▶	This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 11/17/06

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
JANET SCHULER,	)	
	)	**Charge No.: 2004CA3823**
Complainant,	)	**EEOC No.: 21BA42470**
	)	**ALS No.: 5-315**
and	)	
	)	
SEARS LOGISTICS SERVICES, INC.	)	
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes before me following a public hearing on damages held on June 26, 2006, after the Commission entered a Default Order against the Respondent on August 24, 2005. Complainant appeared *pro se*. A representative from Respondent appeared, along with Respondent's attorney. This matter is now ready for disposition.

The Illinois Department of Human Rights (the "Department") is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

Findings of Fact

The following findings of fact were derived from the record file in this case and from the events and evidence presented at the damages hearing.

1. Complainant filed Charge Number 2004CA3823 with the Department on June 24, 2004.

2. The charge alleged Respondent failed to transfer Complainant on or about March 1, 2004 because of her age (then 53), race (white), and physical handicaps (high blood pressure and diverticulosis). In addition, the charge alleged Respondent unlawfully

terminated her on March 1, 2004 because of her age (then 53), race (white), and physical handicaps (high blood pressure and diverticulosis).

3. On January 7, 2005, the Department's Chief Legal Counsel entered a Default Order against Respondent.

4. On August 8, 2005, the Department filed a Petition for Hearing to Determine Complainant's Damages.

5. On August 24, 2006, the Commission entered a Default Order and referred the matter to the Administrative Law Section for a hearing on damages.

6. On October 28, 2005, an order was entered that set this matter for a status hearing on January 18, 2006.

7. On January 18, 2006, Complainant appeared, *pro se*, and Respondent appeared through its attorney. An order was entered that set a discovery schedule, as well as the next status hearing on March 22, 2006.

8. On March 22, 2006, Complainant appeared, *pro se,* and Respondent appeared through its attorney. Discovery was extended and an order was entered that set this matter for a status hearing on May 3, 2006.

9. On May 3, 2006, Complainant appeared, *pro se,* and Respondent appeared through its attorney. An order was entered that set this matter for a settlement conference before another Administrative Law Judge on June 5, 2006. A public hearing on damages was ordered for July 26 and 27, 2006.

10. On July 26, 2006, Complainant appeared *pro se,* and Respondent appeared through its attorney. Complainant presented her case on damages. Thereafter, Respondent presented its case.

11. Respondent performs the distribution and warehousing functions for Sears retail stores.

12. Respondent's Manteno facility is a "Retail and Replenishment Center." This facility inventories merchandise and then delivers it to Sears retail stores.

13. Complainant worked in Respondent's Order Filling Department as a Material Handler II (also known as "Material Handler Light" or "Break Pack Associate"). When Complainant worked for Respondent, Material Handler II's were responsible for reading work orders and ensuring the continuous and accurate flow of materials in the Retail and Replenishment Center.

14. Material Handler II's were required to lift up to forty (40) pounds in weight by hand or hand truck.

15. The Order Filling Department also employed Material Handler III's. Material Handler III's performed similar duties to Material Handler II's; however, they were required to lift up to one hundred (100) pounds manually or with the use of equipment.

16. In February 2003, Respondent announced that it was consolidating its Break Pack operations into its Columbus, Ohio and Garland, Texas facilities.

17. Material Handler II positions at Manteno would be eliminated by January 2004.

18. In early February 2003, Robin Batka, Manager of Human Resources for Respondent and Manteno's general senior manager announced the consolidation to Manteno's employees. During that announcement, the managers read a letter regarding the consolidation plan and gave the employees a question-and-answer sheet to further explain the consolidation process.

19. The question-and-answer sheet informed affected employees about Sears's Transition Pay Plan and also encouraged them to post for open positions in the facility.

20. In November 2003, the Manteno employees were informed that the consolidation would not take place until April-June 2004.

21. As the consolidation approached, Respondent encouraged the Material Handler II's to apply for Material Handler III positions.

22. To post for a Material Handler III position, employees were required to have a physical examination and take an Arcon lift test to ensure they were physically capable of performing the one hundred (100) pound lifting requirement associated with the Material Handler III duties.

23. In February and March 2004, approximately thirty (30) Material Handler II's took the Arcon lift test.

24. Approximately sixteen (16) Material Handler II's passed the lift test and were given Material Handler III positions.

25. On February 3, 2004, Dr. Schnell gave Complainant a job pre-placement physical examination and indicated in her report that Complainant could perform all of the work for the job.

26. On February 27, 2004, Complainant was given an Arcon lift test. The physician who conducted the lift test issued a report stating that Complainant was "not medically qualified to perform the essential physical requirements of the job" because her "back strength was not adequate for the job."

27. Including Complainant, fourteen (14) of the Material Handler II's failed the one hundred (100) pound lift test.

28. Material Handler II's who failed the lift test could post for open clerical positions or were terminated and eligible for a severance package.

29. Between February and May 2004 there were no open clerical positions at the Manteno facility.

30. Severance packages were calculated in accordance with Sears's Transition Pay Plan.

31. Under the Transition Pay Plan, Respondent's employees with one or more years of continuous service were given one week of pay for each complete year of service, based on the employees' wage rates on their last day worked.

32. The last day of Material Handler II operations at the Manteno facility was May 6, 2004.

33. Complainant worked as a Material Handler II at Respondent's Manteno facility from October 1996 until she was terminated on or around March 1, 2004.

34. At the time of her termination, Complainant earned $11.50 per hour and worked approximately 40 hours per week.

35. Complainant was terminated on or around March 1, 2004 due to discrimination, and was not offered a severance package.

36. After she was terminated, Complainant held a number of positions at different businesses in and around Kankakee, Illinois.

37. Immediately after her termination, Complainant registered for work at People Link Staffing Services, a temporary staffing agency.

38. Complainant worked at one assignment before she was terminated because she could not work left-handed.

39. In July 2004, Complainant registered for work at ManPower, Inc., another temporary staffing agency. .

40. ManPower, Inc. placed Complainant in a temporary position at Standard Corporation in August 2004.

41. On her first day of work at Standard Corporation, Complainant was removed from the job due to her attitude and because she disrupted orientation by asking too many questions.

42. Because of Complainant's behavior on her first day of employment at Standard Corporation, ManPower, Inc. refused to place her with another employer.

43. Although Complainant was taken out of rotation for available jobs, she continued to call ManPower, Inc. and ask for work.

44. ManPower, Inc. employees noted that Complainant was “abusive and very loud” on the phone and “threatened to get a lawyer for discrimination.”

45. Complainant was involuntarily terminated from Jewel Food Stores, Ryan’s Restaurant, Arcane Cleaning Services, U.S. Caden Corp, Jaenicke’s, Lynn Cleaning, Preferred Building Maintenance and Option’s.

46. After Respondent terminated Complainant, she collected approximately $4,800 in unemployment insurance compensation.

47. Complainant’s last paycheck covered the first week of March 2004.

48. Complainant suffers from severe stomach problems, high blood pressure and an underactive thyroid.

49. Complainant takes several types of medication for her medical problems.

50. Complainant’s medical problems with her stomach, thyroid and blood pressure began after she began working for the Respondent, but prior to the acts of discrimination.

51. All the medical records admitted into evidence are dated before the March 1, 2004 termination date.

Conclusions of Law

1. Complainant is an “aggrieved party” and Respondent is an “employer” as those terms are defined in the Illinois Human Rights Act, 775 ILCS 5/1-103(B) and 5/2-101(B).

2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. In accordance with the Commission’s August 24, 2005 Default Order, Respondent is in violation of the Illinois Human Rights Act that prohibits age, race and physical handicap discrimination.

4. Complainant has failed to demonstrate that she is entitled to emotional distress damages resulting from Respondent’s discriminatory conduct.

5. Complainant has demonstrated that she is entitled to back pay.

6. Respondent has demonstrated that the back pay award should be limited to $904.00.

7. Complainant is entitled to prejudgment interest in accordance with the Illinois Human Rights Act and the Commission's Procedural Rules.

8. In light of the findings of liability against Respondent, the Commission should order Respondent to cease and desist from any age, race and physical handicap discrimination.

