Manager, Randy Slater. Short only referred the allegations relating to the Complainant to Slater and did not refer the allegations relating to Lazo and Tellez. Lazo, Tellez and Short are all males who are young enough to be outside of the Complainant's age group. Slater approved the Complainant's termination from employment over this incident.

The complaint as framed for the Hearing Examiner presents a number of very interesting questions to be resolved. The ultimate question, of course, is did the Complainant's termination from employment violate the provisions of the Madison Equal Opportunities Ordinance Section 3.23 et seq. Mad. Gen. Ord. However, to reach the ultimate question, a number of other issues must be resolved first. These include if there was discrimination who made the discriminatory decision? Also, is the Complainant similarly situated to Lazo or Tellez or other employees involved in this incident?

The parties spend much time in their post-hearing briefs setting forth the analytical approach to be used in this case. The Respondent contends that the "mixed motive" test set forth in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) is most appropriate. The Complainant utilizes the standard burden shifting test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). As a general matter, the Commission has used the burden shifting analysis of McDonnell Douglas and has not applied the "mixed motive" test of Price Waterhouse feeling that any discriminatory motive so taints the transaction that discrimination must be found. It has been the Commission's position, that rather than limiting liability, the factors that are used in mixed motive analysis are more appropriately considered in the damage phase of analysis. Harris v. Paragon Restaurant Group, Inc. et al., Wis. CA 91-1267 (06/18/92) Dane Cty. Cir. Ct. 90 cv 1139 (02/14/90), Federated Rural Electric Ins. Co. v. Kessler, Wis. CA 94-552 (09/10/85). While the MEOO is closely linked with Title VII, the ordinance was adopted to address purely local interests and concerns. As such, the Commission may look to Title VII or the Wisconsin Fair Employment Act for guidance without necessarily being bound by decisions of those two jurisdictions. McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W.2d 830 (Ct. App. 1988). While general principles may act to confine the Commission's interpretation and application of the ordinance, no such principles appear to be in operation here. McMullen, supra. Both parties recognize that the burden shifting approach of McDonnell Douglas is intended to be flexible to better address the specific facts and circumstances of each individual complaint. The first application of this principle is in setting forth the prima facie claim that the Complainant must demonstrate to shift the burden to the Respondent. Generally the Commission has used a somewhat less restrictive form of the prima facie statement than other forums. In general, the Commission's formulation can be stated as, is the Complainant a member of a protected class, did the Complainant suffer some adverse employment action and is there reason to believe that the adverse action was a result in any significant manner of the Complainant's membership in the protected class? This approach appears to be similar to that taken by the 7th Circuit in analyzing claims of discrimination based upon federal law. Leffel v. Valley Fin. Serv., 113 F.3d 787, 793 (7th Cir. 1997). This approach does not make separate elements out of such factors as who similarly situated employees are and whether the Complainant was replaced by someone outside of her or his protected class. Instead, those items become part of the analysis of what proof exists to demonstrate a causal link between the Complainant's protected class and the adverse action suffered by the Complainant.

Despite the broad use of the strict burden shifting approach, the Supreme Court has recognized that it does not need to be slavishly applied in all cases. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 31 FEP 609 (1983). As in the Aikens case, the parties here have spent much time and effort addressing the ultimate question of discrimination. Indeed, they have both argued comprehensively their respective positions with respect to the ultimate question. Given the record in this matter and the thoroughness with which the parties have addressed all of the issues, the Hearing Examiner will move directly to the question of discrimination without delving too deeply into the niceties of the McDonnell Douglas analysis.

In the present case, it is clear that the Complainant is a member of the protected class "age" in that she is at least ten (10) years older than the other individuals involved with this incident. While it is true that the Respondent's Vision Center employed others in the Complainant's age group, they were not involved in the incident that gives rise to this complaint. This complaint is not one of discrimination in hiring, but is rather a claim that rests on differential treatment in employment.

