

BEFORE THE  
MISSOURI COMMISSION ON HUMAN RIGHTS  
STATE OF MISSOURI

STATE OF MISSOURI ex rel. )  
Jacquelyn Annette Sharp, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
Enterprise Manufacturing Inc. )  
f/k/a Scot Young research, Inc., )  
 )  
 )  
Respondent. )

Case Number: 07-0013 HRC

DECISION AND ORDER

After reviewing the record in the above-styled case the Commission Panel adopts the Hearing Examiner's Findings of Fact and Conclusions of Law and issues the following Decision and Order.

**IT IS HEREBY ORDERED:**

1. Respondent violated the Missouri Human Rights Act by retaliating against and constructively discharging Plaintiff Jacquelyn Sharp.
2. Respondent shall pay to Plaintiff the sum of \$37,609.45 in back pay for 2004, 2005 and 2006;
3. Respondent shall pay to Plaintiff the sum of \$45,000 in actual damages for humiliation and emotional distress.
4. Respondent shall pay to Plaintiff the sum of \$15,000 in actual damages for violation of her civil rights;
5. Respondent shall pay prejudgment interest at a rate of 3.09%;
6. Respondent shall cease and desist from any further unlawful and discriminatory acts in violation of the Missouri Human Rights Act.
7. Respondent shall adopt a retaliation policy to protect Enterprise's employees from future retaliatory acts in the work place by establishing reasonable and adequate procedures for investigating complaints of retaliation and implementing suitable remedial action against retaliatory acts; and

8. Respondent shall submit a written report to the Missouri Commission on Human Rights (MCHR) within 90 days of MCHR's order that describes the manner in which Enterprise has complied with the requirements of this order.

 7-10-12

Jennifer Placzek  
Commissioner

Agree   
Disagree

 8/10/12

Roger Worthington  
Commissioner

Agree   
Disagree

 8/17/12

James Buford  
Presiding Commissioner

Agree   
Disagree

**FILED**  
AUG 20 2012  
MISSOURI COMMISSION  
ON HUMAN RIGHTS

Before the  
Commission on Human Rights  
State of Missouri



STATE OF MISSOURI, ex rel.  
JACQUELYN ANNETTE SHARP,

Petitioner,

vs.

ENTERPRISE MANUFACTURING, INC.,  
f/k/a SCOT YOUNG RESEARCH, INC.

Respondent.

No. 07-0013 HRC

**RECOMMENDED DECISION**

The Hearing Examiner recommends that the Missouri Commission on Human Rights ("MCHR") adopt his finding that Enterprise Manufacturing, Inc. f/k/a Scott Young Research, Inc. ("Enterprise") violated the Missouri Human Rights Act, Chapter 213, RSMo ("MHRA"), by retaliating against and constructively discharging Jacquelyn Annette Sharp<sup>1</sup> because she had filed a sexual harassment complaint against Enterprise. The Hearing Examiner further recommends that MCHR order Enterprise: to pay Sharp \$97,609.45, plus prejudgment interest at the rate of 3.08%, for back pay and actual damages; to cease and desist from any further unlawful and discriminatory acts in violation of MHRA; to adopt a retaliation policy to protect

<sup>1</sup>Although Jacquelyn Annette Sharp is now known as Jacquelyn Annette Cook, we refer to her as Sharp throughout this recommended decision in conformity with the documents received into evidence and her name at the relevant time.

employees from retaliation in the work place; and to submit a written report to MCHR concerning Enterprise's compliance with MCHR's order.

### **Procedure**

On May 4, 2004, Sharp filed a complaint with MCHR asserting Enterprise retaliated against her for filing a sexual harassment complaint with MCHR. On March 30, 2007, MCHR appointed the Hearing Examiner. MCHR filed an amended complaint on May 21, 2007. Enterprise filed its answer on October 15, 2007. Sharp did not intervene in this proceeding.

A hearing was convened on the following dates in 2010: April 21-23, May 20, and June 23. Assistant Attorneys General Vanessa Howard Ellis and Amber Jordan represented MCHR. Patrick E. McGrath of Wallace, Saunders, Austin, Brown & Enochs, Chartered, represented Enterprise.

### **Evidentiary Rulings**

We took a number of evidentiary issues raised by the parties under submission with the case: (a) MCHR objected to Enterprise's Exhibit D, a copy of a garnishment order from Elizabeth Vering's employment file, as irrelevant; (b) MCHR moved to strike a portion of witness Un Brown's testimony as not responsive to the question asked on direct examination; (c) Enterprise objected to the admission into evidence of designated portions of the deposition transcripts of Vering as irrelevant and as hearsay; (d) Enterprise objected to the admission into evidence of designated portions of the deposition transcript of Jimmy Cassity as hearsay; and (e) Enterprise objected to pages 14-19 of MCHR's Exhibit 6, which was purportedly a copy of a memorandum from Scot Young, on grounds that there was an insufficient foundation for admitting it into evidence. We overrule the objections to items (a) and (b), but sustain the objections to items (c) – (e).

