STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

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| IN THE MATTER OF: | ) | |
| | ) | |
| JOSEPH WARZECHA, | ) | |
| | ) | Charge No. 2002CA2514 |
| Complainant, | ) | EEOC No. 21BA22046 |
| | ) | ALS No. 04-238 |
| and | ) | |
| | ) | |
| WISCONSIN TOOL and STAMPING CO., | ) | |
| | ) | |
| Respondent. | ) | |

ORDER

This matter coming before the Commission pursuant to a Recommended Order and Decision, the Respondent's Exceptions filed thereto, and the Complainant's Response to the Respondent's Exceptions; and this matter coming before the Commission pursuant to the Respondent's Motion for Rehearing on Damages and the Complainant's Response to the Respondent's Motion

The Illinois Department of Human Rights is an additional statutory party that has conducted state action in this matter. They are named herein as an additional party of record. The Illinois Department of Human Rights did not participate in the Commission's consideration of this matter.

**IT IS HEREBY ORDERED:**

1. Pursuant to 775 ILCS 5/8A-103(E)(1) & (3), the Commission has **DECLINED** further review in the above-captioned matter. The parties are hereby notified that the Administrative Law Judge's Recommended Order and Decision, entered on January 23, 2009, has become the Order of the Commission.

2. Pursuant to 56 Ill. Adm. Code 5300.1020, because the Respondent failed to demonstrate that substantial justice required a rehearing on the damages awarded, the Respondent's Motion for Rehearing on Damages is hereby **DENIED**.

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| **STATE OF ILLINOIS** | ) | |
| | ) | **Entered this 22nd of April 2009.** |
| **HUMAN RIGHTS COMMISSION** | ) | |

Commissioner Sakhawat Hussain, M.D.

Commissioner Spencer Leak, Sr.

Commissioner Rozanne Ronen

**STATE OF ILLINOIS**
**HUMAN RIGHTS COMMISSION**

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| **IN THE MATTER OF:** | ) |
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| **JOSEPH WARZECHA,** | ) **Charge No: 2002CA2514** |
| **Complainant,** | ) **EEOC No:21BA22046** |
| | ) **ALS No: 04-238** |
| **and** | ) |
| | ) |
| **WISCONSIN TOOL and STAMPING CO.,** | ) |
| **Respondent** | ) |

## RECOMMENDED ORDER AND DECISION

This matter is before me on *Complainant's Petition for an Award of Attorneys' Fees and Costs*, filed May 15, 2008, following the issuance of a *Recommended Liability Determination* (RLD) in favor of Complainant. On June 4, 2008, Respondent filed *Respondent's Motion for Rehearing on Damages* and *Respondent's Objections to Fee Petition*. Complainant filed *Complainant's Response to Respondent's Objection to Fee Petition* on June 19, 2008.

## FINDINGS OF FACT

1. Complainant was represented by Attorney Marshall J. Burt (Burt) of the Law Offices of Marshall J. Burt and Attorney Andrew J. Cohen (Cohen).
2. Complainant requests an hourly rate of $250.00 for the services of lead counsel Burt. Complainant submits the affidavit of Burt averring to his professional qualifications. Burt graduated from IIT Chicago-Kent College of Law and has been licensed to practice law in Illinois since 1988. Burt is admitted to and actively practices before the Court of Appeals for the Seventh Circuit and the U.S. District Court for the Northern and Central Districts of Illinois. Burt is a member of the trial bar of the U.S. District Court and the National Employment Lawyers Association. Burt has extensive experience in litigating employment law cases before administrative agencies, the

Equal Employment Opportunity Commission, the Illinois Department of Human Rights and the Illinois Human Rights Commission Burt has successfully litigated hundreds of claims on behalf of employees in discrimination cases in the U.S. District Court and claims of wrongful discharge in the Circuit Court of Cook County.

3. Complainant requests an hourly rate of $250.00 for the services of co-counsel Cohen. Complainant submits the affidavit of Cohen averring to his professional qualifications. Cohen graduated from IIT Chicago-Kent College of Law in 1993 and is licensed to practice law in Illinois. Cohen is admitted to practice before the U.S. District Court for the Northern District of Illinois and is a member of its trial bar. Cohen regularly practices in the law division of the Cook County Circuit Court and other surrounding county circuit courts. Cohen has extensive experience in litigating employment law cases before administrative agencies, the Equal Employment Opportunity Commission, the Illinois Department of Human Rights and the Illinois Human Rights Commission and has litigated hundreds of employment cases in federal and state courts.

4. In support of the requested hourly rate of $250 00 for the services of Burt and Cohen, Complainant submits the affidavit of John P. Madden (Madden) in which Madden avers to his own professional qualifications and submits his opinion as to the reasonableness of the hourly fee charged for services. Madden has been licensed to practice law in Illinois since 1997 and is the president and co-founder of the employment law firm O'Malley & Madden, P.C. Madden has extensive experience in all aspects of trial litigation before state and federal courts and administrative tribunals, including U.S. District Courts, the Illinois Human Rights Commission, the Equal Employment Opportunity Commission and the U.S. Department of Labor. Madden has successfully litigated a wide range of employment discrimination cases under federal and state laws. Due to his

experience in the area of employment litigation, Madden is familiar with the range of fees customarily charged by Chicago area attorneys who practice in employment law. Madden opines that the requested rate of $250.00 per hour is within the range customarily charged by such attorneys with ten or more years of experience and further opines that $250.00 per hour is on the low end of the range for an attorney with Burt's experience practicing in the Chicago metropolitan area.

5. Complainant requests an award for 313 70 hours of legal services performed and reimbursement of $156.06 for costs.

## CONCLUSIONS OF LAW

1. Pursuant to Section 8A-104(G) of the Illinois Human Rights Act, (Act), 775 ILCS 5/1-101 *et seq.*, a prevailing Complainant is entitled to reasonable attorney fees and costs incurred to litigate this matter.
2. Complainant has provided adequate evidence regarding the hourly rate, the number of hours expended and necessary costs incurred in litigating this matter.
3. The skill and experience of Complainant's attorneys and evidence of the usual and customary rate for Chicago-area attorneys support that $250.00 is the reasonable hourly rate for legal services rendered in the litigation of this matter.

## DETERMINATION

Complainant is entitled to an award of $72,700.00 in reasonable attorneys' fees for 290.80 hours of legal services at the rate of $250 00 per hour Complainant is also entitled to an award of $136.06 for reasonable and necessary costs incurred in the litigation of this matter

## DISCUSSION

Post-hearing Pleadings

The *Recommended Liability Determination*, issued April 30, 2008, ordered Complainant to submit an attorneys' fee petition and ordered Respondent to submit a written response to the petition if it opposed the requested attorneys' fees.