The Complainant is also a member of the protected class "sex." All of those involved in the incident other than the Complainant were males. While the Vision Center has other women employees none were involved in the incident giving rise to this complaint.

There is nothing in the record, one way or the other, to equate the treatment of other employees who might be in the Complainant's protected classes with her treatment in this particular incident. The Respondent has harsh employment policies and it applies them strictly. In part, it is the zealousness with which the Respondent enforced its policy that brings the parties before the Commission.

There can be no doubt that the Complainant suffered an adverse employment action. Termination and loss of one's job is one of the clearest examples of an adverse employment action that one can imagine.

As is typically the case, the hardest question to resolve is whether the Complainant's membership in either or both protected classes played any role in her termination. The Hearing Examiner will attempt to address the arguments of both of the parties and provide his own analysis where appropriate.

The Respondent asserts that the ultimate decision maker was Randy Slater and he was not provided any information from which he could have determined the Complainant's age or sex. The Respondent cites Wallace v. SMC Neumatics, Inc., 72 FEP Cases 1635 (7th Cir. 1997) citing Conn v. GATX Terminals Corp., 18 F.3d 417, 420 (7th Cir. 1994) for support of its contention. While Slater had to be contacted and made the decision to terminate the Complainant's employment, he acted only upon the information provided to him by Short. Under this circumstance, Slater cannot be considered the ultimate decision maker. He acted upon limited information. The person who truly made the decision in this case was the person who decided what information Slater should receive. That person was Ryan Short.

The case of Rhone v. Marquip, MEOC Case No. 20967 (Ex. Dec. 04/05/89) is less applicable than Wallace. In Wallace, a coworker who "funneled" selective information to the decision maker bound the employer by his action. Short's determination that neither Lazo or Tellez had violated the Respondent's policies effectively screened the information available to Slater depriving him of the ability to make an informed decision.

The Complainant contends that the fact that Lazo and Tellez were not disciplined while the Complainant was terminated presents a classic picture of discrimination. As is often the case in discrimination complaints, one can answer the ultimate question only by reference to inferences drawn from the facts rather than by reference to direct discriminatory statements. In the present case the fact of Lazo and Tellez's treatment when coupled with the statements of managers other than Short that they both should have been disciplined or even terminated from employment for their parts in the incident gives rise to a strong inference of discrimination. Lazo and Tellez were both young males and shared those characteristics with Short. It is not unusual that one might look more favorably on those with whom one shares things in common, but that describes the essence of discrimination. Short had little if anything in common with the Complainant, this may well have disposed him to be less concerned for the Complainant's future while he was in a better position to know how Lazo and Tellez and their careers might be affected.

The Respondent asserts that neither Lazo nor Tellez are appropriate comparisons with the Complainant. Lazo was a new employee, only approximately two (2) months at the store, while the Complainant had been working at the store for approximately two and a half (2½) years. Also, the Complainant was training Lazo. It appears, that the Respondent argues that under the circumstance,

Lazo felt compelled to "give in" to the Complainant's request to violate company policy by accepting her IOU. However, such facts did not seem to alter the opinion of the Respondent's other managers when they opined that Lazo should have been disciplined.

The Respondent also contends that Lazo did receive some form of oral counseling from Short. The testimony on this point is not credible. It appears that Short attempted to manipulate Lazo's testimony at the Unemployment Compensation hearing to reflect a form of discipline that Lazo did not believed he had received. There is nothing in the record that credibly demonstrates that Lazo received anything more than a fatherly chat.

With respect to Tellez, the Respondent argues that as an Assistant Manager, he was not similarly situated to the Complainant. However, Tellez was involved in the specific incident. It is the connection of the incident that creates the similarity between the Complainant and Tellez not their respective positions in the Vision Center.

Again the Respondent contends that as between the Complainant and Tellez, Tellez was relatively innocent of wrongdoing in the incident. This assertion is undercut by the testimony that Slater and others would have recommended some form of discipline, perhaps even termination, for Tellez. The Respondent undermines its own argument with its discussion of its policy to discipline each breach of its policies without regard to the apparent seriousness. If the Respondent will terminate an employee who was purchasing contact lenses on layaway for forgetting on one occasion to leave the lenses at work, then certainly Lazo or Tellez could and should have been disciplined for their parts in the February 26, 1997 incident. The contact lens incident appears all the more harsh for the fact that the lenses were being worn at work upon the instructions of the doctor who worked for the Respondent.

The Respondent submitted evidence of its discipline meted out to other employees without regard to their membership in various protected classes. Again, while on one hand it demonstrates that the Respondent harshly applies its disciplinary policy, it does nothing to explain why Lazo and Tellez were relieved from any form of discipline while the Complainant was terminated. Also, it does not necessarily follow that because the Respondent may have acted without discrimination in some cases that discrimination was not a motive in the present case. This is particularly true because it is not entirely clear whether Short was involved in the disciplinary decision in those other cases.

The Respondent asserts that the Complainant's prior record of discipline suggests that discrimination did not occur in the present case. Again, it does not necessarily follow that because the Respondent may have acted without discrimination earlier that it did not do so in the present case. The Respondent contends that if it had wished to discriminate against the Complainant on the basis of her sex or age, it could have more easily used one of the earlier incidents to terminate her employment. The Respondent's explanation misses the point of this claim. In the earlier instances, there was not necessarily another individual involved. In the present case, it is the comparison of the Complainant's treatment with that of Lazo and Tellez that forms the basis of the claim.

It does not necessarily follow that all parties involved in a given incident must receive the same discipline, if any. However, in the present case, the Respondent makes a point of how important strict adherence to its honesty policies is. Given its record of occasionally draconian enforcement of its policies relating to honesty, it is inconceivable to the Hearing Examiner that it would terminate the Complainant and not discipline Lazo or Tellez in any manner at all.

Based upon the record in this matter the Hearing Examiner must conclude that the Respondent acted in an illegally discriminatory manner when it terminated the Complainant and did nothing to

discipline two other employees involved in the same incident. While it is the Hearing Examiner's impression that the age difference between the employees was the most likely motivating factor, the record equally demonstrates a motivation based on sex. Given the lack of clarity as to which protected class provided motivation, the Hearing Examiner determines that a combination of the Complainant's two protected classes formed the basis for the Respondent's discriminatory action.

The Respondent argues vigorously that the Complainant was guilty of two violations of policy in this single incident. It contends that the Complainant was shopping while on the clock which constitutes a theft of time, as well as failing to fully pay for a product. The Respondent asserts that the shopping on the clock violation was more serious and did not involve Lazo or Tellez. The Respondent further alleges that the record demonstrates that the Complainant was really terminated for the shopping on the clock violation and not for failing to fully pay.

The Hearing Examiner disagrees with the Respondent's depiction of the record. The statements by the Complainant about her grounds for termination do not provide a basis for the Respondent's conclusion. The Complainant was in no position to know why the Respondent had terminated her at the time of the statements. While the Respondent applies its policies harshly and broadly, it seems to be most concerned about issues of money or the loss of product. Given the Respondent's history of discipline for other offenses, it is not credible that the Respondent did not take action because of the Complainant's failure to fully pay.

As noted above, even if the Respondent took action, in part, because of the shopping on the clock policy and in part because of the failure to fully pay, the Respondent is not saved from a finding of discrimination and liability. The Commission uses the in part test and does not apply the mixed motive test. Any discriminatory motive, even if offset by a legitimate reason for termination, is sufficient for a finding of discrimination.