Therefore, we admit Enterprise's Exhibit D into evidence. We deny the motion to strike a portion of Un Brown's testimony because we found it to be responsive to the question asked. Pages 14-19 of MCHR's Exhibit 6 are not admitted into evidence because MCHR failed to establish an adequate foundation for its admissibility. We sustain the hearsay objection to the designated portions of the deposition transcript of Elizabeth Vering. We do not admit the designated portions of the deposition transcript of Jimmy Cassity because neither the deposition transcript nor the designations were provided to this Commission.

### **Findings of Fact**

1. At all relevant times, Enterprise employed more than 15 people in Missouri and manufactured cleaning equipment at a facility located in St. Joseph, Missouri.
2. At all relevant times, Enterprise was wholly owned by Scot Young through his sole ownership of Scot Young, Ltd., which held all of Enterprise's stock.
3. Enterprise first employed Sharp, who is now married to Drexel Cook and known by the last name Cook, in September 1996. Sharp worked at Enterprise until she resigned her position on March 13, 1998. Enterprise rehired Sharp in June 1998, and she began working as production supervisor.
4. In 2000, Jimmy Cassity joined Enterprise as an operations manager. At that time, Sharp told certain Enterprise employees she was unhappy with the hiring of Cassity and was concerned about her job.
5. On September 20, 2001, Barb Shoemaker, an office manager at Enterprise, wrote a memo to Cassity commending Sharp's ability to catch errors in orders.
6. In February 2002, Sharp confronted Cassity about a sexual comment he had made to her. Cassity apologized to Sharp.

7. In April 2002, Steve Brockman replaced Sharp as production supervisor, and Sharp was given the opportunity to begin working in the office without any decrease in pay. She began working in the office in June 2002.

8. On August 12, 2002, Cassity sent a memo to Young describing how Sharp had reduced order errors since moving to the office and stating that Sharp should have a more prominent role in customer service.

9. On November 19, 2002, Cassity sent a memo to Young explaining that he would ultimately like to have Sharp back in production rather than in the office.

10. On December 13, 2002, Shoemaker attended a Fair Labor Standards Act ("FLSA") presentation by the State of Missouri that described the criteria for classifying an employee as hourly or salary for FLSA purposes.

11. On December 17, 2002, Sharp filed a Charge of Discrimination with MCHR. Sharp alleged she had been subjected to sexual harassment by Enterprise and Cassity. Cheryl Carpenter, Cyndee Merritt, Danielle Johnson, and Tracy Sharp, who also worked at Enterprise, complained of sexual harassment by Enterprise and Cassity as well.

12. When she filed the complaint, Sharp's boyfriend was Drexel Cook. Cook was also an employee at Enterprise who worked in the shipping and warehousing department.

13. Enterprise received notice of the sexual harassment complaint on December 31, 2002. Shoemaker, who was Sharp's supervisor in the office, informed Young of the complaint that day.

14. As of December 31, 2002, Sharp had received total income for the year in the amount of \$28,580.87 from the following sources: Enterprise – \$26,130.87; and Alternative Construction, Inc. – \$2,450.00.

15. On January 2, 2003, Nicola Rhodes-Young, Enterprise's Director and Scot Young's wife, sent a memorandum to Shoemaker and other "Key Members of Staff Syr USA" concerning the sexual harassment complaint. The same day, Enterprise also implemented a new attendance policy for hourly employees. Under the new attendance policy, points were to be assessed as follows: No Call / No Show = 3 points; Missed Day = 1 point; Tardy = ½ point; and Leave Early = ½ point. Enterprise also received a single-page fax of handwritten correspondence from an attorney that same day, which indicated that clerical workers and pool secretaries were subject to FLSA as hourly employees and should be put on a time clock and paid hourly as soon as possible.

16. On January 3, 2003, Shoemaker informed Sharp and Carpenter they would no longer be salaried employees; instead, they were to be paid hourly. Sharp's change in status resulted in her pay changing from that of a salary employee earning \$27,560 per year to that of an hourly employee earning \$13.25 per hour. The change of status subjected Sharp to the newly-adopted attendance policy. Shoemaker documented the change in a memorandum to file stating management had learned from a previous seminar by the State of Missouri that Enterprise was not compliant with FLSA and was advised to correct the matter as soon as possible. No other employees were changed from salary to hourly.

17. Shoemaker began documenting actions related to the sexual harassment complainants. On January 9 and 10, 2003, she drafted two memorandums about Sharp's boyfriend Cook and his conduct at work.

18. On January 13, 2003, Scot Young and Nicola Rhodes-Young arrived at the St. Joseph facility of Enterprise. Scot Young informed Sharp he would discuss her future with the company after he talked with his lawyers. Young admits he wanted to terminate Sharp, but was subsequently counseled by his lawyers that he could not legally do so.

19. On January 13, 2003, Scot Young also gave a speech to all employees at the facility concerning the sexual harassment complaints. He explained the company could not handle lawsuits of this magnitude and the workers would be impacted as well.

20. Young circulated a memorandum to managers and certain employees stating that no one was to pick up any faxes from the office fax machine.

21. Sharp's job primarily required that she take customer orders made by fax and phone.

22. On January 14, 2003, Sharp was instructed to no longer answer the office phones.

23. On January 23, 2003, Young gave another speech to all employees indicating that the sexual harassment allegations were unfounded.

24. On February 5, 2003, Young sent a memorandum to Cassity requesting his resignation as operations manager at the St. Joseph facility, but also indicating he would be provided an opportunity with the company in sales.