*Complainant's Petition for an Award of Attorneys' Fees and Costs* was filed May 15, 2008. On June 4, 2008, Respondent filed two separate briefs: *Respondent's Motion for Rehearing on Damages* and *Respondent's Objections to Fee Petition*. On June 19, 2008, Complainant filed *Complainant's Response to Respondent's Objection to Fee Petition*.

The filing of *Respondent's Motion for Rehearing on Damages* was procedurally inappropriate and is stricken. Similarly, the filing of *Complainant's Response to Respondent's Objection to Fee Petition* was inappropriate and is also stricken. Neither brief was considered in this decision.

Attorneys' Fee Petition

After a finding of liability against Respondent, Complainant is entitled to reasonable attorneys' fees and costs incurred in litigating the matter. The purpose of the fee award is to provide an effective means of access to the judicial process to victims of civil rights violations who might not otherwise have the means to retain counsel. *Clark and Champaign National Bank,* IHRC, 354(J), July 2, 1982. In *Clark and Champaign National Bank, supra, the* Commission set forth guidelines to be considered in awarding attorneys' fees. The burden of proof for requesting attorneys' fees rests with the Complainant.

Appropriate Hourly Rate

When considering a fee petition, it is first necessary to establish a reasonable hourly rate. An appropriate hourly rate is generally dependent upon the actual hourly

rate the attorney charges, the experience of the attorney and the prevailing community rate for similar legal services. *Clark and Champaign National Bank, supra*.

Attorney Marshall J. Burt

Complainant requests an hourly rate of $250.00 for the services of lead counsel, Marshall J. Burt (Burt). In support of the requested rate, Complainant submits the affidavit of Burt stating his professional qualifications and the actual rate he charged for his services litigating this matter. Burt graduated from IIT Chicago-Kent College of Law and has been licensed to practice law in Illinois since 1988. Burt is admitted to and actively practices before the Court of Appeals for the Seventh Circuit and the U.S. District Court for the Northern and Central Districts of Illinois. Burt is a member of the trial bar of the U.S. District Court and the National Employment Lawyers Association. Burt has extensive experience in litigating employment law cases before administrative agencies, the Equal Employment Opportunity Commission, the Illinois Department of Human Rights and the Illinois Human Rights Commission and has successfully litigated hundreds of claims on behalf of employees in discrimination cases in the U.S. District Court and claims of wrongful discharge in the Circuit Court of Cook County. Burt charged $250.00 per hour for representing Complainant in this case.

Attorney Andrew J. Cohen

Complainant requests an hourly rate of $250.00 for the services of co-counsel Andrew J. Cohen (Cohen). In support of the requested rate, Complainant submits the affidavit of Cohen stating his professional qualifications and the actual rate he charged to litigate this case. Cohen graduated from IIT Chicago-Kent College of Law in 1993 and is licensed to practice law in Illinois. Cohen is admitted to practice before the U.S. District Court for the Northern District of Illinois and is a member of its trial bar. Cohen regularly practices in the law division of the Cook County Circuit Court and other surrounding county circuit courts.

Cohen has extensive experience litigating employment law cases before administrative agencies, the Equal Employment Opportunity Commission, the Illinois Department of Human Rights and the Illinois Human Rights Commission and he has litigated hundreds of employment cases in federal and state courts. Cohen often represents clients together with Burt and his involvement in this case was purposely limited to the hearing phase in order to limit expenses. Cohen charged Complainant $250.00 per hour for his services in this matter.

John P. Madden

In further support of the requested hourly rate of $250.00 for the services of Burt and Cohen, Complainant submits the affidavit of John P. Madden (Madden) averring to his own professional qualifications and submitting his opinion as to the reasonableness of the requested hourly fee. Madden has been licensed to practice law in Illinois since 1997 and is the president and co-founder of the employment law firm O'Malley & Madden, P.C. Madden has extensive experience in all aspects of trial litigation before state and federal courts and administrative tribunals, including U.S. District Courts, the Illinois Human Rights Commission, the Equal Employment Opportunity Commission and the U.S. Department of Labor. Madden has successfully litigated a wide range of employment discrimination cases under federal and state laws.

Madden avers that due to his experience in the area of employment litigation, he is familiar with the range of fees customarily charged by Chicago-area attorneys who practice in employment law. Maddens states that the requested rate of $250.00 per hour is within the range customarily charged by Chicago-area attorneys with ten or more years of experience and further opines that $250.00 is on the low end of the range for an attorney with Burt's experience practicing in the Chicago metropolitan area.

Complainant has submitted credible evidence detailing the experience of his legal counsel, the actual rate his attorneys charged for legal services, and the prevailing

community rate charged for legal services for employment discrimination litigation. I find the requested hourly rate of $250.00 for the services of Attorneys Burt and Cohen reasonable and adequately supported.

Appropriate Number of Hours Expended

Once the hourly rate is decided upon, the next step is to determine whether the hours claimed are justified. Complainant files a billing itemization detailing the time spent and hours billed for specific services performed. The billing statement is sufficiently detailed for examination.

Respondent generally objects to each itemized billing entry as "unreasonably vague" arguing that the specific time expenditures record multiple tasks, making it difficult to determine the specific portion of time devoted to each specific task.

Written Discovery

Respondent objects specifically to four entries totaling 16.8 hours by Burt devoted to drafting interrogatories and document requests. Respondent argues that the time spent was excessive, characterizing the discovery requests as "straightforward," "formulaic," "boilerplate" and not specifically tailored to this case.

I reviewed the discovery requests attached to Respondent's opposition brief and, contrary to Respondent's characterization, I find that many of the requests are obviously specifically tailored to issues related to the *prima facie* case at issue in this matter; however, there is sufficient routine boilerplate present to justify a reduction in the total time spent in drafting the discovery Accordingly, a reduction of 50% (8.4 hours) of the time spent on the following entries related to drafting discovery requests is justified.

| | |
|---|---|
| 10/11/2004 MJB review client docs; draft interrogatories to Def | 6.0 hrs (reduce to 3 hrs) |
| 10/12/2004 MJB Cont drafting interrogatories to Def and begin drafting doc request | 4.0 hrs (reduce to 2 hrs) |
| 10/18/2004 MJB revise discovery requests; telephone conference with client re discovery requests | 3.8 hrs (reduce to 1.9 hrs) |

10/21/2004 MJB finalize discovery request, prepare certificate of service 3.0 hrs (reduce to 1 5 hrs)