Having concluded that the Respondent discriminated against the Complainant on the bases of sex and age, the Hearing Examiner now turns to the question of remedy. The ordinance requires the Hearing Examiner to set forth a remedy that will redress the injury done by the act of discrimination and put the Complainant back in the place that she would have been absent the act of discrimination. 3.23(10)(c)2.b, formerly sec. 3.23(9)(c)2.b. The Complainant seeks various economic damages including lost wages and investment opportunity, damages for the emotional injuries resulting from an act of discrimination and punitive damages.

There is no question that the Complainant is entitled to back pay for some period of time subsequent to her termination. Under the circumstances set forth in this record however, the back pay award must be limited by the Complainant's eventual failure to mitigate her damages. The Complainant seeks back and front pay damages. The Complainant significantly overstates these damages.

The record indicates that from the date of her termination through August 28, 1998, the Complainant did not apply for other employment and merely obtained additional hours working with Dr. Dorsey.

During the period from August 28, 1998 to October 23, 1998, the Complainant made only two or three applications for employment different from or in addition to that with Dr. Dorsey. As of the time of hearing, the Complainant indicated that for entirely personal reasons, she was inclined to abandon the field of opticians for the area of veterinary assistant.

Given the extremely low rates of unemployment in the greater Madison area, it is inconceivable to the Hearing Examiner that the Complainant could not have replaced her lost wages from the Respondent.

The Hearing Examiner believes that it is reasonable to allow some short period of time subsequent to the Complainant's termination for beginning a job search without failing to mitigate damages. Depending upon the nature of employment and the reasonability of an individual's selectivity in potential positions, the Hearing Examiner would recognize a period of approximately eight (8) to ten (10) weeks, as being reasonable for beginning a serious job search. Given the job market, the position involved, the income to be replaced and the Complainant's past employment experience, the Hearing Examiner believes that the Complainant is entitled to ten (10) weeks' back pay. Any further wage loss either in the form of back pay or front pay is disallowed as a result of the Complainant's failure to reasonably mitigate her damages.

The Complainant worked an average of 30 hours per week for the Respondent prior to her termination. Her rate of pay was $10.15 per hour. At the same time she was working for the Respondent, she supplemented her income by working 15 hours per week for Dr. Dorsey. Her rate of pay with Dorsey was $8.50 per hour. Once terminated, the Complainant picked up an additional 5 hours per week with Dorsey at the same rate of pay.

As a result of her termination, the Complainant lost 30 hours per week at $10.15 per hour of income. That was partially offset by the additional 5 hours per week the Complainant picked up with Dorsey. The additional income she derived from her extra hours with Dorsey replaced her lost income neither in hours nor amount. The Hearing Examiner multiplied the Complainant's 30 hours per week by the hourly wage and then reduced that amount by the additional wages paid by Dorsey. For the ten (10) weeks of wages the Hearing Examiner will recognize, the Complainant's wage loss would be $2,620.00.

The Complainant requested an award of front pay from the date of the decision to some anticipated retirement date. On this record, front pay is entirely unwarranted. Generally speaking, front pay should only be considered when return to employment with the Respondent is impossible. In this case, the Complainant has indicated that she does not wish to return to employment with the Respondent. Such a statement of preference falls well short of the requirement that reemployment not be feasible. Additionally, front pay, as an extraordinary remedy, should only run for a period of time until the Complainant could be expected to replace her lost income. There is nothing in this record to demonstrate that the Complainant could not reasonably expect to replace her lost income for the rest of her working life. Also, the retirement date suggested in the Complainant's brief is several years beyond that testified to by the Complainant as her likely retirement date.

The Complainant does not specifically request pre-judgment interest on her wage claim. However, the Commission has regularly made such awards as a method to make the Complainant whole for the lost opportunity costs of the wages she lost. The Commission has utilized 5% as a reasonable rate of interest for such awards. The Respondent will have to pay 5% interest compounded annually on the back pay award until the award is paid.