Discussion

In accordance with the Commission's Default Order, this matter proceeded to a damages only public hearing. Complainant testified on her own behalf. Complainant's Exhibits 1-5,7,10-13,17-24, and 26-43 were introduced and admitted into evidence. Respondent called two witnesses in its case: Robin Batka, a Human Resources Manager for Respondent and Lynn Jennings, a staffing specialist with ManPower, Inc., a job placement firm. Respondent's Exhibits 1-9 were introduced and admitted into evidence.

The hearing was challenging, primarily because of Complainant's outbursts, argumentative attitude toward witnesses and me, and failure to follow my directions on hearing procedures and protocol. Complainant "talked over me" when I was making rulings and establishing order. Despite my repeated admonishments to the contrary, during cross-examination of Respondent's witnesses, Complainant commented, made faces, made inappropriate narratives, and asked questions of the witnesses while objections were pending.

The record suggests Complainant seeks back pay and emotional distress damages. Indeed, Complainant states in her post-hearing letter brief that she seeks back pay, plus incentives, as well as an award for pain and suffering.

Emotional Distress

Emotional distress damages are recoverable as actual damages for injury or loss suffered by the complainant caused by violations of the Illinois Human Rights Act**.** **Village of Bellwood v. Illinois Human Rights Comm'n,** *184 Ill. App. 3d 339, 541 N.E.2d 1248, (1st Dist. 1989).* Complainant has the burden of coming forward and presenting evidence for the relief she seeks. Complainant must prove by a preponderance of the evidence that she is entitled to emotional distress damages.

There are two elements of proof needed to establish a claim for damages: (1) proof of actual harm or injury; and (2) proof that the unlawful conduct caused the harm or injury. For the reasons discussed more fully below, I find that although it is clear Complainant suffers from severe medical problems that may very well be related to job stress, she failed to sustain her burden of proof for emotional distress damages because she failed to establish that there is a causal connection, or nexus, between Respondent's discriminatory actions and the stress and medical problems she did, and does, experience.

In support of her claim for emotional distress damages, Complainant testified on her own behalf, as well as introducing medical records and medical prescriptions. In response to questions on the relevancy of the medical records, Complainant testified repeatedly that the records are relevant because they reflect medical problems she sustained from the stress caused by her job at Respondent. (Tr. at 23-24). Specifically, when Complainant was asked whether the medical problems were from the job or from the discrimination, Complainant stated: "From the job. From the stress. I paced back and forth. I lifted heavy stuff. Walked up and down stairs." (Tr. at 24). In addition, every single medical record in evidence is dated *before* the discriminatory conduct

occurred. In fact, almost all of Complainant's medical records are from 2002, nearly two years before her termination.

When Complainant introduced the prescription medications she has taken over the years, and still takes today, she was asked to explain their relevance. Complainant explained that she must take certain medications because she will experience diarrhea if she does not. When asked how that relates to the damages she is seeking, Complainant stated: "The stress of the job - caused me the stomach problems, from the job." When asked specifically if she meant from the job or from the discrimination, Complainant stated: "From the job. From the job." (Tr. at 40). When explaining why she takes her blood pressure medication, Complainant stated that her blood pressure is high from the stress of the up and down, and the pacing back and forth. Complainant went on to explain that it was the work at Sears, the 10-hour days that gave her high blood pressure. (Tr. at 41).

During cross-examination, Complainant denied seeking counseling or help from a psychiatrist or psychologist following her termination at Respondent. (Tr. at 60). In response to Respondent's interrogatory No. 7, which asked Complainant to state whether she received any counseling or treatment due to Respondent's unlawful conduct, she stated: "the answer is absolutely not." (R. Ex. 1 at 4).

In sum, I do not recommend an award for emotional distress since: (1) Complainant's evidence proves that her medical problems existed well *before* the discrimination in March 2004; (2) Complainant's own testimony and evidence support that her medical problems did not result from the discrimination, but rather from job-related stress; and (3) Complainant never sought help or counseling for emotional distress after her termination.

Back Pay

The Illinois Human Rights Act provides for awards of back pay damages when liability has been determined. **775 ILCS 5/A-104.** Complainant has the burden of coming forward and the burden of proof to support his/her request for damages. The public policy of a back pay award is to make the complainant whole. Thus, a back pay award should put the complainant in the position she would have been in but for the discriminatory act. **Clark v. Human Rights Comm'n,** *141 Ill. App. 3d 178, 182-83, 490 N.E.2d 29 (1st Dist. 1986).* In calculating back pay, an employee should advance her theory of likely earnings along with supporting evidence. *Id.* If that showing is reasonable, the burden shifts to the employer to prove that the employee's earnings should have been less. *Id.*

Respondent argues that Complainant has failed to put forth a theory of likely earnings or produce any evidence that would allow the Commission to ascertain the amount she believes she is owed. I disagree.

It is true that Complainant did not directly state the exact amount she seeks in back pay or exactly how back pay should be calculated. Notwithstanding, I find that it is possible to discern from the record the essential information necessary to calculate back pay. The amount of her hourly rate of pay at the time she was terminated was $11.50 (C. Ex. 1-5); she worked approximately 40 hours per week during most weeks of the year (Tr. at 15). An employee is presumptively entitled to back pay from the date of an employee's wrongful termination until the date of the Recommended Order and Decision. **Zimmerman and Illinois Central Gulf Railroad Co***., ___ Ill. HRC Rep. ___, (1986CN3091, Nov. 23, 1992)*. Often back pay calculations are somewhat speculative. Ambiguities in the calculation process must be resolved in favor of a prevailing complainant, and against the discriminating employer, since the employer's wrongful act

gave rise to the uncertainty. **Clark v. Human Rights Comm'n**, *141 Ill. App. 3d 178, 183, 490 N.E.2d 29, 95 Ill. Dec. 556 (1st Dist. 1986).*

Once Complainant has met her burden, the burden shifts to Respondent. Respondent may present evidence to show why the cut-off date for back pay should be earlier than the date of the Recommended Order and Decision. Here, Respondent presented evidence to support two defenses that would limit back pay damages to an earlier date. First, Respondent argues a back pay award is limited to the time between Complainant's termination and Respondent's Manteno facility consolidation ("job elimination" defense). In the alternative, under a "failure to mitigate" defense, Respondent argues a back pay award must be limited to the date that Complainant's "abusive" behavior eliminated her chances of receiving work through ManPower, Inc. For the reasons discussed below, I find the "job elimination" defense persuasive. Since the cut-off date is earlier under this defense, I will not address the failure to mitigate damages defense with a later cut-off date.

Job Elimination Defense

Respondent's job elimination defense rests on the following facts: (1) the Manteno facility was consolidated into other facilities; (2) Complainant's job was eliminated on May 6, 2004 (two months after she was terminated); and (3) Complainant was not eligible for any other open jobs at the time of the consolidation. I find Respondent made a sufficient showing to justify a cut-off of back pay damages under the job elimination defense.

After the consolidation was announced, Material Handler II's (the position held by Complainant) were encouraged to apply for Material Handler III positions or open clerical positions. There were no open clerical positions at the Manteno facility between Complainant's termination and May 6, 2004, the date the consolidation was complete.

To be eligible for the Material Handler III position, a Material Handler II was required to take and pass the Arcon lift test that met that position's lifting requirements.

Respondent contends Complainant failed the one hundred (100) pound lift test. Complainant contends she can lift one hundred (100) pounds and Dr. Schnell told her she was capable of performing all of the work for the Material Handler III job. In support of its position, Respondent points to a physical examination report from Provena St. Mary's Occupational Health Services dated February 27, 2004 that was introduced into evidence by both Complainant and Respondent. The report was made after a job pre-placement examination was performed on Complainant. The February 27, 2004, report states Complainant was "not medically qualified to perform the essential physical requirements of this job." It further states: "[B]ack strength not adequate for job." (C. Ex. 23, R. Ex. 8). Also admitted into evidence by both Complainant and Respondent was a physical examination report prepared after Dr. Schnell performed a job pre-placement examination on Complainant on February 3, 2004. (C. Ex. 23, R. Ex. 8). The February 3, 2004 report supports Complainant's position that Dr. Schnell stated Complainant was able to perform all the work for the Material Handler III job.

Complainant's and Respondent's contentions and the facts supporting the contentions are not inconsistent. I find that after the general, job pre-placement examination on February 3, 2004, Complainant was given an Arcon one hundred (100) pound lift test on February 27, 2004 that she failed. I find the lift test was reliable because other than Complainant's comments that she can lift one hundred (100) pounds, she failed to introduce any evidence that challenges the validity of the test results or the manner in which the test was administered. Thus, I find that because Complainant failed the lift test, she was ineligible to perform the Material Handler III job requirements.

Since there were no open clerical jobs, those Material Handler II's who failed the one hundred (100) pound lift test were terminated. Fourteen (14) Material Handler II's, including Complainant, also failed the test. Material Handler II's who failed the lift test were offered a "transition pay package" in accordance with Respondent's Transition Pay Plan. Under the plan, Respondent's employees with one or more years of continuous service were given one week of pay for each completed year of service, based on the employees' wage rate on their last day worked. According to the plan, a week of pay is the equivalent of 40 hours of pay. Complainant was terminated on or around March 1, 2004, and was not offered a severance package.

In **Chas. A. Stevens v. Illinois Human Rights Comm'n**, *196 Ill. App. 3d 748, 554 N.E.2d 976 (1990)*, the Illinois Appellate Court acknowledged a "job elimination" defense. In that case, however, the Illinois Appellate Court held that the respondent had failed to make a sufficient showing to justify the complainant would have been discharged even if there had been no discriminatory termination; in **Chas**., the respondent's assertions were held to be mere speculation. In contrast, the record in this case supports a finding that Complainant was ineligible for any of Respondent's open jobs, and that Complainant's job would have been eliminated on May 6, 2004.

To make Complainant whole, she should be awarded back pay for the months between her termination (March 1, 2004) and the elimination of all Material Handler II positions (May 6, 2004), as well as the payment she would have received under the Transition Pay Plan. Thus, had Complainant not been terminated on March 1, 2004, she would have continued to work for 5 weeks and 2 days, until May 6, 2004, when the consolidation was complete. Accordingly, using the $11.50 per hour wage, Complainant would be entitled to $2,484.00 in back pay from the date of termination to the date of the consolidation ($11.50 multiplied by 40 hours multiplied by 5 weeks, plus $11.50 multiplied by 16 hours). In addition, Complainant is entitled to receive 7 weeks of

wages, or $3,220.00 ($11.50 per hour multiplied by 40 hours multiplied by 7 weeks) under the Transition Pay Plan.

Respondent also elicited testimony from Complainant that she received approximately $4,800.00 in unemployment insurance compensation (Tr. at 43-44). Unemployment compensation is not recoverable and must be subtracted from the back pay total. **Zawada and Cook Spring Co**., *60 Ill. HRC Rep. 238 (1990)*

In sum, Respondent should be ordered to pay Complainant back pay in the total amount of $904.00 ($2,484.00 for wages due from the date of the termination to the date of the consolidation plus $3,220.00 for wages due from the Transition Pay Plan minus $4,800.00 in unemployment compensation). If Complainant is required to repay any amount of that unemployment compensation to the State of Illinois, Respondent should be required to reimburse Complainant for the repaid amount. **Brown and Cresco Lines, Inc.,** *46 Ill. HRC Rep. 184 (1985).*

Pre-Judgment Interest

Respondent should also be ordered to pay Complainant interest on the back pay as contemplated by Section 8A-104(J) of the Illinois Human Rights Act (735 ILCS 5/8A-104(J)) and calculated as provided in Section 5300.1145 of the Commission's Procedural Rules.

Cease and Desist

Since a Default Order has been entered and there has been a finding of liability against Respondent, it is recommended Respondent be ordered to cease and desist from age, race and physical handicap discrimination in the future. *See* **Magraff and Alexopolis**, ___ *Ill. HRC Rep. ___, (1990CN0209, Nov. 8, 1993*).

Recommendation

It is recommended the Commission:

a. award back-pay in the amount of $904.00;

b. order that if the Illinois Department of Employment Security requires complainant to repay the unemployment compensation she has received, Respondent shall pay to Complainant the amount of the requested repayment within 30 days of her demand;

c. award prejudgment interest on the back pay award in accordance with the Illinois Human Rights Act and the Commission's Procedural Rules; and

(3) order Respondent to cease and desist from age, race and physical handicap discrimination in the future.

HUMAN RIGHTS COMMISSION

BY: _____
REVA S. BAUCH
DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: September 21, 2006