Pre-hearing Memorandum

Complainant lists the following entries related to work performed drafting the pre-hearing memorandum, totaling 35.2 hours:

| | |
|---|---|
| 12/21/2005 MJB Begin drafting pre-hearing memo, review documents, office conference with Andrew J. Cohen re trial preparation and pre-hearing memo | 6 0 hrs |
| 12/22/2005 MJB Cont'd drafting pre-hearing memo, statement of facts, review documents for exhibits | 4 0 hrs |
| 12/22/2005 MJB Cont'd drafting pre-hearing memo, review witness statements and prepare witness lists | 4.0 hrs |
| 12/28/2005 MJB Cont'd drafting pre-hearing memo, prepare damage calculations, review employee personal files, and revise statement of facts and exhibit and witness lists | 4.7 hrs |
| 12/29/2005 MJB Cont'd drafting pre-hearing memo, review statement of facts, exhibits, tool room reports | 3 5 hrs |
| 1/3/2006 MJB Research and review WTS bankruptcy petition, office conference with Andrew J. Cohen re same, continue work on pre-hearing memorandum | 2.0 hrs |
| 1/4/2006 MJB Cont'd drafting pre-hearing memo, organize documents and exhibits; review witness statements and employee records | 6 0 hrs |
| 1/5/2006 MJB Cont'd drafting pre-hearing memo, review employee overtime records and revise damage calculations | 2.0 hrs |
| 1/6/2006 MJB Finalize complainant's draft of hearing memo, forward to opposing counsel | 3.0 hrs |

Respondent maintains that the hours billed for work performed drafting the Complainant's pre-hearing memorandum are excessive. Respondent argues that the contested facts were minimal, the issues were straightforward and the final document consisted of a mere eight pages.

Respondent's argument is unconvincing. The time expenditures are sufficiently detailed and indicate specific tasks performed, such as reviewing witness statements,

reports, exhibits and employee records. I find the specific tasks indicated and the time expenditures reasonably necessary for the preparation of the pre-hearing memorandum.

Preparation of Attorneys' Fee Petition

Respondent contends the hours billed for drafting the attorneys' fee petition are excessive. I agree. The entries related to drafting the attorneys' fee petition total 17.5 hours. Burt asserts that contemporaneous billing records were kept pursuant to a computerized billing program. It is difficult to believe that it would have taken counsel more than 3 hours to prepare affidavits of their respective credentials and print out a computer-generated invoice for work performed on this case. Therefore, Complainant is entitled to a total of 3 hours for preparation of affidavits, printing time records and consulting with Madden on his supporting affidavit. The 17.5 hours related to entries drafting the attorneys' fee petition is reduced by 14.5 hours.

Duplicative Work Performed by Attorneys Burt and Cohen

Respondent contends that 13 separate time entries are unnecessarily duplicative as they billed for activities performed by both attorneys at the same time. I point to three time entries as examples of those objected to by Respondent. (1) On 2/10/2006, Burt billed 7.30 hours for: office conference with Cohen re motions in limine; draft Mt in Limine #1 re undisclosed justification for termination; draft Mt in Limine #2 re undisclosed evidence; draft Mt in Limine #4 re Sony; Draft Mt in Limine #5 re Unemployment. On that same day, 2/10/2006, Cohen billed 2.0 hours for: office conference with Burt re motions in limine, review and revise same. (2) On 4/17/ 2006, Burt and Cohen each separately billed 11 hours for: trial preparation; prepare client testimony; opening statement; organize trial notebook and exhibits. (3) On 4/21/2006, Burt and Cohen each separately billed 7 hours for: attend trial; meeting with client; reorganize case file.

Respondent's objection here is not well taken. I find it appropriate and necessary that co-counsel would spend a reasonable amount of time collaborating and engaging concurrently in activities related to preparation for the public hearing in this matter. I note that Cohen stated that he purposely delayed his engagement in this matter until the point of preparation for public hearing in order to mitigate fees and the attorneys' billing register supports his assertion. Except for one entry for 6/23/2005 related to the review of Respondent's discovery documents, billing related to Cohen's services did not appear until approximately two months prior to the start of the public hearing.

For these reasons, Respondent's characterization of the subject time expenditures as unnecessarily duplicative is rejected. I find the concurrent time expenditures and the tasks performed reasonable and adequately justified for the litigation of this matter.

Costs for Issuance of Witness Subpoena

Respondent objects to costs for services related to issuance of a subpoena for Peter Mayer (Mayer) to appear as witness for the public hearing. Respondent maintains that Complainant delayed service of the subpoena on Mayer until the eve of the public hearing, necessitating an extra fee for rush service. Respondent argues that it should not be made to reimburse this fee because the delay in service was due to Complainant's inadvertence.

The subject entry indicates that Complainant billed $23.06 for overnight mail to its process server and $85.00 for personal service of the subpoena. While I do not find the service fee unreasonable, it appears that Complainant may have been able to eliminate the need for the overnight mail charge by having attended to the matter a day or two earlier. Therefore, the overnight mail charge is reduced by $20.00 to reflect a reasonable first class mail rate.

The 313.70 hours requested by Complainant for legal work performed are reduced by 22.90 hours as discussed above. Complainant is entitled to $72,700.00, which includes 290.8 hours of reasonable time spent litigating this matter at the reasonable rate of $250.00 per hour. Complainant's requested costs of $156.06 are reduced by $20.00 as previously discussed. Complainant is entitled to $136.06 in costs.

## RECOMMENDATION

Accordingly, I recommend that:

1. Respondent pay Complainant $72,700.00 for reasonable attorneys' fees incurred for the services of Attorneys Burt and Cohen;
2. Respondent pay Complainant $136 06 for reasonable costs;
3. Complainant receive all other relief recommended in the Recommended Liability Determination entered April 30, 2008.

**HUMAN RIGHTS COMMISSION**

**By:** _____
**SABRINA M. PATCH**
**Administrative Law Judge**
**Administrative Law Section**

**ENTERED: January 23, 2009**

**STATE OF ILLINOIS**
**HUMAN RIGHTS COMMISSION**

**IN THE MATTER OF:**

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|---|---|
| **JOSEPH WARZECHA,** | ) |
| **Complainant,** | )**Charge No: 2002CA2514** |
| | ) **EEOC No: 21BA22046** |
| | ) **ALS Nos: 04-238** |
| **and** | ) |
| | ) |
| **WISCONSIN TOOL & STAMPING CO.,** | ) |
| **Respondent** | ) |

## RECOMMENDED LIABILITY DETERMINATION

On June 23, 2004, the Illinois Department of Human Rights (Department) filed a Complaint on behalf of Complainant alleging that Respondent discriminated against Complainant on the basis of age in violation of the Illinois Human Rights Act (Act), 775 ILCS 5/1-101 *et seq*. A public hearing on the merits of the Complaint was held on April 18, 19, 20 and 21, 2006. This matter is ready for decision.

The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter. It is, therefore, named herein as an additional party of record.

## CONTENTIONS OF THE PARTIES

Complainant contends Respondent unlawfully discriminated against him on the basis of age when it discharged him from his position as tool and die maker. Respondent denies that it discriminated against Complainant because of his age and further contends it discharged Complainant because his skills did not meet the current needs of Respondent, because of poor economic conditions and because he refused a shift transfer.

## FINDINGS OF FACT

The following facts were determined to have been proven by a preponderance of the evidence. Assertions made at the public hearing which are not addressed herein were determined to be unproven or immaterial to this decision

1. Complainant filed a *Charge of Discrimination*, Charge number 2002CA2514, with the Illinois Department of Human Rights (Department) on April 23, 2002 The Department filed a Complaint, on behalf of Complainant, on June 23, 2004

2. Complainant was born December 15, 1938 and was 63 years old on March 22, 2002, the date of the alleged discriminatory discharge.

3. Complainant became a tool and die maker when he was 18 years old after having attended school for the profession in Poland. Complainant came to the United States on February 4, 1966 and continued to work as a tool and die maker Complainant received a certificate of completion of three years of instruction in all prescribed theory related to the tool and die trade from the City Colleges of Chicago Prosser Vocational Evening School on May 27, 1980. While attending school in the evening, Complainant continued to work as a tool and die maker during the day.

4. While working as a tool and die maker, Complainant worked on dies of various sizes, the largest weighing five tons and the smallest weighing between 100 to 150 pounds Complainant made, maintained and repaired dies.

5 Complainant was hired as a tool and die maker by Sherer Manufacturing (Sherer), located in Skokie, Illinois, on April 30, 1999. Sherer was a stamping company. The president of Sherer was John Dombeck, Jr., (Dombeck). Dombeck was 68 years old in March, 2002. Complainant was hired by Pete Mayer and Eric Buberel was his immediate supervisor.

6. While working at Sherer, Complainant never received any criticism for his work performance.

7. Sometime prior to November, 2001, Dombeck formed the MSJ company, which was formed for the purpose of purchasing the assets of Wisconsin Tool and Stamping Company out of bankruptcy, including its real estate, machinery and inventory After purchasing the assets around November, 2001, MSJ changed its name to Wisconsin

Tool & Stamping Company (Wisconsin Tool or Respondent). Sherer sold its building and machinery, cashed in its receivables and asked its customers to begin ordering from Wisconsin Tool All of the Sherer employees, including Complainant, were offered jobs at Wisconsin Tool on December 21, 2001.

8 Complainant accepted the offer and was transferred to work at Wisconsin Tool in Schiller Park, Illinois.

9. John J Dombek III (Dombeck III) is the son of Dombeck. Dombeck III is the president and secretary of Wisconsin Tool and he was 39 years old in March, 2002. Employees at Wisconsin Tool referred to John J. Dombeck III as "Junior." Dombeck and Dombeck III both were responsible for operating Respondent Wisconsin Tool

10 Complainant did not have to apply for or interview for a position at Wisconsin Tool before or after he began working there. Approximately one and a half months after Complainant began working for Wisconsin Tool, Bradford Cortez (Cortez), the human resource manager, gave Complainant an application for employment and asked that he fill out only the name, telephone number and address

11 Complainant was not asked by Respondent to take any classes or undergo any training when he was transferred to Wisconsin Tool.

12. Some of the dies at Wisconsin Tool were bigger than those at Sherer; however, Complainant was familiar with the bigger dies because he had previously worked on similar sized dies in Europe and with another company in the United States.

13. Prior to working for Wisconsin Tool, Complainant had no experience working on Sony dies.

14 During Complainant's second week of working for Wisconsin Tool, Ernie Papucci (Papucci), Complainant's tool room foreman, complemented Complainant on his work telling him "Joe, you are ahead, Joe, you're ahead, which is good, which is good . ."

15 In mid-March, 2002, Papucci offered Complainant a transfer from first shift to second shift and told him it was not mandatory that he transfer. Complainant responded that if it was not mandatory, he would rather stay on the first shift.

16 If Papucci had told Complainant he was required to take a transfer to second shift to retain his job, or that the company needed him to transfer to second shift, Complainant would have accepted the transfer.

17. Complainant was working on March 22, 2002, and was scheduled to work overtime, when Papucci handed Complainant an envelope at 4:30 p.m. Complainant opened the envelope and read the letter inside. The letter stated that Complainant was being discharged.

18. The discharge letter was dated March 22, 2002, and read in pertinent part, "We had been hoping that during this difficult period of slow business conditions we could keep all of our employees with the company. Unfortunately, this is not the case." Complainant asked Papucci if Papucci had anything to do with his discharge and Papucci denied having anything to do with the discharge. Complainant then went to the human resources department to speak with Cortez because the discharge letter was unsigned. Cortez told Complainant that he was unaware of the discharge letter. Complainant then went into the hallway and asked a production manager in the hallway if he had anything to do with the letter and he told Complainant that he did not.

19. Dombeck's secretary overheard Complainant talking in the hallway and went with Complainant to Dombeck's office. Complainant showed Dombeck the letter and asked him what he had done wrong. Dombeck held his head down and did not answer. Complainant then went back to the tool room, packed his tools, shook hands with his co-workers and left to go home.

20. Joseph D'Amico (D'Amico) was the first person hired as tool and die maker after Complainant was discharged. D'Amico was hired on the same day Complainant was

discharged to work on the night shift. D'Amico was 61 years old. D'Amico only worked for approximately two months and was separated from Respondent on May 30, 2002. D'Amico was paid $23 50 per hour, a little less than Complainant's hourly rate of $23 75.

21. A regular work week at Respondent consisted of forty hours. From the time he began working for Respondent on March 22, 2002, D'Amico worked overtime each week for seven consecutive weeks. D'Amico worked: 47 hours his first week, ending March 31, 2002, including 7 hours of overtime; 50.5 hours the second week, ending April 7, 2002, including 10.5 hours of overtime; 50 hours the third week, ending April 14, 2002, including 10 hours of overtime; 50 hours the fourth week, ending April 21, 2002, including 10 hours of overtime; 61.5 hours the fifth week, ending April 28, 2002, including 11.5 hours of overtime; 56.9 hours the sixth week, ending May 5, 2002, including 16.9 hours of overtime and 51.1 hours the seventh week, ending May 12, 2002, including 11 1 hours of overtime. D'Amico only worked three days of his final week ending June 2, 2002.

22. After D'Amico was hired, Respondent hired five more tool and die makers in the following six months. Bruce Singer, approximately 49 years old, was hired May 14, 2002 for the night shift. Roy Gross, approximately 47 years old, was hired for the night shift on June 15, 2002. Gregorz Piotrowski, 40 years old, was hired on August 12, 2002 for the day shift. Krzysztof Garca, 41 years old, was hired on August 14, 2002 for the day shift. Jim Piekarski, 39 years old, was hired on September 16, 2002 for the night shift.

23. None of these employees was required to have experience with Sony dies as a condition of employment as a tool and die maker

24. Complainant's work performance was never criticized while he worked for Sherer or Wisconsin Tool. At the time he was discharged, Complainant's work performance met the employer's expectations.

25. Complainant was devastated to be terminated and felt humiliation and embarrassment.

26. Complainant made $23.75 per hour and $35.64 per hour for overtime after working forty hours per week. Except for one week, Complainant worked overtime hours each week he worked for Wisconsin Tool.

27. Respondent's articulated reasons for discharging Complainant were that Complainant's skills did not meet the current needs of Respondent; Respondent was faced with poor economic conditions that required it to cut costs; and Complainant refused a shift transfer.

28. Respondent's proffered reasons for discharging Complainant are pretextual.

29. Complainant suffered damages of lost wages and emotional distress as a result of Respondent's discriminatory conduct.

## CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 5/1-103(B) of the Act.
2. Respondent Wisconsin Tool & Stamping Co. is an "employer" as defined by section 5/ 2-101(B)(1) of the Act and is subject to the provisions of the Act.
3. The Commission has jurisdiction over the Parties and subject matter of this action.

## DETERMINATION

Complainant has proved by a preponderance of the evidence that Respondent discriminated against him when it discharged him on the basis of age

## DISCUSSION

Complainant's experience as tool and die maker

Complainant became a tool and die maker when he was 18 years old after having attended school for the profession in Poland. Complainant came to the United States on February 4, 1966 and continued to work as a tool and die maker. Complainant received a certificate of completion of three years of instruction in all prescribed theory related to the tool and die trade from the City Colleges of Chicago Prosser Vocational Evening School on May 27, 1980. While

attending school in the evening, Complainant continued to work as a tool and die maker during the day.

While working as a tool and die maker, Complainant worked on dies of various sizes, the largest weighing five tons and the smallest weighing between 100 to150 pounds. Complainant made, maintained and repaired dies

Complainant's work history with Respondent

Complainant's work history with Respondent began when he was hired as a tool and die maker by Sherer Manufacturing (Sherer), located in Skokie, Illinois, on April 30, 1999. Sherer was a stamping company engaged in the business of manufacturing stamped metal products. Complainant was hired by Pete Mayer and Eric Buberel (Buberel) was his immediate supervisor.

John Dombeck, Jr. (Dombeck) was born March 19, 1934 and was 68 years old on March 22, 2002 Dombeck has been the president of Sherer since it began in 1975 or 1976. Dombeck remains the president of Sherer, although Dombeck describes Sherer's current business status as that of a "shell company" that has no employees, no machinery and no real estate

According to Dombeck, at some point in time, he formed the MSJ company, which was formed for the purpose of purchasing the assets of Wisconsin Tool and Stamping Co. out of bankruptcy, including its real estate, machinery and inventory. Following the purchase of the assets around November, 2001, MSJ changed its name to Wisconsin Tool & Stamping Company (Wisconsin Tool or Respondent) Sherer sold its building and machinery, cashed in its receivables and asked its customers to begin ordering from Wisconsin Tool. All of the Sherer employees, including Complainant, were offered jobs at Wisconsin Tool on December 21, 2001.

Complainant, among others, accepted the offer of a position as tool and die maker for Wisconsin Tool and began working at Wisconsin Tool in Schiller Park, Illinois in December, 2001 John Dombek III, (Dombeck III), the son of Dombeck, became the president of Wisconsin Tool Dombeck III was born March 12, 1963 and was 39 years old on March 22, 2002.

Although Complainant was not required to apply or interview for a position at Wisconsin Tool, approximately 1 ½ months after he began working for Wisconsin Tool, Bradford Cortez (Cortez), the human resource manager, presented Complainant an application for employment and asked that he fill out only the name, telephone number and address.

Complainant had a satisfactory work history while at Sherer and Wisconsin Tool. Complainant credibly testified that there was no difference between his job duties at Sherer and his job duties at Wisconsin Tool, except that some of the dies at Wisconsin Tool were bigger than those at Sherer; however, Complainant said that he was familiar with working with such dies because he had worked with them in Europe and at another U.S. company. Complainant said that the skills he used at Wisconsin Tool were no different from the skills he had used his entire career as a tool and die maker. Complainant further stated that he was not asked to undertake any classes, training or instruction when he took on the position at Wisconsin Tool and that he was never disciplined, informed that he worked too slowly or criticized for his work performance while he worked for Wisconsin Tool. Complainant said that Ernie Papucci (Papucci), the tool room foreman, complimented him during his second week after he began working for Wisconsin Tool. Papucci said "Joe, you are ahead, Joe, you're ahead, which is good, which is good ... " (Tr. April 18, 2006, p. 52, 20-24, 53, 1-8).

Buberel was the tool room foreman and Complainant's supervisor when Complainant worked at Sherer. Buberel came to work at Wisconsin Tool at the same time as Complainant. Buberel credibly testified that Complainant was a knowledgeable, experienced and skillful tool and die maker at Sherer and that Complainant was as capable and skillful as the other tool and die makers when he worked for Wisconsin Tool.

Dombeck, too, testified that Complainant was a "good worker" and that Complainant was able to perform his job duties and responsibilities while at Wisconsin Tool.

Complainant's *prima facie* case

A Complainant bears the burden of proving discrimination by a preponderance of the evidence, in accordance with the Act at section 5/8A-102(I). In cases alleging age discrimination, the three-step analysis as set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 793, 93 S.Ct. 1817 (1973) and *Texas Dept. of Community Affairs v Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981), adopted by the Illinois Supreme Court in *Zaderaka v Illinois Human Rights Commission*, 131 Ill 2d 172, 545 NE2d 684 (1989), is typically applied. Under this three-step approach, a complainant must first establish a *prima facie* case of unlawful discrimination Then the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its adverse action. Once respondent successfully makes this articulation, the presumption of unlawful discrimination drops and the complainant is required to prove, by a preponderance of the evidence, that the respondent's articulated reason is a pretext for unlawful discrimination. The latter requirement merges with the complainant's ultimate burden of proving that the respondent unlawfully discriminated against complainant.

To establish a *prima facie* case of age discrimination, Complainant must prove that 1) he is a member of the protected class of persons over 40 years of age; 2) he was performing his job well enough to meet the employer's legitimate expectations; 3) there was an adverse job action taken; and 4) he was replaced by a younger employee outside the protected classification See, *Illinois J. Livingston Co. v Illinois Human Rights Commission*, 302 Ill App 3d 141, 704 NE2d 797, 235 Ill Dec 224 (1st Dist 1998).

Elements one and three are uncontested: Complainant was born December 15, 1938 and was 63 years old when Respondent discharged him on March 22, 2002.