The Complainant seeks damages for the loss of the Complainant's participation in an employer matched stock purchase plan. The Complainant participated in this plan while she was an employee. While the Hearing Examiner believes that such a form of damages might be appropriate in an employment discrimination claim, the record in this matter is too speculative for the Hearing Examiner to award such damages. In order to be awarded, the Hearing Examiner would have wanted an analysis of the terms of the plan, testimony that the Complainant could not withdraw from the plan at will and, more extensive analysis of the increase or decrease in the value of the stock, and payment or reinvestment options for dividends paid on the stock, if any. The Complainant failed to carry her burden of proof as to the economic value of this element of damages.

The Complainant seeks an award for emotional distress damages stemming from the Respondent's act of discrimination. It is this element of damages that often is greatest and is also the most poorly understood. It is clear that the Complainant need not demonstrate that she is entitled to such damages through the testimony of an expert witness. Chomicki v. Wittekind, 128 Wis. 2d 188, 381 N.W.2d 561 (Ct. App. 1985), Leatherberry v. GTE Directories Sales Corp., MEOC Case No. 21124 (MEOC 04/14/93, Ex. Dec. 01/05/93). However, the Complainant does carry the burden of proof as to whether such an award is justified and to the amount of the award.

The Complainant was the only witness to testify about her damages and specifically her emotional distress. She stated that she was "devastated" by her treatment. She was embarrassed and worried about telling her husband about the fact and circumstances of her termination. These are not unusual expressions about one's emotional state after an act of discrimination. However, to support more than a nominal award of damages, a prevailing complainant must demonstrate with more vividness how the act of discrimination affected her. Chung v. Paisan's, MEOC Case No. 21192 (Ex Dec. 02/10/93), Meyer v. Purlie's Cafe South, MEOC Case No. 3282 (MEOC 10/05/94 Ex. Dec. 04/06/94) contrast Leatherberry v. GTE Directories Sales Corp., MEOC Case No. 21124 (MEOC 04/14/93, Ex. Dec. 01/05/93). It is noteworthy that the Complainant did not call any other witnesses to describe her emotional distress. She did not even call her husband who might have been in the best position to explain the effects of the Respondent's discrimination on the Complainant.

Given the sparse testimony in the record and the lack of any unusual adverse impact on the Complainant, the Hearing Examiner awards the Complainant the sum of $2,500 for her emotional distress.

The Complainant seeks punitive damages for the Respondent's act of discrimination against the Complainant. The Hearing Examiner finds no support for the Commission's authority to make awards of punitive damages. The Complainant argues for a record award but does not indicate under what authority such an award may be made. The general purposes of punitive damages is not to enrich the Complainant but to punish the Respondent and to deter future violations. The Ordinance contains provisions for certain awards including civil forfeitures. These provisions are intended to punish the violator. The fact that these awards and forfeitures may have little punitive or deterrent effect on a Respondent as large as the one in this complaint does not overcome their intent or the limitation they place on other awards.

In order to make the Complainant whole and to preserve her award, the Commission routinely awards a prevailing Complainant the costs and fees including a reasonable attorney's fee for the expenses of bringing a complaint. Such awards are an important incentive for individuals to act as private attorneys general and to enforce the purposes and policies of the ordinance. In order to establish the costs and fees of this action. The Complainant's attorney may submit a petition including affidavits of hours expended and to support the reasonableness of the rate to be charged no later than 21 days from the order in this matter becoming final. The order becomes final when all appeals, if any, are exhausted. The award of attorney's fees and other costs represent part of a "make whole" remedy. In order for the Complainant to be placed in the same position that she would have been absent the discrimination, the Complainant's expenses in pursuing this claim must be paid otherwise she would likely end up with less than when she began the process.

It seems likely that this complaint came about as a result of the Respondent's too vigorous application of a perhaps overly strict policy. While it is the Respondent's right to have and enforce such policies, it must be prepared to live with the consequences of its policy decisions.

Signed and dated this 6th day of March, 2001.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner