

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

<p>Patti Ashford 5501 Gettle Ave Madison WI 53705</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Magna Publishing 611 N Sherman Ave Madison WI 53704</p> <p style="text-align: center;">Respondent</p>	<p>HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p>Case No. 22719</p>
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This complaint came on for a public hearing on the merits of the complaint on October 13, 1998 in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd. before Hearing Examiner Clifford E. Blackwell, III. The Complainant, Patti Ashford, appeared in person and by her attorney, Mary Kennelly, of the law firm of Fox and Fox. The Respondent, Magna Publishing, Inc. appeared by its president and owner, William Haight, and by its attorney, Paul Curran, of the law firm of Curran, Hollenbeck & Orton, S.C. Based upon the record in this matter, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Patti Ashford, was perceived to be a lesbian by an employee of the Respondent.
2. The Respondent, Magna Publishing, is a publisher of several newsletters and other similar publications targeted at administration of colleges and universities. Its principle place of business is located in the City of Madison.
3. In February of 1996, the Complainant submitted an application for employment with the Respondent. At that time, the Respondent decided not to hire for the position for which the Complainant applied. Later that year, Chris Potts, a relatively new Editor for the Respondent, began the hiring process for two Assistant Editors. He reviewed the Respondent's files of active applications and contacted several professional and personal sources for qualified and interested candidates. The pool of potential candidates settled on by Potts included the Complainant.
4. In late 1996, the Respondent's hiring process included three steps. First, the hiring supervisor, in this case Potts, would screen applicants for interest and qualification. If an applicant passed this initial step, the candidate was invited for a second interview which included skill and personality testing. Before an applicant could be invited for a second interview, a higher level supervisor must give his or her approval. At the time of the Complainant's application, Potts' supervisor, Richard Perkins, had to consent to testing the Complainant. Perkins was consulted and gave his approval to the Complainant's second interview. The third and final step was an interview with a higher level supervisor, in this case, Perkins.
5. After reviewing the Complainant's initial application materials, Potts confirmed that the Complainant was still interested in employment and asked for additional writing samples. He

conducted the initial interview and was favorably impressed. As part of the initial interview, Potts showed the Complainant around the office. While being escorted by Potts, the Complainant was introduced to Haight and Perkins.

6. Potts discussed his initial interview and the Complainant's application with Perkins. Potts indicated that he wished to move the Complainant to the second interview. Perkins consented to a second interview for the Complainant. A higher level supervisor such as Perkins had to grant permission for a second interview because of the expense in time and materials necessary for the testing.
7. Potts and the Respondent's Director of Operations, Sue Long, proctored the test. The second interview and tests confirmed Potts' initial impressions that the Complainant had the skills to perform the job and was interested and excited about the possibility of working for the Respondent.
8. After the second interview, Potts recommended that Perkins hire the Complainant and set up a final interview between Perkins and the Complainant. This interview took only five to ten minutes. During the interview, Perkins asked the Complainant about the importance of family to her. Perkins did not ask about the Complainant's current employment or her interest in writing and journalism. Final interviews for other successful candidates lasted approximately thirty minutes.
9. After the interview with the Complainant, Potts immediately met with Perkins to find out how the interview had gone. Perkins told Potts that he (Perkins) wouldn't hire the Complainant. He stated that he (Perkins) was "no homophobe", but that he would not be responsible for the disruption in the office that the hiring of the Complainant would cause. Potts objected to the basis of Perkins' decision. Perkins, noting Potts' status as a Christian, indicated that he (Perkins) thought that Potts would be opposed to that sort of thing. By that sort of thing, Potts understood that Perkins meant homosexuality. Potts told Perkins that Christians could hold differing opinions about homosexuality, but that what Perkins was doing was illegal and that Potts would not be a party to it.
10. At all their interviews, the Complainant wore slacks, a blouse/shirt and sweater. This attire was similar to that of other successful candidates and similar to that of other employees of the Respondent.
11. Neither Potts nor Perkins notified the Complainant of the decision not to hire her. Potts took his concerns to Sue Long as Director of Operations. Long took no action with respect to Potts' concerns and did not raise them to Haight. Because both Perkins and Long did not listen to his objections, Potts did not follow up his concerns while employed by the Respondent.
12. After Potts' discussion with Long, he consulted several professional and personal friends to determine whether he could have done anything else in the circumstance. These friends included Neal Kunde and Scott Hainzinger.
13. After the Complainant's application was rejected by Perkins, the Respondent received an application from Kristine Hartelt. Hartelt did not have as much writing or journalism experience as the Complainant and in Potts' mind, was not as enthusiastic about the position of Assistant Editor. Hartelt had been employed by a large client of the Respondent. Hartelt was hired for the same position for which the Complainant had been rejected. Hartelt's starting salary was approximately \$25,000 per year.
14. Potts' employment was terminated in February of 1997. Shortly after his termination, Potts contacted the Complainant to ask if she had ever wondered about the reasons behind her failure to be hired by the Respondent. Potts met with the Complainant and disclosed the circumstances of his meeting with Perkins. Potts also contacted several other employees and past employees of the Respondent to question their treatment by the Respondent. Potts separately filed a claim