Next, as analyzed in the background facts of Complainant's experience and work history above, Complainant has demonstrated that he performed his job duties well enough to meet Respondent's expectations. Complainant testified as to his satisfactory job performance and

Dombeck and Buberel submitted credible testimony supporting that Complainant's work performance was experienced and skillful. Complainant has demonstrated element two of his *prima facie* case.

For the remaining element of Complainant's *prima facie* case, Complainant has to demonstrate that Respondent replaced him with a younger employee outside the protected classification.

Although Respondent maintains it did not replace Complainant's position, Respondent's own testimony and evidence belie this contention. After Complainant was discharged, Dombeck admits that Respondent continued to hire for the position of tool and die maker for the next six months.

Joseph D'Amico (D'Amico), 61, was hired for the position of tool and die maker for the night shift on the very same day Complainant was discharged, March 22, 2002; however, D' Amico's employment ended approximately two months later, on May 30, 2002.

After D'Amico was hired, Respondent hired five more tool and die makers in the following six months. Bruce Singer, approximately 49 years old, was hired May 14, 2002 for the night shift. Roy Gross, approximately 47 years old, was hired for the night shift on June 15, 2002. Gregorz Piotrowski, 40 years old, was hired on August 12, 2002 for the day shift. Krzysztof Garca, 41 years old, was hired on August 14, 2002 for the day shift. Jim Piekarski, 39 years old, was hired on September 16, 2002 for the night shift.

With the exception of D'Amico, who was employed for a very short time, the record shows that Respondent hired five younger tool and die employees in the immediate six months following Complainant's discharge. These facts sufficiently establish that Complainant was replaced by younger employees outside of his protected classification.

Following Complainant's demonstration of a *prima facie* case, Respondent must articulate a legitimate, non-discriminatory reason for discharging Complainant.

Respondent's articulation

Respondent articulates a rather convoluted explanation for discharging Complainant; however, the reasons for the discharge can be reduced to three: 1) Complainant's refusal to accept a shift transfer, 2) Respondent's poor economic conditions that required it to reduce overtime spending and 3) Complainant's inexperience with Sony dies

Dombeck testified at the hearing that Respondent attempted to save money by moving people to get more help on the second shift so it did not have to pay for overtime on the first shift. Respondent's supplemented answers to interrogatories at interrogatory #5, marked as Plaintiff's Exhibit 22, states that Complainant's discharge was

> prompted by poor business conditions. Consequently, a decision was made to remove one Tool & Die Maker position from Respondent's day shift and add a new one to the night shift, in order to reduce day shift overtime. Ultimately, it was decided to fill this night shift position with an available former employee who had more experience with the operations at Respondent's facility than did Complainant, and thus could be expected to work efficiently on the night shift, which lacked the higher level of supervision present during days.

Respondent's interrogatory answer further states that Complainant had only worked at Respondent's facility two months and thus had less experience with Respondent's operations that virtually all of his fellow tool and die makers, especially with respect to working with larger dies used in manufacturing parts for Sony Corporation, Respondent's largest customer.

Respondent's articulation provides neutral, non-discriminatory reasons for Complainant's discharge.

Complainant's showing of pretext

The question remaining is whether Complainant can show that Respondent's articulation is a pretext for age discrimination. A Complainant may establish pretext by showing either that (1) the employer's explanations are not worthy of belief; (2) the proffered reason had no basis in fact; (3) the proffered reason did not actually motivate the decision; or (4) the proffered reason was insufficient to motivate the decision. *Grohs v Gold Bond Prod.*, 859 F2d 1283 (7th Cir

1988), *Burnham City Hospital v Illinois Human Rights Commission,* 126 Ill App 3d 999 (4th Dist. 1984)

First, Respondent contends that Complainant was discharged due to "poor business" conditions that required it to transfer one person from the day shift to the night shift. Respondent argues that Complainant was discharged because he refused to transfer to the night shift.

Complainant presented evidence refuting this contention. Complainant testified credibly that Papucci asked him if he wanted to transfer to the night shift, but informed him that it was not mandatory and that he responded to Pappucci that he would rather stay on days if the transfer was not mandatory. Complainant further credibly testified that he would have accepted the transfer to the night shift had he been informed that his failure to transfer would result in his discharge.

Complainant's testimony on this point has to be given more weight. Respondent presented nothing to indicate that Complainant refused a mandatory transfer. I did not hear from Papucci and nothing in the personnel records suggests that Complainant refused a mandatory transfer. Complainant put forth a believable chronology of the actions leading to and immediately following his discharge that supports his position. As soon as Complainant received his discharge letter, he demanded an explanation. He first questioned Papucci. Next, Complainant walked to the office of Cortez, the Human Resource Manager, and questioned him. Then, Complainant walked to Dombeck's office and questioned him. According to Complainant, Papucci and Cortez each indicated he had nothing to do with the discharge and Dombeck did not mention to Complainant that his failure to accept a shift transfer was the reason for his discharge.

Although Dombeck's testimony as to this event was different, Dombeck's recount of this event supports that he did not inform Complainant that his failure to accept a shift transfer was the reason behind his discharge. Dombeck testified that he told Complainant "that it was unfortunate, that it was nothing personal, but we had to make some cuts." Moreover,

Respondent's discharge letter presented to Complainant makes no mention that his failure to accept a transfer to the night shift was the reason for his discharge.

On these facts, Respondent's articulated reason that it discharged Complainant for failing to accept a shift transfer has no basis in fact and is unworthy of belief.

I next address Respondent's explanation that it was experiencing poor business conditions that required it to attempt to save money by moving people to the second shift so it did not have to pay for overtime on the first shift. This articulation, too, is easily discredited by the record.

Respondent admits that it hired a total of six new tool and die makers in the six months immediately after Complainant was discharged. Four were hired for the night shift and two were hired for the day shift. Specifically, D'Amico, 61, was hired on the same day Complainant was discharged. D'Amico was hired for the position of tool and die maker for the night shift at a pay rate of $23.50 per hour, which was similar to Complainant's hourly rate of $23.75.

A regular work week at Respondent consisted of forty hours. Complainant's payroll records, marked as Complainant's Exhibit #18 at the hearing, indicate that Complainant worked an average of 8.4 hours of overtime for the weeks he worked at Wisconsin Tool. D'Amico's payroll records, identified as Respondent's Exhibit #4 at the hearing, shows that, from the time he began working for Respondent on March 22, 2002, D'Amico worked overtime each week for seven consecutive weeks. D'Amico worked: 47 hours his first week, ending March 31, 2002, including 7 hours of overtime; 50.5 hours the second week, ending April 7, 2002, including 10.5 hours of overtime; 50 hours the third week, ending April 14, 2002, including 10 hours of overtime; 50 hours the fourth week, ending April 21, 2002, including 10 hours of overtime; 61.5 hours the fifth week, ending April 28, 2002, including 11.5 hours of overtime; 56.9 hours the sixth week, ending May 5, 2002, including 16.9 hours of overtime and 51.1 hours the seventh week, ending May 12, 2002, including 11.1 hours of overtime. D'Amico only worked three days of his final week ending June 2, 2002.

The evidence shows that Respondent continued to pay overtime to D'Amico for work done on the night shift at a level averaging 11 hours per week, a rate that far exceeds the amount of overtime hours Complainant had worked on the first shift. Under these facts, Respondent's articulation that it discharged Complainant in order to save overtime expenses is simply untenable.

As to Respondent's articulation that it discharged Complainant because he lacked experience on Sony dies, there was no evidence in the record to support that Complainant had any performance inadequacies working with any dies at Wisconsin Tool. Dombeck testified that he only observed Complainant's performance "just in passing, but nothing specific" and that Complainant's performance appeared to be "okay." Dombeck further testified that he received no complaints about Complainant's performance at Wisconsin Tool.

Further, there was no evidence presented supporting that any of the tool and die workers hired subsequent to Complainant had any specific experience with Sony dies or that any specific experience with Sony dies was a requirement for this position. Dombeck testified that he knew that D'Amico had previously worked for the old Wisconsin Tool Company before it went bankrupt, but there was no evidence put forth that Respondent had knowledge that D'Amico had any specific experience with Sony dies or that Respondent hired D'Amico for this specific experience. To the contrary, Dombeck specifically testified that he had no knowledge of the specific tool and die experience of any of the tool and die makers hired after Complainant was discharged. (Tr. April 19, 2006, p. 232, 13-24, p. 233, 1-2.)

Q. Did you hire people to work in the tool room after Mr. Warzecha left?
A. Yes.
Q. And those people who were hired in the tool and die room were tool and die makers, correct?
A. I assume so.
Q. You don't know?
A. I don't know.
Q. You don't know if the people who were hired in the tool and die room were tool and die makers?

> A No I don't look over the records. I assume they have their papers and so forth, but my supervisors could be hiring someone that they think is good that [sic] and don't have all the papers. I don't know.

Moreover, there is no other evidence in the record that Respondent's supervisors considered experience with Sony dies in any hiring decisions of tool and die makers made in the six months after Complainant was discharged.

Complainant has demonstrated that none of Respondent's articulations are worthy of belief and all have no bases in fact.

The record shows that Respondent has given false reasons for discharging Complainant and this showing is strong evidence of discriminatory motive; however, it is not dispositive of the issue. The Commission said in *Cox and Combined Insurance Co. of America,* IHRC, 5199, January 20, 1995, that a finding that the employer's articulation is false does not compel a finding of unlawful discrimination. The fact finder must infer unlawful discrimination based on the record as a whole. Thus, the complainant maintains the burden of proving not only that the articulation is false, but also a causal chain in which a prohibited factor plays a dispositive role. *St. Mary of Nazareth Hospital v. Curtis*, 163 Ill App 3d 566, 571, 516 NE2d 813, 816 (1st Dist. 1987).

The facts on this record support that, other than D'Amico, who was hired for a very short period of time on the same day Complainant was discharged, the other five tool and die workers hired in the immediate six months following Complainant's discharge were all aged in the thirties and forties. The record further supports that these workers had no experience superior to that of Complainant and each was paid a similar salary. Moreover, Complainant was proven to be a good employee with no discipline record or other criticisms of his work performance. The record, when viewed as a whole, supports that age was a motivating factor in Complainant's discharge.

## DAMAGES

Section 5/8-108(J) of the Act authorizes the Commission to take such action as may be necessary to make Complainant whole. When the Complainant has been a victim of unlawful discrimination under the Act, he should be placed in the position he would have been but for the discrimination. *Clark v. Human Rights Commission*, 141 Ill App 3d 178, 490 NE2d 29 (1st Dist. 1986).

Reinstatement

A prevailing Complainant is entitled to be reinstated to the job lost due to discrimination. Complainant testified that he is still looking for work and ready, willing and able to return to work for Respondent. Dombeck testified that, although he continued to hire tool and die workers after Complainant was discharged, he did not feel comfortable hiring Complainant back at the time because this action was pending and he did not want to compromise any legal position he had. Other that this, there is nothing in the record to lead me to believe a hostile atmosphere exists in the work place or that any other condition exists that would preclude or suggest that reinstatement would be inappropriate.

Emotional Damages

The presumption under the Act is that recovery of all pecuniary losses will fully compensate an aggrieved party for his losses. *Smith v. Cook County Sheriff's Office*, IHRC, 1077 (RRP), Oct 31, 1985. However, the Commission will award damages beyond pecuniary loss if it is absolutely clear from the record that the recovery of pecuniary loss will not adequately compensate the complainant for his actual damages. *Village of Bellwood Bd. of Fire and Police Commissioners v Illinois Human Rights Comm'n*, 184 Ill App 3d 339, 541 NE2d 1248, (1st Dist 1989).

The Commission accepts a Complainant's own testimony as a sufficient basis for awarding emotional distress damages. *Nichols and Boyd A. Jarrell & Co., Inc* 14 Ill. HRC Rep. 149 (1984).

Complainant testified credibly as to the emotional distress he felt as a result of the unlawful discharge Complainant said he was "devastated" and felt nervous; he could not sleep or eat resulting in him losing nine pounds; he avoided contact with his friends because he felt uncomfortable, humiliated and embarrassed. Complainant stated that, although he had experienced being discharged from other companies earlier in his life, he did not feel the same level of distress because he was a younger man at the time of the other discharges and knew that he would have no trouble finding replacement employment.

Theresa Warzecha (Theresa), Complainant's wife of forty years, credibly corroborated Complainant's testimony as to the devastation, sleeplessness and embarrassment he felt as a result of the discharge. Theresa testified that Complainant was a very happy guy who loved his job at Respondent and loved socializing with friends Theresa described Complainant's usual demeanor as being a "very, very happy go-lucky guy." Theresa testified that the discharge made Complainant sad and resulted in a change of his social habits. Theresa said that Complainant no longer wanted to socialize, and stopped inviting family and friends to their home because he felt embarrassed and betrayed. Theresa relayed that Complainant refused to travel to Florida to visit their first grandchild, because he was not financially able to and because he was afraid to miss a telephone call from a prospective employer. Theresa stated that Complainant's condition is getting better and has improved somewhat.

I find the nature and duration of Complainant's suffering and the amount of humiliation and embarrassment experienced by Complainant similar to that experienced by the complainant in *Lynch v. Cook County Hospital*, IHRC, 8091, June 30, 1999, where the Commission found that respondent had failed to promote complainant because of his age and, instead, promoted a younger person. The Commission awarded the Lynch complainant $10,000 00 to compensate him for his emotional distress damages suffered as a result of the illegal discrimination. I find such an amount appropriate in this case.

Back pay

Complainant is presumptively entitled to full back pay from the date of his unlawful discharge; however, Complainant has a duty to mitigate damages by seeking other employment. Complainant submitted credible testimony to fulfill this obligation. Complainant stated that he "looked for work all over the places, Chicago, suburbs, every tool room, every manufacturing job." Complainant entered into evidence his Exhibit #23, which details several companies Complainant contacted to seek employment and the respective results. The exhibit includes copies of applications and business cards, along with dates when Complainant made the inquiries. The dates begin from November, 2002 until May, 2005.

Complainant's lost wage damages are itemized in the joint prehearing memorandum. Complainant made $23.75 per hour while working for Respondent. Complainant testified that he regularly worked overtime and the evidence support this; however, Complainant's Exhibit #18 does not support that the number of overtime hours worked for the period leading up to Complainant's discharge, from January 6, 2002 until March 22, 2002, consistently equated to twelve hours per week. The average number of overtime hours worked for the thirteen pay periods as documented by Complainant's Exhibit #18 equates to 8.4 hours per week. Therefore, Complainant is entitled to 8.4 hours of overtime for each week he was unemployed up to the date of hearing. Complainant's overtime pay is calculated as 1 ½ times his regular hourly pay.

3/22/2002-12/31/2002 = 40 weeks

| | |
|---|---|
| Regular pay- 23.75 x 40 weeks x 40 hour per week= | $ 38,000.00 |
| Overtime pay - 35.63 x 40 weeks x 8 hours/week = | $ 11,401.60 |
| | $ 49,401.16 |
| Offset for unemployment benefits | $ 12,388.00 |
| | $ 37,013.60 |

Respondent is entitled to an offset of $12,388.00, which is the amount of unemployment compensation benefits Complainant received in 2002, for a total amount of $37,013.60. *Belha*

*and Modform*, IHRC 3201, Jan. 31, 1995, *Childress and Illinois Department of Corrections*, IHRC, 549(Y), January 7, 1983

1/1/2003- 12/31/2003=52 weeks
Regular pay- 23.75 x 52 weeks x 40 hours/week= $49,000.00
Overtime pay - 35.63 x 52 weeks x 8 hours/week = $14,822.08

1/1/2004-12/31/2004
Regular pay- 23.75 x 52 weeks x 40 hours/week= $49,000.00
Overtime pay - 35.63 x 52 weeks x 8 hours/week = $14,822.08

1/1/2005-12/31/2005
Regular pay- 23.75 x 52 weeks x 40 hours/week= $49,000.00
Overtime pay - 35.63 x 52 weeks x 8 hours/week = $14,822.08

1/1/2006-12/31/2006
Regular pay- 23.75 x 52 weeks x 40 hours/week= $49,000.00
Overtime pay - 35.63 x 52 weeks x 8 hours/week = $14,822.08

1/1/2007-12/31/2007
Regular pay- 23.75 x 52 weeks x 40 hours/week= $49,000.00
Overtime pay - 35.63 x 52 weeks x 8 hours/week = $14,822.08

For each month beginning 1/1/2008 until Complainant is reinstated, Complainant is entitled to $4,940.16:
Regular pay- 23.75 x 4 weeks x 40 hours/ week= $3,800.00
Overtime pay - 35.63 x 4 weeks x 8 hours/week = $1,140.16

Offsets

Respondent argues that it is entitled to an offset of $12,388.00 for unemployment benefits received by Complainant in 2002 and of $34,526.00 for social security benefits received by Complainant in 2003 and 2004. Complainant opposes any offsets, arguing that such offsets are barred pursuant to the collateral source rule. Under the collateral source rule, the amount of damages awarded to complainant will not be decreased by the amount of benefits received from a source wholly independent and collateral to the respondent. *City of Chicago v. Human Rights Commission*, 264 Ill App 3d 982, 637 NE2d 589, (1st Dist 1994), *Boden v. Crawford*, 196 Ill App 3d, 71, 76, 552 NE2d 1287 (1990). In the City of Chicago case, the Appellate Court said that unemployment compensation and social security disability benefits are generally characterized

as collateral source payments; however, the court acknowledged that the trial court has discretion to deduct or not deduct such payments from a back pay award

I note that the Appellate Court referenced social security *disability* benefits in the City of Chicago case; however, here, the record is unclear as to the type of social security benefits Complainant received and I will not speculate. Instead, I exercise my discretion to forego an offset of these benefits from the damages award

As indicated in the damages calculation above, the Commission has ample precedent where unemployment benefits were offset, *Schumacher v Anden Group, Inc.*, IHRC, 4532, May 27, 1994, *Brandmeyer v State of Illinois Dept. of Revenue*, 47 Ill HRC Rep 291, (1989); thus, Complainant's damages award calculation includes an offset for 2002 for the amount of unemployment benefits received.

Interest

Finally, Complainant is entitled to interest on the back pay award in order to make him whole.

## RECOMMENDATION

Accordingly, it is recommended that the Complaint in this matter be sustained on the age discrimination claim and that Complainant be awarded the following relief:

A. That Respondent pay to Complainant lost back pay in the amount of $356,124.00 for the period ending December 31, 2007, plus $4,940.16 per month until reinstatement;

B. That Respondent reinstate Complainant to employment within 30 days after a final order of the Commission incorporating this recommendation becomes effective. Reinstatement shall restore all seniority and benefits and be at a rate of pay commensurate with that which Complainant would now be paid if the illegal discharge had not occurred.

C. That Respondent pay to Complainant $10,000.00 in emotional distress damages;

D. That Respondent pay to Complainant prejudgment interest on the amounts in A to be calculated as set forth at 56 Ill Admin.Code, Section 5300.1145;

E Respondent clear from Complainant's personnel records all references to the filing of the underlying charge of discrimination and the subsequent disposition thereof;

F Respondent cease and desist from discriminating on the basis of age;

G. Respondent pay to Complainant the reasonable attorney's fees and costs incurred in the prosecution of this matter, that amount to be determined after review of a motion and detailed affidavit meeting the standards set forth in *Clark and Champaign National Bank*, 4 Ill HRC Rep 193 (1982), said motion and affidavit to be filed within 21 days after the service of the Recommended Liability Determination; failure to submit such a motion will be seen as a waiver of attorney's fees and costs;

H. If Respondent contests the amount of requested attorney's fees, it must file a written response to Complainant's motion within 21 days of the service of said motion; failure to do so will be taken as evidence that Respondent does not contest the amount of such fees;

I. The recommended relief in paragraphs A through H is stayed pending resolution of the issue of attorney's fees and issuance of a final Commission order.

**HUMAN RIGHTS COMMISSION**

**By:_**

**ENTERED: April 30, 2008**

**SABRINA M. PATCH**
**Administrative Law Judge**
**Administrative Law Section**