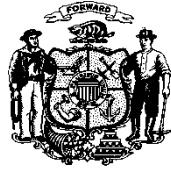


State of Wisconsin



Labor and Industry Review Commission

Cindy Schaefer, Complainant

Fair Employment Decision¹

Marcus Center for the Performing Arts,
Inc., Respondent

Dated and Mailed:

ERD Case No. CR201900591
EEOC Case No. 26G201900568C

September 29, 2023

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The decision of the administrative law judge is **reversed** in part and **affirmed** in part. Accordingly, the commission issues the following:

Order

1. *Time within which respondent must comply with Order.* The respondent shall comply with all of the terms of this Order within 30 days of the date on which this decision becomes final. This decision will become final if it is not timely appealed, or, if it is timely appealed, it will become final if it is affirmed by a reviewing court and the decision of that court is not timely appealed.
2. That the respondent shall cease and desist from discriminating against the complainant on the basis of age.
3. That the respondent, if it has not already done so, shall offer the complainant instatement to the director of finance position or to a position substantially equivalent to that position. This offer shall be tendered by the respondent or an authorized agent and shall allow the complainant a reasonable time to respond. Upon the complainant's acceptance of such position, the respondent shall afford her all

¹ **Appeal Rights:** See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the Labor and Industry Review Commission as a respondent in the petition for judicial review.

Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website, <http://lirc.wisconsin.gov>.

seniority and benefits, if any, to which she would be entitled but for the respondent's unlawful discrimination, including sick leave and vacation credits.

4. That the respondent shall make the complainant whole for all losses in pay the complainant suffered by reason of its unlawful conduct by paying the complainant the amount she would have earned as the director of finance, including pension, health insurance, and other benefits, from the date the respondent failed to promote the complainant until such time as the complainant resumes employment with the respondent or would have resumed such employment but for her refusal of a valid offer of the director of finance position or a substantially equivalent position. The back pay for the period shall be computed on a calendar quarterly basis with an offset for any interim earnings during each calendar quarter. Any unemployment insurance or welfare benefits received by the complainant during the above period shall not reduce the amount of back pay otherwise allowable but shall be withheld by the respondent and paid to the Unemployment Compensation Reserve Fund or the applicable welfare agency. Additionally, the amount payable to the complainant after all statutory set-offs have been deducted shall be increased by interest at the rate of 12 percent simple. For each calendar quarter, interest on the net amount of back pay due (i.e., the amount of back pay due after set-off) shall be computed from the last day of each such calendar quarter to the day of payment. Pending any and all appeals from this Order, the total back pay will be the total of all such amounts.

5. That the respondent shall pay to the complainant reasonable attorney's fees and costs incurred in pursuing this matter in the total amount of \$94,252.64. A check in that amount shall be made payable jointly to the complainant and her attorney, Alan Olson, and delivered to Mr. Olson.

6. That within 30 days of the date on which this decision becomes final, the respondent shall file with the commission a Compliance Report detailing the specific actions it has taken to comply with this Order. The Compliance Report shall be prepared using the "Compliance Report" form which has been provided with this decision. The respondent shall submit a copy of the Compliance Report to the complainant at the same time that it is submitted to the commission. Within 10 days from the date the copy of the Compliance Report is submitted to the complainant, the complainant shall file with the commission and serve on the respondent a response to the Compliance Report.

Notwithstanding any other actions a respondent may take in compliance with this Order, a failure to timely submit the Compliance Report required by this paragraph is a separate and distinct violation of this Order. The statutes provide that every day during which an employer fails to observe and comply with any order of the commission shall constitute a separate and distinct violation of the order and that, for each such violation, the employer shall forfeit not less than \$10 nor more than \$100 for each offense. *See Wis. Stat. §§ 111.395, 103.005(11) and (12).*

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against her based on her age and because she opposed discrimination, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). The Equal Rights Division of the Department of Workforce Development issued an initial determination finding probable cause to believe the respondent discriminated against the complainant because of her age and because she opposed discrimination under the Act. An administrative law judge for the Division held a hearing on the merits of the complaint and issued a decision finding that no discrimination occurred. The complainant filed a timely petition for commission review of that decision.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based on its review, the commission makes the following:

Findings of Fact

1. The respondent, the Marcus Center for the Performing Arts ("Marcus"), is a performing arts venue located in Milwaukee, Wisconsin.
2. The complainant, Cindy Schaefer, began working for Marcus in August 1985 at age 26. Her date of birth is October 7, 1958.
3. Ms. Schaefer was originally hired to work as an assistant controller. In 1997, she was promoted to the position of controller. In 2004, her role became a hybrid position in which she continued to serve as the controller and also assumed the role of IT manager. She worked as Marcus' controller for 22 years while also having responsibilities in IT, payroll, and HR. Ms. Schaefer has an associate degree in accounting, but is not a CPA.
4. Caroline Hayden, whose date of birth is May 15, 1954, began working for Marcus as the controller in September 1994, at which point she was 40 years old. She was promoted to the position of VP of finance, HR, and administration within four years and held that title until she left the organization in October 2016, at age 62. Ms. Schaefer reported to Ms. Hayden while Ms. Hayden worked for Marcus.
5. Ms. Hayden experienced a change in how she was treated by Marcus' CEO, Paul Matthews, in the later years of her employment. He would glare at her in meetings, ridicule her in front of her peers, and yell at her in the middle of the office. Once she announced her retirement, he pushed her to set a date. Mr. Matthews' negative treatment came about as Ms. Hayden got older, despite her positive work history.
6. Ms. Hayden heard Mr. Matthews make age related comments about staff and candidates for employment with Marcus. Specifically, he complained about a

candidate who he felt was too old, pushed for older staff to retire, and, during one hiring process, stated, “We are finally getting some young blood in here.”

7. Ms. Hayden supervised Ms. Schaefer for approximately 22 years and found her to be a strong employee who was “fabulous” at training other staff and had “phenomenal leadership abilities.” Ms. Hayden’s written reviews of Ms. Schaefer’s performance were positive.

8. In 2016, Laura Lenhart was hired as the new VP to replace Ms. Hayden. Ms. Schaefer then reported to Ms. Lenhart.

9. On October 24, 2017, Ms. Lenhart asked Ms. Schaefer to complete a “succession plan” detailing her skills and the urgency with which they would need to be replaced should she leave the organization. Ms. Lenhart included a “status” of “retirement likely within 10 years” in this document, although Ms. Schaefer had not indicated that she had plans to retire.

10. Chai Virojana, an independent contractor who worked at Marcus one to three days per week from 2004 to 2019, noticed that Ms. Lenhart was harder on older employees while being more patient with younger staff.

11. Morgan Fries, a staff member in her 30s, was treated more favorably by Ms. Lenhart than older staff members. Some duties were taken away from older staff and transferred to Ms. Fries. Ms. Lenhart provided Ms. Fries with training and mentoring not offered to older staff and promoted her to a director position within 18 months of her hire.

12. Ms. Schaefer, along with other employees in their late 50s or 60s, complained to Heidi Lofy and Richard Hecht, VPs for Marcus, about Ms. Lenhart. Their complaints included a lack of communication, unreasonable expectations, and hostile interactions.

13. Mr. Hecht and Ms. Lofy were concerned about the complaints they received from staff about Ms. Lenhart. They took their concerns to Mr. Matthews. He became angry and responded that he was disappointed in them as VPs, that they were terrible leaders, and that Ms. Lenhart was doing what he wanted her to do.

14. Ms. Schaefer did not complain to Marcus’ leadership or HR about discrimination and did not specifically indicate to leadership or HR that she believed she was treated unfavorably because of her age.

15. Mark Hanson, a member of the finance team, left his employment with Marcus because he felt he was treated unfairly by Ms. Lenhart due to his age. His last day of work was May 27, 2018. He was 60 years old at the time.

16. When Mr. Hanson left Marcus, Ms. Schaefer was tasked with taking over most of his duties while still performing her dual role as controller and IT manager. Ms. Schaefer began training other staff to take over some of these duties, but continued to have an increased workload.

17. Ms. Schaefer was excluded from strategic planning meetings due to her increased workload.

18. On one occasion, while under Ms. Lenhart's supervision, Ms. Lenhart asked Ms. Schaefer whether she was staying current with changes happening in accounting regulations. Ms. Schaefer responded that she would be willing to do so if her workload allowed, but at that time it did not. Ms. Schaefer informed Ms. Lenhart that she relied on Ms. Lenhart to communicate any relevant changes to her.