of retaliation with the Equal Rights Division of the Wisconsin Department of Workforce Development stemming from his termination.

15. Perkins' employment with the Respondent was terminated in the summer of 1997. Long voluntarily terminated her employment with the Respondent.
16. In 1997, the Complainant earned approximately \$14,000. If she had been employed by the Respondent, she would have earned \$25,000. In 1998, she earned approximately \$19,000 instead of \$25,000.
17. The Respondent offered its employees a health insurance compensation plan, but the value of that plan was not stated on the record.
18. The Complainant was embarrassed and saddened by the reasons for her failure to be hired by the Respondent. The extent of her emotional distress seems relatively minor.

CONCLUSIONS OF LAW

19. The Complainant is a member of the protected class "sexual orientation" by virtue of Perkins' perception that she is a lesbian.
20. The Respondent is an employer within the meaning of the Equal Opportunities Ordinance and is subject to the requirements and prohibitions of the ordinance.
21. The Respondent violated the ordinance by failing or refusing to hire the Complainant because of the perception that she is a lesbian.
22. The Respondent did not discriminate against the Complainant on the basis of her physical appearance.

ORDER

In order to redress the violation of the ordinance and to make the Complainant whole, the Respondent is ordered to do the following:

- a. cease and desist from discriminating against applicants for employment in violation of the ordinance,
- b. offer the Complainant the next available position as an Assistant Editor,
- c. pay the Complainant back pay in the amount of \$15,685.00 for the period of January 1, 1997 to October 13, 1998,
- d. pay the Complainant \$6,000 per year or a pro rata portion of that amount from October 13, 1998 until it offers her a position as Assistant Editor,
- e. pay to the Complainant the sum of \$500 as compensation for the Complainant's emotional distress, pay the Complainant's reasonable costs and attorney's fees expended in bringing this action.

The Respondent shall make the payment of the back pay set forth in paragraph "c" above and the sum awarded for emotional distress in paragraph "e" above no later than thirty days after this order becomes final. The amount of continuing wages shall be paid within thirty days of this order becoming final and semi-annually thereafter until a bona fide offer of employment is made to the Complainant.

The Complainant shall submit a petition for her costs and fees to the Hearing Examiner no later than 21 days following this order's becoming final. The Respondent may respond to the Complainant's petition within fifteen days of its filing. The Complainant may reply to the Respondent's response within ten days of its filing.

The Complainant's allegation of discrimination based upon her physical appearance is dismissed.