25. On February 7, 2003, Cassity resigned from his position as operations manager at Enterprise's St. Joseph facility.

26. On February 13, 2003, Shoemaker sent a note to Young about a conversation she overheard between Sharp and Tracy Sharp. Both Sharp and Tracy Sharp were informed they could not have personal conversations at work because they were both complainants in lawsuits.

27. On February 27, 2003, Young circulated a memorandum announcing Cassity would become a Brand Manager working directly for Syrclean.com UK, but he would not have management authority over employees in the St. Joseph facility.

28. On March 4, 2003, Shoemaker provided Young with a job description for Sharp. This was the first job description prepared for Sharp's position. Shoemaker also sent Young a memorandum about customer order errors committed by Sharp. Young sent a draft dismissal

letter concerning Sharp to his attorney asserting her efforts to hamper Cassity as grounds for dismissal. Young did not dismiss Sharp.

29. On March 5, 2003, Bob Chalfant, a business consultant for Enterprise and an advisor to Scot Young, told Sharp she should ask for money to settle the lawsuit so they would not run her down anymore. Chalfant was one of the people to whom Sharp had been instructed to report any bullying or retaliation she encountered after filing the sexual harassment complaint.

30. On March 13, 2003, Chalfant again told Sharp to ask for money to settle the lawsuit and keep her job. Chalfant also informed Sharp that her boyfriend Cook was getting dragged into it.

31. On March 17, 2003, Young sent correspondence to his attorney stating:

When we fire Drexel, Liz & Donna on Wednesday, plus de-mote Tracie to a work-related option (at no loss in pay), I am sure Jaci [Sharp] will quit.

I would like to interview **both** Jaci and Cheryl **before** this action occurs to **insure** [sic] that they both feel and state that they themselves feel no victimization and are able to comfortably conduct their jobs.

Will an interview by me with Bob as witness be good enough for this action?

“Drexel” refers to Drexel Cook, who was Sharp’s boyfriend at this time. “Liz” refers to Elizabeth Verning, who was friends with the sexual harassment complainant Tracy Sharp.

“Donna” refers to Donna Bressman who was one of Sharp’s friends at Enterprise and the lead person in the wet mop department. “Tracie” refers to the sexual harassment complainant, Tracy Sharp. “Cheryl” refers to Cheryl Carpenter, who was another sexual harassment complainant.

32. On March 17, 2003, Young sent a memorandum to Sharp and Carpenter, purportedly confirming a conversation he had with them that morning concerning their working atmosphere and stated he:

wanted to be assured that you are not enduring any type of retaliation either in or outside of your workplace. I appreciate you confirming that you are not suffering any type of distressful behavior from anyone attached to the company.

Young also sent correspondence to the U.S. Equal Employment Opportunity Commission (“EEOC”) requesting permission to terminate Sharp. The EEOC subsequently informed Young it would be illegal for him to terminate her.

33. On March 19, 2003, Young gave another speech to all employees concerning the sexual harassment complaints. Young stated a group of employees had sought to get Cassity fired. He also stressed the need for employee loyalty. On that same day, Cook and Vering were fired and Bressman was demoted from her supervisory position.

34. On March 20, 2003, Chalfant informed Sharp that Cassity had a lawsuit against her for defamation. Enterprise also revoked Sharp’s security code access to the building.

35. On March 21, 2003, Young issued another memorandum to all employees stating how anxious he was to have the support of all employees and how there would not be retaliation against any employee. Sharp and the other sexual harassment complainants received another memorandum from Young stating no bullying or other problems related to the lawsuits would be tolerated and any such actions should be reported. Shoemaker met with Sharp to explain that Enterprise was not suing her, but that Enterprise would be unable to do anything about any lawsuit brought by Cassity.

36. On March 25, 2003, Shoemaker drafted a memorandum to Young about Sharp’s statements to her and Penny Roberts, who was Sharp’s new supervisor. Sharp had stated that she should not have to answer questions from production because her duties were now restricted to the office. Sharp was instructed to answer production questions, if asked. Roberts also drafted a memorandum to Young and his attorney about the same incident and Sharp’s refusal to sign

Shoemaker's memorandum recounting the incident. Chalfant sent Young a letter about the incident as well.

37. On March 26, 2003, Steve Brockman, the operations manager replacing Cassity, wrote a memorandum to Roberts and Shoemaker stating: "Effective immediately I would appreciate it if all office personnel please refrain from entering the production areas during work hours, except to access the time clock."

38. On March 28, 2003, Sharp was instructed to stay out of the production area. Roberts instructed Sharp to log any questions about production issues asked of her. Young instructed Shoemaker to keep a log of every mistake committed by Sharp.

39. On April 9, 2003, Young wrote another letter to the EEOC to determine whether he could terminate Sharp once the EEOC investigation was completed.

40. On April 21, 2003, Chalfant again told Sharp to come up with a number to settle the lawsuit.

41. On April 23, 2003, Young wrote his attorney for clear direction on whether Sharp could be dismissed or if such action had to be delayed.

42. On May 16, 2003, Roberts asked Sharp whether she had second thoughts about the lawsuit in order to keep her job. Roberts reported the discussion to Young on June 3, 2003.

43. On June 4, 2003, Young circulated another memorandum stating no retaliation should be undertaken.

44. On June 23, 2003, Shoemaker informed Sharp she would be moved to Enterprise's Renick location. Cassity also worked in the Renick location. Sharp was troubled by having to work in such close proximity to Cassity.

45. On July 2, 2003, Sharp began working at the Renick location.

46. On July 5, 2003, Shoemaker called Sharp at home and informed her she would arrive at work late on July 7, 2003. Sharp stated she did not feel comfortable working at Renick alone when Cassity was there and did not report to work on July 7, 2003.

47. On September 4, 2003, Young sent a memorandum stating that only production workers would receive a 2% salary increase and office workers and managers would not receive any raise. Sharp did not receive a raise.

48. On September 22, 2003, Chalfant again discussed with Sharp whether the litigation could be settled so she could continue working with the company.

49. On October 2, 2003, Sharp was issued a written warning for attendance because she had accumulated eight points under the new attendance policy when she had not shown up to work on September 8 and 9, 2003. This was the first time Sharp had ever been written up for attendance at Enterprise, and Sharp had not been issued a verbal warning prior to the written warning, as called for by the attendance policy.

50. On October 7, 2003, Shoemaker informed Sharp she could not have any personal conversations while at work.

51. On October 10, 2003, Sharp was told she would temporarily have to work at the Messanie location where she used to work because there would not be any manager at the Renick location.

52. On October 15, 2003, while at the Messanie location, Sharp was unable to work efficiently because she did not have all the files she needed, had to use someone else's computer, and no one at the location assisted her with customer service calls.

53. On November 6, 2003, Young wrote a memorandum to all employees concerning the profit-sharing program and informed them it would be delayed because of financial problems that were created, in part, by the sexual harassment lawsuits.

54. On November 14, 2003, Sharp was issued a written warning for making excessive errors during order entry. This was the first time Sharp had ever been written up for excessive mistakes during her entire career with Enterprise.

55. The actions described above show that Young intended for his actions and those of his supervisory employees committed at his direction to force Sharp's resignation in retaliation for her filing of her sexual harassment complaint.

56. On November 17, 2003, Sharp went to the emergency room of a hospital complaining of head and chest pains. Sharp was treated for stress and anxiety and was provided anti-anxiety medication. Prior to her emergency room visit, Sharp had been experiencing frequent migraines she attributed to the stress created by Enterprise's actions.

57. On November 21, 2003, Sharp submitted her letter of resignation to Shoemaker stating she could no longer handle the stress caused by Enterprise's actions taken against her since she filed her sexual harassment complaint. On this date, Enterprise had a total of 91 employees, 90 of which were located in Missouri.

58. As of December 31, 2003, Sharp received total income for the year in the amount of \$32,170.98 from the following sources: Enterprise – \$21,385.81; Alternative Construction, Inc. – \$200.00; and St. Joseph Frontier Casino – \$10,585.17.

59. On May 3, 2004, Sharp filed a charge of discrimination with MCHR based upon her constructive discharge on November 21, 2003.

60. As of December 31, 2004, Sharp received total income for the year in the amount of \$16,074.05 from the following sources: Alternative Construction, Inc. – \$212.00; St. Joseph Frontier Casino – \$12,703.85; and \$3,158.20. During 2004, Sharp voluntarily resigned from St. Joseph Frontier Casino because she did not want to continue working nights and weekends.

61. On December 22, 2005, MCHR entered a finding of probable cause in relation to Sharp's amended complaint after investigating Sharp's allegations.

62. As of December 31, 2005, Sharp received total income for the year in the amount of \$9,659.35 from the following sources: Phoenix Scientific – \$5,851.35; and Cookman Printing Co. – \$3,808.00. During 2005, Sharp had been terminated from Phoenix Scientific for excessive absenteeism after only a few months of work. Sharp also restricted the amount she worked in 2005 so that she could assist a family member that had health problems.

63. On March 2, 2006, the executive director of MCHR filed the affidavit of the failure of conciliation with MCHR.

64. As of December 31, 2006, Sharp received total income for the year in the amount of \$15,049.76 from Cookman Printing Co.

65. As of December 31, 2007, Sharp received total income for the year in the amount of \$14,305.64 from Cookman Printing Co.

66. As of December 31, 2008, Sharp received total income for the year in the amount of \$17,373.25 from Cookman Printing Co.

67. As of December 31, 2009, Sharp received total income for the year in the amount of \$18,083.12 from Cookman Printing Co.

### **Conclusions of Law**

MCHR has jurisdiction to hear and determine this complaint.<sup>2</sup> Enterprise was an employer for purposes of MHRA because it employed more than six employees in Missouri. The burden is on MCHR to prove, by a preponderance of the credible evidence, that Enterprise

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<sup>2</sup>Section 213.075.5. Statutory references are to RSMo 2000, unless otherwise indicated.

committed a violation of MHRA.<sup>3</sup> The Hearing Examiner makes findings of fact and conclusions of law based upon the evidence presented at the hearing and recommends an order to MCHR.<sup>4</sup> MCHR reviews the record, findings, and proposed order and determines whether to accept or amend the recommended order, which then becomes the order of MCHR.<sup>5</sup>

In making his findings of fact, the Hearing Examiner determined the credibility of witnesses and exercised discretion in believing all, part, or none of the testimony of any witness.<sup>6</sup> A witness' credibility is the witness' "capacity for being believed or credited,"<sup>7</sup> and any facts or circumstances shedding light on the accuracy, truthfulness, and sincerity of a witness are properly considered.<sup>8</sup> The Hearing Examiner recommends MCHR adopt his credibility determinations, reflected in his findings of fact, because he had the benefit of observing the demeanor of the witnesses appearing before him.

### I. Retaliation

Under § 213.070(2) of MHRA, it is unlawful:

To retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter[.]

The Missouri Supreme Court explained the retaliatory acts prohibited by § 213.070(2) as follows:

Section 213.070 prohibits retaliation "in any manner." To retaliate is to "inflict in return." Webster's Third New International Dictionary 1938 (1976). As used in the statute, retaliation includes

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<sup>3</sup>*Comm'n on Human Rights v. Sikeston*, 769 S.W.2d 768, 800 (Mo. App., S.D. 1989); *Heidebur v. Parker*, 505 S.W.2d 440, 443-444 (Mo. App., St.L.D. 1974); and *Lampe v. Franklin American Trust Co.*, 399 Mo. 361, 96 S.W.2d 710 (1936).

<sup>4</sup>Section 213.075.13.

<sup>5</sup>Section 213.075.14.

<sup>6</sup>*Clark v. Reeves*, 854 S.W.2d 28, 30 (Mo. App., W.D. 1993).

<sup>7</sup>*Marvin E. Neiberg Real Estate Co. v. Taylor-Morley-Simon, Inc.*, 867 S.W.2d 618, 626 (Mo. App., E.D. 1993).

<sup>8</sup>*Roberts v. Emerson Elec. Mfg. Co.*, 362 S.W.2d 579, 584 (Mo. 1962).

any act done for the purpose of reprisal that results in damage to the plaintiff even though the act is not otherwise the subject of a claim in contract or tort.

\* \* \*

Thus, retaliation exists under section 213.070 when (1) a person files a complaint, testifies, assists or participates in an investigation, proceeding or hearing conducted by pursuant to chapter 213 and (2), as a direct result, he or she suffers any damages due to an act of reprisal.<sup>9]</sup>

Sharp filed a sexual harassment complaint with MCHR. Therefore, the only remaining question is whether, as the direct result of her filing a sexual harassment complaint against Enterprise, Sharp suffered any damages from acts of reprisal committed by Enterprise. We find that she did.

The record before us establishes that Enterprise, upon learning of Sharp's sexual harassment complaint, immediately began to retaliate against Sharp. Multiple acts of reprisal were conducted by Young and other members of Enterprise's management over an extended period of time. The acts of reprisal only ended upon Sharp's resignation, which was their purpose.

Enterprise was informed of Sharp's sexual harassment complaint on December 31, 2002. By January 2, 2003, the retaliation began with a decision to change Sharp from a salaried employee to an hourly employee. On that day, Enterprise adopted a new attendance policy for its hourly employees. The next day, Sharp was informed she was being changed from being paid a salary to being paid hourly. As a result, the newly-adopted attendance policy applied to Sharp. This resulted in a significant change in the terms and conditions of Sharp's employment and provided an additional tool for retaliating against Sharp.

On behalf of Enterprise, Shoemaker testified that the change in Sharp's status from salary to hourly was the result of legal advice received by Enterprise concerning the legal requirements

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<sup>9</sup>*Keeney v. Hereford Con. Prods., Inc.*, 911 S.W.2d 622, 625 (Mo. banc 1995) (citations omitted).

of FLSA. We do not find Shoemaker's testimony to be credible. Her testimony and the documentary evidence submitted in support of her testimony were vague, internally inconsistent, and unpersuasive. Therefore, we find that Enterprise's changing of Sharp's employment status was an act of reprisal for filing the sexual harassment complaint rather than an effort by Enterprise to comply with FLSA.

In further retaliation for filing the sexual harassment complaint, Enterprise began to immediately restrict Sharp's employment duties and continued to do so until she ultimately resigned. The restrictions were of two types: those that lowered her job satisfaction and those that served to isolate her from her co-workers. On January 13, 2003, Sharp was instructed to no longer pick up faxes from the office fax machine. The next day, Sharp was instructed to no longer answer the office phones. Sharp's job involved orders that primarily were made by fax and phone; therefore, her inability to get faxes and answer the phone herself inhibited her ability to function effectively at her job and made her performance dependent upon another employee. In March 2003, Enterprise revoked Sharp's access code to the building; consequently, Sharp could no longer get into the building as she had in the past without relying upon another employee to permit her in the building.

Other restrictions imposed by Enterprise were designed to isolate Sharp from the co-workers she had worked with for years. Sharp had only been working in the office since June 2002. Prior to moving to the office, Sharp had worked in production and even became a production supervisor. Her knowledge of production and the relationships she had with those in production were viewed as an asset by management. Nevertheless, in March 2003, Sharp was instructed she should no longer go to the production department as she had done in the past to perform her job. Management, however, could not completely forego her expertise, and she was

ordered to answer questions from the production department even though her duties were restricted to the office.

Enterprise continued to change Sharp's work conditions to hamper her effectiveness and to isolate her. In June 2003, Sharp was moved to Enterprise's Renick location where she would have to work in close proximity to Cassity and only had Shoemaker with her in the office. Enterprise was aware that this move would cause Sharp stress. Even after the move to Renick, Enterprise manipulated Sharp's working conditions to maximize her stress and minimize her effectiveness until she quit. In October 2003, Sharp was required to return to the Messanie location where she had previously worked because there would not be managers at the Renick location. Arrangements were not made for her to effectively do her job at that location. Sharp did not have access to the files she needed, had to use someone else's computer, and was not provided assistance in taking customer service calls.

The restriction and changing of Sharp's work conditions were part of Enterprise's efforts to create grounds for her termination. In addition to being subject to the new attendance policy, Sharp was subject to close monitoring by her supervisors. Although Young described himself as uninvolved in day-to-day operations of the company, he received numerous memoranda concerning Sharp's actions, which he used to argue for Sharp's dismissal. Enterprise also began giving written warnings to Sharp for an attendance violation and for committing too many order errors. Prior to Sharp filing the sexual harassment lawsuit, she had never been written up for attendance or committing too many errors; indeed, shortly before her sexual harassment complaint, management had pointed out that the number of errors committed by the office had been reduced after Sharp's placement in the office.

Enterprise's efforts to isolate Sharp were not restricted to her job duties. After learning of the complaint, Young commenced a series of actions designed to turn Enterprise workers

against Sharp and the other complainants by increasing the co-workers' fears that their jobs and compensation would be harmed by the lawsuits. Within two weeks of Enterprise being notified of the complaint, Young arrived in St. Joseph to give a speech to all employees about the sexual harassment complaints. He informed the workers the company could not handle a lawsuit of this magnitude and the workers would be impacted as well. Ten days later, Young gave a second speech indicating that the sexual harassment allegations were unfounded. Young gave a third speech on March 19, 2003, in which he told all employees that a group of employees had sought to get Cassity fired. He also stressed the need for employee loyalty. Young's speech coincided with dismissal and demotion of Sharp's friends, including her boyfriend, to ensure the message was received.

These multiple acts of reprisal were not only intended to force Sharp's resignation, but were used to seek leverage against Sharp in the lawsuit she had filed. On multiple occasions, Enterprise used the acts of reprisal as a negotiating tactic. Repeatedly, Chalfant, who was Young's close advisor, indicated that the actions against Sharp were tied to the lawsuit. On March 5, 2003, Chalfant told Sharp she should settle the lawsuit so they would not run her down anymore. On March 13, 2003, he again told her to settle the suit and keep her job. He also indicated to her that her boyfriend Cook was getting dragged into it, which appears to have been a threat Enterprise carried through on within a week when Cook was dismissed from his position. On March 20, 2003, Chalfant continued pressuring Sharp and indicated Cassity could sue her for defamation. On April 21, 2003, Chalfant again told Sharp to come up with a number to settle the lawsuit. On May 16, 2003, Roberts, Sharp's new supervisor, also approached her about whether she had second thoughts about the lawsuit to keep her job.

Taken together, these acts of reprisal display a systematic effort by Enterprise to punish Sharp for filing the sexual harassment lawsuit and to use her job and job conditions as leverage

to negotiate a more favorable settlement of the lawsuit she filed. Enterprise failed to provide credible evidence challenging such a conclusion. The various anti-retaliation memorandums issued by Young do not support a contrary inference as they were always provided shortly before or after an act of reprisal and appear to be nothing more than an effort to create a paper record contradicting the actual actions of Enterprise. We also did not find credible Young's testimony that he did not retaliate against Sharp and reconciled himself to the fact he could not terminate her. Young repeatedly corresponded with his attorney and the EEOC seeking approval to terminate Sharp. He also kept Sharp under close monitoring by other managers that reported her actions to him. Based on our view of his credibility and the record before us, we believe Young conducted the acts of reprisal against Sharp with the intent to force her resignation.

Enterprise, in an apparent attempt to justify the actions against Sharp, also asserted Sharp had been engaged in a treacherous conspiracy against Cassity and Enterprise since he was hired in 2000. The evidence submitted in support of this proposition was not credible. Even if it had been credible, it was insufficient to support a finding of any such conspiracy. Sharp was candid about her unhappiness over Cassity's hiring and feared for her job. Nevertheless, we find no evidence she engaged in any industrial espionage against Enterprise and Cassity. Indeed, Cassity himself appears to have been Sharp's largest supporter among management and believed her to be a very valuable asset to Enterprise right up until the time she filed the sexual harassment complaint.

## II. Constructive Discharge

We further find that the repeated acts of reprisal by Enterprise ultimately led to Sharp's constructive discharge from her position. As explained by the Missouri Supreme Court in *Wallingsford v. City of Maplewood*<sup>10</sup>:

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<sup>10</sup>287 S.W.3d 682, 686 (Mo. banc 2009).

Constructive discharge occurs when an employer deliberately renders an employee's working conditions so intolerable that the employee is forced to quit his or her job. *Gamber*, 225 S.W.3d at 477 (quoting *Bell v. Dynamite Foods*, 969 S.W.2d 847, 851 (Mo.App.1998)). "To effect a constructive discharge, the working conditions must be such that a reasonable person would find them intolerable." *Id.* A claim of constructive discharge requires more than a single incident; rather, the claim requires proof of a continuous pattern of discriminatory treatment *Id.* Claims of constructive discharge often include evidence of subtle discrimination in the form of social coercion, demotions or changes in job responsibilities. As a result, constructive discharge is a fact-intensive inquiry. *Levendos v. Stern Entm't, Inc.*, 860 F.2d 1227, 1230 (3d Cir.1988).

Based upon the numerous retaliatory acts previously described, we find Sharp was constructively discharged from her position because the nature of the retaliatory actions taken against her would force a reasonable person to quit his or her job. Indeed, Scot Young had repeatedly stated his desire to terminate Sharp, but had been told by the EEOC, MHRC, and his own lawyer that he should not do so. Unable to directly terminate her, Scot Young intended to force Sharp's resignation by means of these retaliatory actions because the EEOC, MHRC, and his own lawyer told him he could not directly terminate her.

For all of the foregoing reasons, we conclude that Enterprise committed multiple acts of reprisal against Sharp in violation of § 213.070(2). Sharp was harmed by these retaliatory actions in that the terms and conditions of her employment were adversely affected, she suffered humiliation and emotional distress, her civil rights were violated, and she was ultimately constructively discharged as a result of Enterprise's actions.

### III. Damages

The damage award is determined by MCHR and the Hearing Examiner relies on the following analysis in making his recommendation. Section 213.075.11 provides in part:

The panel shall state its findings of fact and conclusions of law, and if, upon all the evidence at the hearing, the panel finds:

(1) That a respondent has engaged in an unlawful discriminatory practice as defined in this chapter, the commission shall issue and cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful discriminatory practice. The order shall require the respondent to take such affirmative action, as in the panel's judgment will implement the purposes of this chapter, including, but not limited to, payment of back pay; hiring; reinstatement or upgrading; . . . [and] payment of actual damages[.]

#### A. Reinstatement

We do not find reinstatement to be an appropriate remedy based upon the circumstances of this case. First, a significant amount of time has passed since Sharp's constructive discharge, which makes it difficult to place Sharp in her past position or an equivalent position. More importantly, due to the nature of Enterprise's conduct toward Sharp, reinstatement would be particularly inappropriate and unlikely to serve any remedial purpose.

#### B. Back Pay

In general, a victim of employment discrimination and discharge is entitled to back pay from the date of discharge until the date of the final judgment.<sup>11</sup> However, the claimant also has a duty to make reasonable efforts to mitigate damages by seeking other employment.<sup>12</sup> We find Sharp's initial efforts to mitigate damages by seeking other employment to have been appropriate and award her back pay in the amount of \$10,056.82 for 2004, \$16,471.52 for 2005, and \$11,081.11 for 2006.<sup>13</sup> In more recent years, however, Sharp's employment priorities appear to have changed. Moreover, an unusually long period of time has passed from Sharp's discharge to the Hearing Examiner's recommended decision. For these reasons, the Hearing Examiner finds that an award of back pay for these more recent years would be inappropriate and unduly

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<sup>11</sup>*Pollock v. Wetterau Food Distr. Group*, 11 S.W.3d 754, 770 (Mo. App., E.D. 1999).

<sup>12</sup>*Id.*

<sup>13</sup>Sharp did not suffer any income loss in 2003.

speculative. Therefore, the Hearing Examiner does not recommend the awarding of any back pay for these more recent years after 2006.

### C. Actual Damages for Humiliation and Emotional Distress

Actual damages in a Missouri civil rights case may also include amounts for humiliation and emotional distress.<sup>14</sup> MCHR may award damages for emotional distress even without a medical diagnosis.<sup>15</sup> It is clear that retaliatory actions taken against Sharp caused her emotional distress and even led to her seeking medical treatment for anxiety and stress. Therefore, an award of damages for humiliation and emotional distress is justified in this case.

A violation of MHRA is akin to the tort of intentional infliction of emotional distress, for which medically documented damages need not be proven with mathematical precision.<sup>16</sup> This method of proof for MHRA cases means an individual complaining of retaliation will have difficulty establishing a precise dollar figure for emotional distress. We address this issue by comparing the evidence of emotional distress suffered by Sharp to that suffered by similarly situated persons. Awards for emotional distress between \$75,000 and \$100,000 have been upheld when an individual has become withdrawn or shown physical manifestation of the emotional distress and humiliation inflicted by the unlawful actions of an employer.<sup>17</sup> Here, Enterprise inflicted severe emotional distress and repeated public humiliation on Sharp over a lengthy period of time that resulted in Sharp seeking medical attention. Therefore, given the degree of harm suffered by Sharp, the Hearing Examiner recommends that MCHR award Sharp \$45,000 in actual damages for humiliation and emotional distress.<sup>18</sup>

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<sup>14</sup>*Conway v. Missouri Comm'n on Human Rights*, 7 S.W.3d 571, 575 (Mo. App., E.D. 1999).

<sup>15</sup>*Id.*

<sup>16</sup>*See State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 566 n.4 (Mo. banc 2006).

<sup>17</sup>*Foster v. Time Warner Enter. Co.*, 250 F.3d 1189, 1196 (8<sup>th</sup> Cir. 2001); and *Morse v. Sounthern Union Co.*, 174 F.3d 917, 925 (8<sup>th</sup> Cir. 1999).

<sup>18</sup>*See Lynn v. TNT Logistics North America, Inc.*, 275 S.W.3d 304 (Mo. App., W.D. 2008).

#### D. Actual Damages for Violation of Civil Rights

In *Conway*,<sup>19</sup> the court awarded actual damages for violation of civil rights in the amount of one third of the amount of the damages for humiliation and emotional distress. We believe this is sufficient to compensate Sharp for Enterprise's violation of her civil rights. The Hearing Examiner recommends that MCHR award Sharp \$15,000 in actual damages for violating her civil rights.

#### E. Prejudgment Interest

An award of prejudgment interest is also appropriate in cases under MHRA.<sup>20</sup> The purpose of anti-discrimination laws is to provide "make whole relief," and prejudgment interest is included in this concept.<sup>21</sup> Section 408.040.3<sup>22</sup> awards prejudgment interest equal to the intended federal funds rate, plus three percent. The intended federal funds rate is between 0 percent and 0.25 percent, and as of April 24, 2012, the federal funds rate is 0.08 percent.<sup>23</sup> Therefore, the Hearing Examiner recommends prejudgment interest at the rate of 3.08%.<sup>24</sup>

#### F. Punitive Damages

Punitive damages may be awarded in a case under MHRA.<sup>25</sup> Although we find no cases addressing the pleading requirements for punitive damages in a case under MHRA, as a general proposition the statutes, case law, and rules are clear that "[p]unitive damages must be pleaded and proved."<sup>26</sup> However, because MCHR's petition does not plead for an award of punitive damages, the Hearing Examiner does not recommend an award of punitive damages in

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<sup>19</sup>7 S.W.3d at 574.

<sup>20</sup>*Pollock*, 11 S.W.3d at 771-72.

<sup>21</sup>*Id.*

<sup>22</sup>RSMo Supp. 2010.

<sup>23</sup>Federal Reserve Bank of New York, "Federal Funds Rate" <http://www.newyorkfed.org/markets/omo/dmm/fedfundsdata.cfm>.

<sup>24</sup>Section 408.040.

<sup>25</sup>*Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1062 (8<sup>th</sup> Cir. 1993).

<sup>26</sup>*Benson v. Jim Maddox Northwest Imports, Inc.*, 728 S.W.2d 668, 669 (Mo. App., E.D. 1987).

this case even though punitive damages would seem to be particularly warranted in a retaliation case.

#### G. Cease and Desist Order

In this case, reinstatement would not be an appropriate remedy; therefore, a cease and desist order would have no practical effect as to Sharp. Nevertheless, the Hearing Examiner recommends MCHR issue a cease and desist order to protect future employees from the unlawful and discriminatory practices of Enterprise.

#### H. Adoption of Retaliation Policy and Reporting Requirements

In this case, Enterprise's conduct is so egregious that the Hearing Examiner recommends that MCHR order Enterprise to adopt a retaliation policy to protect Enterprise's employees from future retaliatory acts in the work place and to submit a written report to MCHR within 90 days of MCHR's order adopting this recommended order. The report is to describe the manner in which Enterprise has complied with the requirements of MCHR's order.

#### **Summary**

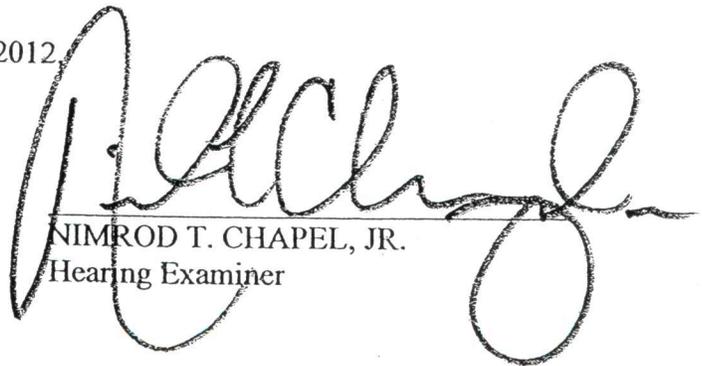
Based upon the Hearing Examiner's finding that Enterprise violated MHRA by retaliating against and constructively discharging Sharp from her position, the Hearing Examiner recommends MCHR order Enterprise to:

1. pay Sharp \$37,609.45 in back pay for 2004, 2005, and 2006;
2. pay Sharp \$45,000 in actual damages for humiliation and emotional distress;
3. pay Sharp \$15,000 in actual damages for violation of her civil rights;
4. pay prejudgment interest at the rate of 3.09%;
5. cease and desist from any further unlawful and discriminatory acts in violation of MHRA;

6. adopt a retaliation policy to protect Enterprise's employees from future retaliatory acts in the work place by establishing reasonable and adequate procedures for investigating complaints of retaliation and implementing suitable remedial action against retaliatory acts; and
7. submit a written report to MCHR within 90 days of MCHR's order adopting this recommended order that describes the manner in which Enterprise has complied with the requirements of MCHR's order.

Pursuant to MCHR's Regulation 8 CSR 60-2.200(1), the parties may file exceptions within 10 days of the date of this recommended decision.

SO RECOMMENDED on April 30, 2012.



NIMROD T. CHAPEL, JR.  
Hearing Examiner