19. In 2016, Marcus turned 50 and its aging facility required updates. The county decided to reduce the amount of funding it provided to Marcus. Additionally, the Milwaukee Symphony Orchestra, which had previously occupied the building 24 to 26 weeks per year, decided to move to its own facility. These challenges necessitated a new approach to fund-raising and booking acts for Marcus. In February of 2018, Marcus decided to have its CEO, Mr. Matthews, as well as one VP, Mr. Hecht, focus on fund-raising and infrastructure improvements. The remaining two VPs, Ms. Lofy and Ms. Lenhart, were tasked with running day-to-day operations. Mr. Matthews communicated to the executive team that a high priority goal of the restructuring plan was to create growth opportunities within the company for younger employees.

20. Ms. Lofy and Ms. Lenhart determined they needed additional leadership positions to make this new organizational structure work and created director level positions in several departments. They announced to staff that some departments would be adding director level positions. However, they did not announce that there would be a new director position in the department of finance. Ms. Schaefer asked Ms. Lenhart about her role and whether she was being made a director, but was informed that Marcus was not creating a director of finance position because it would be redundant.

21. Marcus elevated four managers in other divisions to director positions. (The record contains no evidence of the ages of these individuals).

22. A new IT division was created as part of the restructuring plan. Marcus advised Ms. Schaefer it planned to transfer her IT duties to staff in the new IT department.

23. Reona Vang worked for the accounting firm that conducted audits for Marcus. In early 2018, Ms. Lenhart began discussing a potential director of finance position with her. Ms. Lenhart interviewed Ms. Vang for the position in the summer of 2018. Ms. Vang has a bachelor's degree in accounting, but is not a CPA.

24. At some point, Marcus drafted a position description for the role of director of finance. It listed a “BS or BA degree in Accounting or Finance” as a requirement but did not list having a CPA credential as a requirement.

25. On or about September 27, 2018, Ms. Lenhart informed Ms. Schaefer that Ms. Vang had been hired to be the director of finance and would be starting in October. Ms. Vang was 38 years old at the time.

26. The director of finance position was never posted publicly. Ms. Schaefer was not informed Marcus had created a director of finance position until after it selected Ms. Vang to fill that position. Ms. Schaefer did not have an opportunity to apply or interview for the position and was not formally considered for the position.

27. Prior to Marcus’ creation of the director of finance position, both Ms. Lenhart and Ms. Schaefer were aware that organizations of the size and type of Marcus typically have either a director of finance or a controller, but not both.

28. Upon her hire, Ms. Vang began working on the creation of manuals detailing Marcus’ accounting practices. Ms. Lenhart believed Ms. Schaefer was capable of creating these manuals but had not had time to do so because of her workload, which included IT duties as well as duties formerly belonging to Mr. Hanson.

29. Ms. Schaefer provided training for Ms. Vang and answered her questions about Ms. Schaefer’s own accounting duties. Ms. Lenhart also provided training for Ms. Vang.

30. On January 10, 2019, Marcus informed Ms. Schaefer that it was eliminating her position and that she would be discharged. Her last day of work was January 10, 2019, at which point she was 60 years old.

31. After Ms. Schaefer’s discharge, Ms. Vang took over Ms. Schaefer’s finance duties.

32. Ms. Schaefer’s age was a factor in Marcus’ decisions not to promote her to the director of finance position and to discharge her.

33. After her discharge, Ms. Schaefer looked for new employment. In 2019, she accepted a job with the Milwaukee Jewish Federation making less per year than she earned in her role as controller/IT manager at Marcus. Even after beginning work for her new employer, Ms. Schaefer continued looking for work with a higher salary.

Conclusions of Law

1. Marcus did not retaliate against Ms. Schaefer because she opposed a practice of discrimination, within the meaning of the Act.

2. Marcus discriminated against Ms. Schaefer based upon her age, within the meaning of the Act.

Memorandum Opinion

Retaliation

Ms. Schaefer claims that Marcus failed to promote her and discharged her in retaliation for opposing discrimination. Although Ms. Schaefer complained about Ms. Lenhart to Marcus' leadership and to HR, she did not prove that she opposed discrimination within the meaning of the Act. Therefore, the commission does not find that Marcus retaliated against Ms. Schaefer for opposing discrimination.

Age Discrimination

Ms. Schaefer established that she is in the protected age group and that she was passed over for a promotion and subsequently discharged. Marcus offered several explanations for its actions. First, Ms. Lenhart, who made the ultimate decision to not consider Ms. Schaefer for the director of finance position, asserted she made that decision because Ms. Schaefer was a tactical manager but did not have strategic leadership ability. In support of this explanation, Ms. Lenhart provided the following examples of what she considered to be poor leadership by Ms. Schaefer:

- In a meeting related to reorganizing the company, Ms. Lenhart alleged Ms. Schaefer said, "we're going to lose our jobs," and that this statement lowered the team's morale.
- A Marcus account was overdrawn while Ms. Schaefer was the controller.
- Ms. Schaefer provided confusing feedback to a staff member who reported to her.

However, Ms. Schaefer credibly denied having engaged in each of these incidents. Ms. Schaefer did not make the alleged comment regarding staff losing their jobs. Rather, she asked a question about whether any of the changes being discussed in the meeting would affect anyone's position. A Marcus account was overdrawn, but it was due to a mistake made by a different staff member who failed to follow Ms. Schaefer's instructions. Last, Ms. Schaefer provided negative feedback to a staff member because Ms. Lenhart instructed her to do so despite the fact that Ms. Lenhart had recently provided the staff member with positive feedback. Because the commission does not credit Ms. Lenhart's testimony regarding these incidents, it also does not find Ms. Lenhart's testimony that she did not consider Ms. Schaefer for the director of finance position due to poor leadership to be credible.

Ms. Lenhart also asserted that Ms. Schaefer opposed change and did not keep up to date with accounting regulations. One concrete example of a change considered by Marcus in the finance department that Ms. Schaefer allegedly opposed involved

switching to new accounting software. However, rather than opposing this change, Ms. Schaefer credibly testified that she worked to implement the new software and believed the department was ready to transition to it. It was Ms. Lenhart's ultimate decision not to do so. Ms. Lenhart also testified that Ms. Schaefer did not keep up to date with new accounting regulations and, when asked about it, responded it was not her job to do so. However, Ms. Schaefer credibly explained she believed that task was part of Ms. Lenhart's job. She further indicated that she would have taken over the responsibility if she had the capacity to do so, but her workload in the hybrid controller/IT manager role did not leave her with enough time to take on that additional work. Because the commission does not credit Ms. Lenhart's testimony regarding these assertions, it also does not find these alleged faults in Ms. Schaefer's performance were the reason Marcus failed to consider Ms. Schaefer for the director of finance position.

Marcus' CEO Paul Matthews who was Ms. Lenhart's supervisor and who was familiar with Ms. Schaefer's work, offered an alternate explanation for why Ms. Schaefer was not considered for the director of finance position. He testified that he believed the position required that the applicant be a CPA, a qualification Ms. Schaefer did not possess. However, the position as defined in the position description did not require that the applicant be a CPA and the individual eventually hired was not. The commission therefore concludes Ms. Schaefer's lack of a CPA credential is not the reason she was not promoted.

Having concluded that Marcus' proffered reasons for its decision not to promote Ms. Schaefer, her lack of leadership skills and the absence of a CPA credential, were not in fact the reasons it chose not to promote her, the commission next must determine whether those reasons were really pretexts for discrimination based on Ms. Schaefer's age. The demonstrated falsity of an employer's asserted reason for an employment action may, in itself, be viewed as evidence that a discriminatory motive was behind the action. See *Cole v. Greyhound Bus Lines*, ERD Case No. 200303930 (LIRC Sept. 16, 2005) and *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 146-147 (2000). In this case, the commission has considered the falsity of Marcus' asserted reasons, along with the other evidence presented at the hearing, and when taken as a whole, concludes that the complainant's age was the reason for the adverse employment actions.

Ms. Schaeffer was well qualified for the director of finance position. She had a long history of employment with Marcus with positive performance reviews. She held the title of controller for 22 years and performed duties similar to those required of a director of finance. In fact, Ms. Schaefer trained the new director of finance and her finance duties were taken over by the new director after she was discharged. She would have been capable of performing the additional duties taken on by the new director of finance had her workload (which included duties not taken on by the new director of finance such as IT duties, duties previously performed by Mr. Hanson, and training the new director) permitted her to do so. Marcus' decision not to allow its

long-time, successful employee who had performed similar work for many years to apply and interview for the new director of finance position raises suspicion that it had discriminatory motives. See *Alexander v. Housing Authority of the City of Milwaukee*, ERD Case No. CR201103474 (LIRC Jan. 30, 2020) (the fact that the respondent never gave the complainant an opportunity to apply for a promotion, but handpicked an individual not in the protected class who had similar qualifications, was a factor that led the commission to believe discrimination may have occurred).

In addition, the commission notes that the decision-makers in this matter had a pattern of treating older employees less favorably than younger workers. Mr. Matthews, Ms. Lenhart's supervisor, had a history of considering age in employment related decisions. For example, Ms. Hayden, the former VP of finance, HR, and administration, was treated poorly by Mr. Matthews and felt pressured to set a retirement date due to her age. At the hearing, Ms. Hayden also credibly testified that she heard Mr. Matthews make comments that suggested he preferred to hire, promote, and retain younger staff, including stating approvingly during one hiring process, "We are finally getting some young blood in here." While Ms. Lenhart made the ultimate decision not to promote Ms. Schaefer, she worked under Mr. Matthews' leadership and guidance; Mr. Matthews had instructed the executive team, including Ms. Lenhart, to make creating opportunities for younger employees a priority. Mr. Matthews rejected concerns about Ms. Lenhart's behavior towards older employees with a statement that she was doing what he wanted her to do. For these reasons, the commission believes Ms. Lenhart took Mr. Matthews' views into consideration in her decision making. Like Mr. Matthews, Ms. Lenhart also had a record of treating older employees harshly while favoring younger employees, including offering mentoring and promotion opportunities to younger staff that she did not make available to older staff. Additionally, Ms. Lenhart specifically asked Ms. Schaefer to create her own "succession plan," on the assumption that Ms. Schaefer intended to retire within 10 years, notwithstanding the fact that Ms. Schaefer never indicated she had plans to retire. The commission has previously held that considering the retirement status of an employee who has not indicated he or she intends to retire is suggestive of discriminatory motive. See *Anchor v. State of Wisconsin*, ERD Case No. CR200501702 (LIRC Jan. 4, 2012).

For all of these reasons, the commission concludes that age was a determining factor in Marcus' decision not to promote Ms. Schaefer to the director of finance position. Further, it is clear from the record that, notwithstanding Ms. Lenhart's testimony that she did not intend to discharge Ms. Schaefer when she hired Ms. Vang and only decided to do so later when she realized Ms. Schaefer's position was no longer necessary, Ms. Lenhart was aware at all times that the organization did not need both a controller and a director of finance. After deciding to transfer Ms. Schaefer's IT duties to the newly created IT department, Ms. Lenhart chose to hire a director of finance from outside the organization whom she knew would eventually replace Ms. Schaefer and take over her controller duties. The decision to discharge Ms. Schaefer

was therefore a direct consequence of the discriminatory decision not to promote her due to her age.

Costs and Attorney's fees

The complainant's attorney filed a petition requesting an award of \$92,700 in attorney's fees and \$3,851.28 in costs.

The complainant's attorney's fee request is based on an hourly rate of \$450. The respondent has not argued that the requested \$450 hourly rate is unreasonable. Based on its experience and past practice, the commission finds this rate is reasonable because it is in line with the rates prevailing in the community for similar services for lawyers of comparable skill, experience, and reputation. Indeed, in *Cota v. Oconomowoc Area School District*, ERD Case Nos. CR201700245 and CR201700246 (LIRC July 30, 2021), the commission specifically approved a \$450 hourly rate for Attorney Olson.

The respondent argues that the attorney fee award requested by the complainant should be reduced by \$6,525 because the complainant's complaint included a claim of discrimination based upon disability, which was dismissed in the initial determination and not appealed. Upon consideration of the matter, the commission does not believe that such a large reduction is warranted. The facts associated with the complainant's disability claim are closely related to the complainant's age discrimination claim, and pursuing the disability claim added only a few paragraphs to the complaint and other documents the complainant's attorney prepared in the course of the Division's investigation. The commission believes that the portion of the litigation related to the disability claim accounted for very little of the complainant's attorney's time, and it concludes that, had the complainant not pursued that claim, her attorney's hours prior to the issuance of the initial determination would have been reduced by approximately 15%. The complainant's attorney spent 29 hours total on this matter through the issuance of the initial determination, for a total of \$13,050.00 in attorney's fees requested up until that point. Reducing the fee request by 15% (a \$1,957.50² reduction), results in a total fee award of \$90,742.50.

The respondent also argues the complainant's cost reimbursement should be reduced by \$434.88 because the following expenses should not be reimbursed: \$20 for a flash drive, \$225 for duplicate charges, \$96.14 for Westlaw legal research fees, \$51.74 for personal delivery service, and \$42 for a witness and service fee for a witness who was not called. The commission agrees with the respondent that the flash drive, hardware, is not a recoverable cost. The commission also agrees that there appears to be \$225 in duplicate charges included in the cost calculation. Both of these items are subtracted from the total costs awarded in relation to this matter.

² 29 hours x \$450/ hour x .15 = \$1957.50

Regarding the requested Westlaw fees, while those might be recoverable if connected to this specific case, the complainant's attorney described the expense as "legal database subscription/access (computer research)," implying that he is seeking reimbursement for the cost of a subscription fee not specific to this case. Because this item appears to be part of the complainant's attorney's general overhead costs and not an expense specifically related to this litigation, it is subtracted from the total costs awarded in relation to this matter.

Finally, the commission has considered the respondent's arguments regarding the personal delivery service fee and fees paid to a witness who was not called, but concludes those fees are recoverable. The complainant is not limited to use of the least expensive delivery service option and the commission sees no reason why personal delivery service fees would not be reimbursable. Additionally, while the complainant may have decided not to call a witness for any number of reasons, including that counsel's strategy evolved during the course of the litigation, the fees paid to a potential witness in preparation for the hearing are recoverable unless they are shown to have had no relation to the matter or to otherwise be unreasonable or excessive.

Subtracting the items identified by the respondent that are not recoverable in this litigation: the \$20 flash drive fee, the \$96.14 Westlaw fee, and the \$225 duplicative charges, the expense award is reduced by \$341.14 for a total of \$3,510.14 in costs.

NOTE: The commission consulted with the administrative law judge who held the hearing in this case to obtain the administrative law judge's impressions as to the credibility of the witnesses, based on their demeanor, which were a factor in the administrative law judge's decision. In response, the administrative law judge indicated:

I understood my responsibility was to make findings of fact based on evidence presented to me. Doing so required reaching conclusions regarding the reality of the relationships involved. Ms. Schaefer's demeanor was a factor in making my findings of fact because to be accurate findings must reflect the evidence. As reflected in my findings I did not find her evidence to withstand critical scrutiny, nor did her testimony reflect the self-awareness and self-criticism normal for people in supervisory positions. Supervision requires an awareness of a how your behavior impacts others and Ms. Schaefer's testimony, including her demeanor, showed a lack of that awareness. She did not weigh or consider her testimony or memory when testifying, or stop to think about an answer. It did not involve self-reflection.

As reflected in my decision, I concluded that my demeanor and credibility impressions provided an explanation of why she was not part of her supervisors audit and why when she was put on leave her supervisor thought she could go immediately without doing anything. Most supervisors need to train a replacement or do something before leaving because they are vital to operations. No findings of fact were made based solely on an assessment of her demeanor, but it was considered in all conclusions I reached.

The commission has considered the administrative law judge's response. However, it is not persuaded by the administrative law judge's reasoning. While the administrative law judge may have opinions about what qualities make a good leader, Ms. Schaefer's apparent lack of hesitation when answering questions is not a reason to doubt her credibility. Further, the commission believes that a lack of hesitation may indicate that Ms. Schaefer was confident and well-prepared and not that she lacks self-awareness or self-criticism. The commission has independently reviewed the record, including the transcript of Ms. Schaefer's testimony, and finds her to be a credible witness.

MARILYN TOWNSEND, Commissioner (concurring):

I write separately because, although I concur in the result and analysis reached by the majority that discrimination occurred, I would draw the parties' attention, to §227.54, Wis. Stat., which provides:

The institution of the proceeding for review shall not stay enforcement of the agency decision. The reviewing court may order a stay upon such terms as it deems proper, except as otherwise provided in ss. [196.43](#), [253.06](#), and [448.02 \(9\)](#).

/s/

Marilyn Townsend, Commissioner

cc: Attorney Lynne Mueller
Attorney Alan Olson

Editor's Note: This case has been appealed to circuit court.