MEMORANDUM DECISION

As the parties recognized in their briefs, the Commission generally follows the burden shifting approach established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and elaborated in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) and later cases. Nelson v. Weight Loss Clinic of America, Inc. et al., MEOC Case No. 20684 (Ex. Dec. 09/29/89), Leatherberry v. GTE Directories Sales Corp., MEOC Case No. 21124 (MEOC 04/14/93, Ex. Dec. 01/05/93). In this approach, the Complainant bears the ultimate burden of establishing the existence of each element of discrimination by the preponderance of the evidence. In this case, many of the elements are not in question. There is no doubt that the Complainant suffered an adverse employment action when she was not hired for the position of Assistant Managing Editor by the Respondent in late 1996 and early 1997. Similarly, there is no question that after the Respondent rejected the Complainant as an applicant, it continued to seek applicants for the position and ultimately hired another individual not in the Complainant's alleged protected class. There is a dispute as to whether the Complainant is a member of the protected class "sexual orientation" either by virtue of her actual sexual orientation or her perceived sexual orientation.

The real question presented by this record is did the Respondent know of the Complainant's membership in the protected class "sexual orientation". For purposes of this complaint, perception, whether accurate or not, of the Complainant's membership in the protected class is sufficient to establish actual membership in the protected class. Dischler v. Oscar J. Boldt Construction, Inc., MEOC Case No. 21545, Dane Cty. Cir. Ct. 94 CV 3781, 5/11/95 (Comm'n Dec. 11/29/94, Ex. Dec. 7/11/94). The second question that must be answered by this record is whether the Respondent's alleged knowledge of the Complainant's membership in the protected class "sexual orientation" motivated it, at least in part, to reject the Complainant's application.

The Complainant first applied for employment with the Respondent in February, 1996. Her application was submitted in response to a local newspaper advertisement. For unexplained reasons, the vacancy for which the Complainant had applied was not filled at that time.

In the Fall of that year, the Respondent hired Chris Potts as a Managing Editor. Potts reported to Richard Perkins. Perkins apparently reported to the Respondent's owner and President, William Haight. Perkins may have also reported to the Respondent's Director of Operations, Sue Long. The Respondent is a company that publishes a number of specialized newsletters and journals relating to education, apparently more specifically to collegiate educational administration. In late 1996, it appears that the Respondent published somewhere around ten such newsletters and was considering the addition of several more interest areas.

Once Potts began his employment, he needed to fill two positions for Assistant Editor. He reviewed a file of applications received from the advertisement earlier in the year. He also investigated other professional groups and personal contacts in the journalism field to gather resumes of individuals that he wished to consider.

As a result of Potts' efforts, he narrowed his list of candidates relatively quickly to the Complainant, Dennis Palzkill and Paul Steinbach. He inquired of these individuals about their continued interest in employment with the Respondent. They all indicated that they were still interested.

At that time, the Respondent's hiring process included at least three steps. There was an initial interview with the hiring supervisor. If that interview was sufficiently encouraging, it was followed by a second interview that included some skills and personality testing. Movement to the second interview was a good indication of an acceptable applicant because testing was expensive in time and materials. An applicant would not be tested unless there was a good likelihood of hiring because of the expense of testing.

If an applicant passed the second stage, he or she would then have a final interview. In this case, the final interview would have been with Perkins, Potts' supervisor.

At the Complainant's initial interview, Potts' showed her around the office. She briefly met Haight and Perkins in the hallway and may have briefly met Long. The Complainant was attired in slacks, shirt/blouse and a sweater. Her dress was not notably different from others in the office. Her attire was similar for all three interviews. All three candidates were similarly attired during the interview process.

After the first interview, Potts believed that the Complainant was qualified for the position and liked the apparent enthusiasm the Complainant had for the Respondent's publications and the possibility of working for the Respondent. Potts reviewed his feelings and the Complainant's materials with Perkins. Potts needed Perkins' approval to advance the Complainant's application to the next stage because of the expenses involved in testing. Perkins concurred in Potts' observations and approved moving the Complainant's application to the next stage.

The testing confirmed Potts' initial determination that the Complainant was someone he wanted to work for him. Potts discussed in general terms the Complainant's salary expectations with her and indicated that she would need to have a final interview with Perkins. Potts cleared the interview with Perkins and set a time and date.

The Complainant met briefly with Potts before interviewing with Perkins. The interview with Perkins took only approximately five to ten minutes. Perkins' final interviews with other candidates took closer to thirty minutes. The Complainant and Perkins differ in their accounts of the interview. The Complainant testified that Perkins only seemed interested in the Complainant's views on "family values." Perkins testified that he questioned the Complainant about her commitment to a career in journalism and writing. He also states that he talked with her about her current retail employment. Immediately after the Complainant's interview, Potts escorted the Complainant to the door and returned to Perkins' office to see how the interview had gone. Again, there is a critical departure in the versions of events between Potts and Perkins.

Potts testified that Perkins, while explaining that he was no "homophobe," would nevertheless not hire the Complainant because of the disruption of the office that hiring the Complainant would cause. Potts understood Perkins to be referring to an apparent impression or opinion of Perkins, that the Complainant was a lesbian and that the presence of a lesbian in the office would be disruptive for some unidentified reason. Potts testified that he objected to Perkins' decision and that as a result of Potts' protests, Perkins noted that Potts' status as a Christian should cause Potts to not support the Complainant's application.

On the other hand, Perkins denies Potts' version of their meeting and asserts that he was troubled by the Complainant's inability to explain her lack of interest in writing and journalism. Perkins testified

that he held no opinion of the Complainant's possible sexual orientation and that even if he had, it would not have played a role in his decision not to hire the Complainant.

On this record, the Hearing Examiner finds the testimony of Potts to be more credible than that of Perkins. While it is true that Perkins no longer works for the Respondent, he still may wish to protect his own reputation and would not necessarily wish to be found to have discriminated against an individual in violation of the law. Perkins appeared to be too glib and self-assured. The manner of delivery of his testimony was not convincing and too defensive particularly on cross-examination. Perkins was vague about his interview with the Complainant and the exact nature of the conversation. In general, he seemed to say only that he must have discussed the Complainant's apparent lack of interest in journalism. The only thing that Perkins seemed to be sure of, was that he discussed the Complainant's employment with a used sporting goods retailer.

Potts' testimony was not without problems, but is more convincing to the Hearing Examiner. Potts' testimony, to some extent, is corroborated by Neal Kunde and Scott Hainzinger and is more consistent with the overall record.

The Respondent attacks Potts' testimony on several fronts. First, the Respondent asserts that Potts was motivated to lie because of his own pending retaliation claim filed with the Equal Rights Division of the Department of Workforce Development (ERD). It is true that Potts' own claim could be helped by a finding of discrimination in this case. However, Potts' testimony was not flavored with the type of animosity that the Hearing Examiner would expect from a person with a particular axe to grind. It is the Hearing Examiner's experience that such hard feelings are difficult to hide over the period of one's testimony. Also, other facts in the record over which Potts would have no control, appear to support Potts' version of events. For example, it seems undisputed that Perkins spent only five or ten minutes or so in the final interview with the Complainant as opposed to the almost thirty minutes he spent with other final candidates. This hardly seems a long enough period for Perkins to have discussed with the Complainant her commitment to journalism and writing, as Perkins alleges. Also, the difference in time given to the final interviews between that afforded the Complainant and the other candidates is suspicious. Perkins' explanation that he had a meeting does not explain why the appointment wasn't rescheduled if Perkins was going to actually consider the Complainant's possible employment.

Potts testified that after the incident with Perkins, Potts went to the Director of Operations, Sue Long, to express his concerns. Long took no action with respect to Potts' concerns. When Long took no steps to address his concerns about Perkins' alleged discrimination, Potts dropped the issue at work. Long testified that she did not recall Potts ever coming to her with such a claim. Long no longer works for the Respondent and left on good terms with her employer.

It must be noted that Long denied any knowledge of the Complainant or her application. This is despite the fact that Long proctored the Complainant's employment tests. The Hearing Examiner supposes that it is not necessarily unreasonable that Long might not remember the Complainant's particular tests. There was no testimony about whether the tests were given blind or if the subject was identified. Long testified that she would have remembered if Potts had told her about Perkins' alleged discriminatory statements because discrimination was a serious matter and the Respondent had not experienced such problems. Long did verify that the only instance of a potential discriminatory complaint of which she was aware involved Perkins.

The Hearing Examiner cannot credit Long's statement that Potts must not have spoken to her about Perkins' alleged statements very much. She did not recall anything about the Complainant. It is not

clear whether Long was attempting to protect the Respondent or if she simply did not recall the contact from Potts. It is also possible that Potts' contact with Long was not so clear a statement of concern as Potts recalls. There is evidence in the record to indicate that Potts and Long did not get along well. Perkins testified that he had needed to intervene in disputes between Long and Potts during Potts' employment with the Respondent. Long may have colored her testimony based upon her past relationship with Potts.

Potts' testimony is bolstered by that of Kunde and Hainzinger. Kunde and Hainzinger are social and to some extent professional friends of Potts. Shortly after Potts' conversation with Perkins, Potts spoke with both Kunde and Hainzinger separately. They both testified that Potts discussed the incident with Perkins with them and asked for their advice about how to handle the situation. If Kunde and Hainzinger are to be believed, their conversations with Potts are a strong indication that Potts' testimony is truthful.

At the time of hearing, the Respondent objected to the admission of the testimony of both Kunde and Hainzinger. The Respondent contended that the testimony was at best double hearsay and was therefore, unreliable and must be excluded. The Hearing Examiner admitted the testimony on the grounds that hearings before the Commission utilize the relaxed evidentiary standard of Sec. 227 hearings. The ultimate question of admissibility under such a standard is whether the testimony is relevant to the issues before the tribunal. As the testimony in question goes to support the credibility of Potts on an issue directly in controversy, it appears relevant. Even if more strict evidentiary rules were to apply, the importance of Kunde and Hainzinger's testimony is not for the truth of what Potts told them, but that Potts told them and when he told them.

The Respondent contends that Potts' charge of discrimination came about because of his termination in February of 1997. However, if Kunde and Hainzinger's testimony is true, Potts was concerned about Perkins' conduct in December of 1996, well before Potts' termination.

The Respondent also contends that Potts was not the type of person in whom Perkins would have confided a discriminatory motivation. Potts was a new employee and did not socialize with Perkins. While there is a certain appeal to this argument, a contrary view is equally possible. Because Potts was a new employee and, specifically, because Potts was known to be a "Christian," Perkins may have felt at ease sharing his view with Potts. As a new employee, Perkins may have been seeking to establish a degree of rapport with Potts. Perkins could have seen Potts' status as a "Christian" to be a factor indicating that Potts would understand and agree with Perkins' decision and motivation.

If the Respondent's explanation was true, Potts would not have known of the Complainant's sexual orientation to be able to provide the Complainant with the explanation that Potts gave her. Under the Respondent's stated explanation, no one knew of the Complainant's sexual orientation and, therefore, Potts' actions would be in conflict with the record as summarized by the Respondent. It is clear that the Complainant did not self-identify herself as a lesbian during the process. There is nothing in the Complainant's application materials from which one could conclude anything about her sexual orientation.

On this record, it is impossible to know what gave Perkins the impression or idea that the Complainant is a lesbian. That he held this opinion is readily apparent from Potts' testimony about the conversation he had with Perkins after the Complainant's interview. On this record, the Hearing Examiner concludes that the greater weight of the credible evidence supports Potts' version of the conversation with Perkins.

Accepting Potts' description of his conversation with Perkins, it is clear that Perkins' perception of the Complainant's sexual orientation led to his rejection of the Complainant as a possible employee. Again, it is not at all clear what Perkins believed might be the consequences of hiring a lesbian, but it is clear that he believed that they would be negative and that he did not wish to be the agent of such consequences. Perkins' action in rejecting the Complainant's application in combination with his perception of the Complainant's sexual orientation establish a prima facie claim of discrimination.

The Respondent argues that the Complainant was not qualified for the open positions and was particularly less qualified than Kristine Hartelt, the person who was ultimately hired instead of the Complainant. In support of this contention, William Haight, the Respondent's owner and president, testified that Hartelt's experience with a large client of the Respondent's and general training made her a much more qualified candidate than the Complainant. While the Hearing Examiner can accept that Hartelt's connection with a large client of the Respondent was a valuable asset for Hartelt and the Respondent, it could not have been a factor in the decision not to hire the Complainant. Hartelt's application did not arrive until the Complainant had been rejected. On this record, the Hearing Examiner cannot find that the Complainant was rejected in favor of a more qualified candidate, particularly Hartelt.

The Respondent asserts that Perkins had very little contact with the Complainant and did not know of her sexual orientation. The record does not demonstrate the mechanism by which Perkins came to his conclusion that the Complainant was a lesbian. She was dressed similarly to the other candidates, as well as many of the Respondent's own employees. Perkins' statements as reported by Potts demonstrate that Perkins did believe that the Complainant was a lesbian and that he would not hire her because of that perception. It is paradigmatic of discrimination that one makes assumptions about an individual on the basis of limited observation or stereotype. It is the lack of informed judgment that creates the harm of discrimination. In the present case, the Hearing Examiner must infer that Perkins assumed that he could determine the Complainant's sexual orientation by those actions reported by Potts. The lack of direct evidence is no bar to a finding of discrimination. To require direct proof of all elements would result in significant discrimination going uncorrected.

The issue of damages in the present case lacks the substantial development in the parties' post-hearing briefs that the Hearing Examiner would like. Despite this lack of development, the Hearing Examiner is required to propose a remedial order that will redress the act of discrimination and make the Complainant as whole as she would have been absent the act of discrimination, Sec. 3.23(10)c.

The first manner in which an injured party may be made whole is to require the Respondent to give the Complainant that which was denied to her by the act of discrimination. In this case, that is a job as an Assistant Editor. Front pay may be substituted for an order of employment where there is evidence that the potential relationship has been irreparably damaged by the act of discrimination and succeeding events. The record lacks any evidence establishing that giving the Complainant the next available position as an Assistant Editor would be unduly burdensome on either party or that the parties could not forge a successful working relationship. The Hearing Examiner is particularly convinced of this since the person responsible for the discrimination, Perkins, is no longer employed by the Respondent and would have no contact with the Complainant. The Hearing Examiner was impressed by the testimony of William Haight and believes that Haight would make all reasonable efforts to see that the employment relationship would work for both parties.

The next element of damages is that of back pay. The Complainant made approximately \$14,000 in

1997 and \$19,000 in 1998. That is less than the amount that she would have made had she been employed by the Respondent. Haight testified that based upon the Complainant's experience and training as indicated in her application materials, he would have approved of a salary of approximately \$18,000 per year for the Complainant. However, Kristine Hartelt who seems to possess approximately the same degree of experience, started at \$25,000 per year. Potts testified that he had been considering a starting salary of around \$28,000. The Hearing Examiner finds that the Complainant would have been likely to receive a salary of \$25,000 per year had Perkins not discriminated against her.

The Hearing Examiner discounts Haight's testimony on this point as an attempt to minimize the Complainant's value and as after-the-fact speculation on Haight's part. Haight had not been actively involved in the interviewing and recruitment of the Complainant or Hartelt. For Haight to speculate without the benefit of the interviews conducted by Potts, limits Haight's credibility on this point.

Similarly, Potts testified that the \$28,000 figure represented only the amount he was considering. He did not have authority to extend an offer at any particular figure and the \$28,000 amount lacks foundation in the record.

Other candidates, particularly Hartelt, appear to have started at approximately \$25,000. Though Potts may have considered a salary of \$28,000 per year, the record indicates that the Complainant was requesting a salary closer to \$25,000 per year. There is nothing in this record to credibly distinguish the Complainant from these other candidates.

Since the Hearing Examiner has ordered the Respondent to offer the Complainant the next available Assistant Editor position, it would be unjust for the Complainant not to receive the salary that position would command pending the offer. Failing to require the Respondent to make up the difference between the Complainant's actual pay and the salary which she has been denied pending the offer of employment gives the Respondent no incentive to extend such an offer. Accordingly, the Hearing Examiner orders the Respondent to continue to pay the difference in the Complainant's salary until she receives a bona fide offer of employment from the Respondent.

The Complainant attempted to assert a claim for employment benefits such as health insurance. The record lacks an adequate foundation for the Hearing Examiner to make any award in this area. The only testimony supporting an award with respect to health insurance contributions came from Potts. Potts clearly explained that he could only give his impression of the level of contribution and could not testify on the basis of his own actual knowledge. The Hearing Examiner is unable to determine an amount of an award for these out-of-pocket expenses and will not make such an award.

The Complainant seeks an award for emotional distress, embarrassment and humiliation stemming from the Respondent's act of discrimination. The Respondent asserts that the record is devoid of the type of evidence necessary to make such an award. Specifically, the record lacks evidence of any physical effects or expert testimony of a treating physician.

An award for emotional distress damages stemming from an act of discrimination need not meet the requirements of a claim for intentional or negligent infliction of emotional distress. *Nelson, supra*, *Chomicki v. Wittekind*, 128 Wis. 2d 188, 381 N.W.2d 561 (Ct. App. 1985). An award of such damages may be supported by the testimony of the Complainant herself. *Chomicki, supra*. Having stated that an award of emotional distress damages need not have an extensive factual record to support it, the Hearing Examiner must find that the record in this matter is thinner than most. While to

some extent, emotional distress may be assumed in a claim of discrimination, it is inappropriate for a tribunal to make such an award without any factual basis.

In this case, the Complainant testified that after Potts told her about the reasons for her failure to get the job with the Respondent, she cried and was upset. In other cases before the Commission, similar facts have resulted in awards of approximately \$500. Meyer v. Purlies Cafe South, MEOC Case No. 3282 (Comm'n. Dec. 10/05/94, Ex. Dec. 4/06/94), Chung v. Paisans, MEOC Case No. 21192 (Ex. Dec. 2/6/93, Ex. Dec. on fees 7/29/93, Ex. Dec. on fees 9/23/93). While larger awards for emotional distress damages have been made by the Commission, Leatherberry, supra, Balch v. Snapshots, Inc. of Madison, MEOC Case No. 21730 (Ex. Dec. on Lia. 10/14/93, Ex. Dec. on Dam. 12/09/93). the significant loss and circumstances present in those cases are not present here. The Hearing Examiner has no doubt that the Complainant found the knowledge of discrimination to be distressing, however, the record fails to establish more than a temporary and minimal injury. Given the Commission's past awards the Hearing Examiner finds that an award of \$500 for emotional distress should adequately compensate the Complainant.

The Hearing Examiner also makes an award of reasonable costs and fees including a reasonable attorney's fee. In order for the Complainant to be placed in at least as good a position as she would have been had she not experienced discrimination at the Respondent' hand, the Complainant must not have had to bear the costs of bringing this case to hearing. Awards of costs including reasonable attorney's fees have long been recognized to be an important part of any "make whole" remedy. Nelson, supra; Leatherberry, supra; Chung, supra, supra; Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984), Harris v. Paragon Restaurant Group, Inc. et al., Case No. 20947 (Ex. Dec. 08/08/94, Ex. Dec. 09/27/89), Meyer v. Purlie's Cafe South, MEOC Case No. 3282 (Ex. Dec. 03/20/95).

Signed and dated this 27th day of March, 2000.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner