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

Ashley Robinson 5858 Anthony Pl #206 Monona WI 53716 Complainant vs. Bridges Golf Course 2702 Shopko Dr Madison WI 53704 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER CASE NO. 20092058 EEOC CASE NO. 26B200900032

This matter came on for a public hearing on the merits of the complaint before Commission Hearing Examiner, Clifford E. Blackwell, III, on May 25, 2010 in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Blvd., Madison, Wisconsin. The Complainant, Ashley Robinson, appeared in person and by her attorney, Victor M. Arellano of Arellano & Phebus, S.C. The Respondent, Bridges Golf Course, appeared by its corporate representative, Denise Okey, and by its attorney, Bonnie A. Wendorff of Neider & Boucher, S.C.

Based on the record of proceedings in this matter, the Hearing Examiner now enters his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS OF FACT

1. The Complainant is a female who became pregnant in August or September of 2008. She gave birth to a daughter on May 11, 2009.

2. The Respondent is a privately owned, public golf course located within the City of Madison. The Respondent routinely employs more than 15 individuals in a variety of capacities. These include kitchen staff, wait and bar staff, grounds keepers, etc.

3. The Complainant began her employment with the Respondent in April 2008. She worked as a waitress in the Respondent's restaurant as wait staff. She was paid a basic wage and tips.

4. The Respondent's primary business is as a golf course. However, it also operates a restaurant and bar along with a Pro Shop and related activities. The bar and restaurant business is independent of the golf course, but when the golf course was closed, the bar and restaurant businesses were reduced. The Respondent's prime business period was

from the beginning of the golf season in the early spring until the close of the golf season in late fall.

5. When the Complainant began her employment with the Respondent, it was the beginning of the Respondent's golf season and the busiest period for all aspects of the Respondent's business. The Complainant's hours and wages increased in April 2008 through August 2008. The Complainant's hours and wages decreased in September 2008 through February 2009.

6. The Complainant became pregnant in late August or early September. She notified her coworkers of her pregnancy in September 2008. This included the Restaurant Manager, Stephanie Gosewehr. The Complainant felt that her coworkers including Gosewehr were happy for her and were supportive of her situation. At all times relevant to this complaint, the Complainant was the only pregnant employee.

7. In October of 2009, Gosewehr relinquished her position as Restaurant Manager due to another job commitment. Gosewehr did remain an employee of the Respondent, but only as a member of the wait staff. In November of 2009, the Respondent hired Denise Okey to replace Gosewehr as the Restaurant Manager. However, Okey did not actually assume managerial duties until December of 2009.

8. Gosewehr did not report any problems with the Complainant's job performance for the period of time she supervised the Complainant.

9. It is not clear how Okey became aware of the Complainant's pregnancy. One of the Complainant's coworkers, Stephanie Kelley, may have told Okey shortly after Okey began her employment with the Respondent. The Complainant specifically told Okey of her pregnancy in early December of 2009. The Complainant felt that Okey was not particularly happy or interested in the Complainant's pregnancy.

10. Okey's supervisors including Greg Rice directed Okey to work some hours as wait staff and asked her not to assume managerial duties for a few weeks to permit her time to become familiar with the Respondent's operation and to observe the employees whom she was going to supervise.

11. From the beginning of Okey's and the Complainant's relationship, Okey did not find the Complainant to be a model employee. Okey observed the Complainant to not follow rules, to not keep busy between tasks and that the Complainant took frequent breaks to sit at the bar, to speak on a cell phone or to ignore work that needed to be performed. The Complainant found Okey to be harsh, rude, demanding and cold.

12. In December of 2008, the Complainant told Okey that because of her pregnancy she would need to take some extra breaks and might have to sit due to back and foot pain caused by her pregnancy.

13. In January 2009, the Complainant's hours were regular but were reduced from prior months. The reduction of hours was dictated by the lack of regular business during the winter time. All other employees experienced a similar reduction in hours and some other employees were laid off.

14. On or about February 11, 2009, the Complainant left the restaurant/bar at her scheduled hour but before her replacement, Gosewehr, arrived. Gosewehr came from another job and was often late. The Complainant left the bar without supervision and without obtaining someone to supervise the restaurant/bar area including the cash register.

15. The Complainant was not disciplined for leaving before her replacement had arrived. However, Okey did inform the Complainant of the serious nature of the Complainant's failure and warned the Complainant not to repeat it. The Complainant did not appear to recognize her actions as being unprofessional, but rather accused Gosewehr of creating the problem.

16. Okey continued to observe that the Complainant failed to demonstrate initiative and exhibited disregard for Okey's supervision. In one instance, Okey observed the Complainant sitting at the bar talking with a customer. Okey approached the Complainant with a copy of the work rules and tasks posted by Okey. When Okey handed the Complainant the list of tasks and duties, the Complainant dismissively discarded the list.

17. At the end of January 2009, Okey hired Rebecca Knutson. Knutson was to absorb some extra hours resulting from additional hours of restaurant operation. Knutson's hiring was objected to by both the Complainant and Kelley because they wished additional hours and because Knutson was a friend of Okey.

18. In the first week of February 2009, the Complainant experienced some complications to her pregnancy. She was required to take bed rest for one week. Knutson received the majority of the Complainant's hours while the Complainant was on bed rest.

19. While the Complainant's actual hours for February 2009 are fewer than those for January 2009, the reduction in hours corresponds with the number of hours for which the Complainant was on bed rest and that Knutson picked up when the Complainant was unable to work.

20. On February 27, 2009, the Complainant was scheduled to work the dinner shift after having worked a lunch shift. The dinner crew was left explicit instructions not to leave before all tasks were complete. The Complainant asked the other members of the wait staff if they minded if she was to leave early. She asserted that her tables were complete except for one where the customers were talking. After the fact, other members of the wait staff told Okey of the Complainant's leaving early and disputed that all the tasks were completed.

21. The Respondent was closed on February 28, 2009 and March 1, 2009. The Complainant was scheduled to work on March 2, 2009 and though not scheduled to work on March 3, 2009, did so as a substitute for another worker. Okey was not available to discuss her concerns about the Complainant's leaving early on February 27, 2009 until at least March 4, 2009.

22. On either March 2 or March 3, 2009, the Complainant and Stephanie Kelley approached Jim Thomas, the Respondent's golf pro, to complain about the reduction in their hours.

The Complainant may have specifically alleged that her hours were being reduced because of her pregnancy. While Thomas was sometimes approached as if he was the Respondent's Manager, he had no managerial authority except for the golf operation.

23. On either March 3, 2009 or March 4, 2009, Thomas told Okey that the Complainant and Kelley were concerned about the number of hours for which they were being scheduled. It does not appear that Thomas told Okey of the Complainant's allegation of discrimination. Okey told Thomas that she needed to discuss some performance issues with the Complainant.

24. The Complainant and Okey met in the restaurant on March 5, 2009. The meeting may have started well, but it rapidly devolved into an angry, unprofessional dispute. The Complainant accused Okey of treating her as a child. Okey complained about the Complainant's criticisms of Okey. Eventually, the Complainant left saying that she would contact a lawyer. Okey may have said that the Complainant would not appear on the schedule again.

25. The confrontation was witnessed by Carl Nolan. Nolan was not close enough to the table where Okey and the Complainant met to hear the exact conversation between them. He was seated with Okey's back to him. Nolan believed that Okey had behaved professionally and that it was the Complainant who initiated the confrontation.

26. The Complainant understood that the work schedule for March 2009 had her listed for only two days of work. No copy of the exact work schedule seen by the Complainant is in the record. An incomplete schedule was produced by the Respondent.

27. Okey would prepare the work schedule for the month, generally, in the last week of the prior month. The schedule would be posted and changes to the schedule would be hand written from time to time. It appears that Okey would occasionally take down the posted schedule and make it more legible. It is not clear if this was done on the existing schedule or if more than a single copy of the posted schedule was printed. At the end of the month, the schedule would be deleted from Okey's computer and hard copies would be discarded. Okey did not need a copy of the schedule for reference when preparing payroll.

28. The Complainant was not scheduled to work from March 2, 2009 to either March 14, 2009 or March 15, 2009. On March 10, 2009, the Complainant emailed Okey expressing contrition and remorse for her part in the March 5, 2009 confrontation. The Complainant indicated that she enjoyed working at the Respondent and wished to return. While the Complainant's email indicated a willingness to accept a reduced work schedule, it also appeared to contemplate a return to work only after the birth of her child.

29. The Complainant's March 10, 2009 email went to Okey's home email address not the Respondent's office address. Okey understood the Complainant to be asking to return to work after the birth of the Complainant's baby. Okey did not immediately respond to the Complainant's email.

30. On March 15, 2009, the Complainant called the Respondent to see if her name was on the schedule. It appears that she may have spoken with Omar Plata, the Kitchen

Manager. The Complainant was told that her name was not on the schedule. The Complainant did not contact anyone at the Respondent, including Okey, directly to determine why she was not on the schedule or how she could get back on the schedule.

31. The Complainant was not contacted by anyone when she failed to appear for work on March 16, 2009 or March 17, 2009. It was the practice of the Respondent if an employee who was scheduled to work did not appear that someone from the Respondent would call to inquire about the reasons for the failure to appear.

32. On or about March 16, 2009, the Complainant's mother, Lori Greenwold, attended a business gathering at the Respondent. Greenwold asked Jim Thomas to check into why the Complainant was not on the schedule. Greenwold also indicated that there seemed to be some trouble between Okey and the Complainant. Thomas told Greenwold that he understood that the Complainant was on maternity leave.

33. On March 26, 2009, Okey responded to the Complainant's March 10, 2009 email with an email of her own. Okey told the Complainant to contact Okey after the birth of the Complainant's baby and they could take things from there.

34. The Complainant did not contact Okey or anyone else at the Respondent after her mother's conversation with Thomas to clarify her status nor did she ever contact Okey after the original March 10, 2009 email. The Complainant did not clarify with Okey at any time that she wished to be immediately scheduled for work.

35. The Complainant's baby girl was born on May 11, 2009. The Complainant did not contact Okey to seek a position on the schedule subsequent to her daughter's birth. The Complainant took a number of months as maternity leave or personal time after the birth of her daughter. The Complainant did not seek unemployment compensation at any time.

36. At no time during the Complainant's pregnancy did any employee of the Respondent comment negatively on the fact of the Complainant's pregnancy. Though, the Complainant believed that Okey was rude, cold and a difficult supervisor, Okey did not negatively comment on the Complainant's pregnancy.

37. Though Okey and the Complainant did not get along, the Complainant's pregnancy did not form the bases for any difficulties in the relationship. The problems between Okey and the Complainant stemmed from difficulties arising from their views about their professional dealings, i.e. the Complainant felt that Okey was not a good manager and Okey did not feel that the Complainant was a good employee.

38. To the extent that Okey expressed her dissatisfaction with the Complainant's work performance, it was not patently offensive or based upon the Complainant's status as a pregnant woman.

39. The Complainant's reduction in hours from their peak during the summer of 2008 was part of the usual business cycle for the Respondent's business. All other employees experienced a similar reduction in hours if they were retained at all.

40. Jim Thomas died prior to the hearing in this matter and subsequent to the Complainant's leaving employment with the Respondent.

41. The Respondent did not have a policy or practice of hiring only young attractive, women to work in its restaurant or bar.

CONCLUSIONS OF LAW

1. The Complainant during all times relevant to this complaint was a pregnant woman and as such was a member of the protected class "sex" and was entitled to the protections of the ordinance.

2. The Respondent is an employer in the City of Madison within the meaning of the ordinance and is subject to the requirements of the ordinance.

3. The Respondent did not afford the Complainant terms and conditions of employment less favorable than other employees because of her status as a pregnant woman by allowing or permitting her harassment due to her pregnancy.

4. The Respondent did not afford the Complainant terms and conditions of employment less favorable than other employees because of her status as a pregnant woman by reducing her hours because of her pregnancy.

5. The Respondent did not terminate the Complainant's employment nor did it fail or refuse to permit the Complainant to return to employment subsequent to the birth of the Complainant's baby.

6. The Respondent did not discriminate against the Complainant in violation of the ordinance because of the Complainant's status as a pregnant woman in either the Complainant's terms and conditions of employment or by terminating the Complainant's employment or by failing or refusing to rehire the Complainant.

ORDER

1. The complaint is dismissed.

2. The parties shall bear their own costs and expenses.

MEMORANDUM DECISION

This dispute arises out of the employment of the Complainant at a privately owned, public golf course which runs a restaurant and bar and catering operation as an additional part of the business. The Complainant was hired as a bartender/waitress on April 4, 2008. The Complainant was hired at the beginning of the 2008 golf season. While she worked at the Respondent's business, she also worked as a waitress at another Restaurant called Cloud 9.

In September of 2008, the Complainant became aware that she was pregnant. She informed her supervisor, Stephanie Gosewehr, of her pregnancy. Gosewehr remained the Complainant's supervisor until mid-October 2008. At that time, Gosewehr left her position as the

Bar/Restaurant Manager for the Respondent to take a position at American Family Insurance. Though Gosewehr left her managerial position, she retained employment as a bartender/waitress working evening shifts.

During the golf season, the Respondent's bar/restaurant operated for all lunches, and dinners including a Friday fish fry. The bar/restaurant operation in addition to the indoor restaurant, operated food and beverage service on a patio and with mobile bars on the golf course. Additionally, the bar/restaurant provided bartenders and wait staff for catered and special events.

After the golf season ended, the Respondent's bar and restaurant operation was reduced to weekday lunches and Friday fish fries in addition to various special and catered events. In January of 2009, the Respondent experimented with opening the restaurant for dinners on weekday nights.

For virtually all of her employment with the Respondent, the Complainant worked the lunch shift. This would entail arriving around 10:00 a.m. and working until approximately 4:00 p.m. Some variation in the daily schedule occurred with regularity. On only a small handful of occasions did the Complainant work evenings or fish fries.

At the beginning of the Complainant's employment, she worked as the bar and restaurant business was beginning to become busy with the opening of the golf season. She had not experienced the slower off season schedule for the winter of 2007-2008. The Complainant's earnings and hours increased steadily from April 2008 to her highest month in August of 2008. After August 2008, the Complainant's hours and income began a steady decrease for each month thereafter. In October of 2008, the Complainant quit her employment at Cloud 9. Her employment at the Respondent's bar and restaurant was her sole source of income from that point until her employment by the Respondent ended in March of 2009.

In November of 2008, the Respondent hired Denise Okey. Though she was intended to become the bar/restaurant manager, her first weeks of employment were to familiarize herself with the Respondent's food and beverage business and to observe the other employees. From the beginning of Okey's employment, Okey and the Complainant did not easily work together. Okey viewed the Complainant as lazy. The Complainant viewed Okey as cold and high handed.

The Complainant asserts that Okey's appearance signaled the beginning of the end of the Complainant's employment. Though the Complainant did not receive any written discipline, Okey spoke to the Complainant on several occasions to correct issues that Okey had with the Complainant's work performance. Okey spoke to the Complainant about use of the office computer, use of a cell phone while on the job, sitting at the bar when there was work to be performed and similar matters. Most of these issues were not repeated after Okey addressed them with the Complainant.

Despite speaking with the Complainant, Okey believed that she needed to consistently speak to the Complainant about keeping busy and not sitting and talking with customers and other staff. The Complainant testified that due to her pregnancy, she needed to occasionally sit and take time to rest. The Complainant states that she informed Okey of this need early in Okey's employment. The Complainant does not assert that these occasional periods of rest

were medically required, but were simply a result of weight gain and other physical changes due to her pregnancy.

On or about February 11, 2009, the Complainant was working her regular lunch-time shift. For a reason not disclosed at hearing, the Complainant had a particularly difficult day. When the time came for the Complainant to clock out, her replacement, Stephanie Gosewehr, had not arrived at work. There is a dispute as to whether Gosewehr's schedule was regularly extended because of the time it took her to arrive from her day job at American Family Insurance or not. In any event, instead of waiting for Gosewehr to appear, the Complainant clocked out and left the premises leaving the bar and cash register unattended.

The next morning, Okey spoke to the Complainant about the incident and told her not to allow that to happen again. Okey viewed the Complainant's actions as reflecting a serious lapse in judgment on the Complainant's part.

On February 27, 2009, the Complainant was scheduled to work one of her very occasional fish fry shifts. At the end of the evening, but before the close of business, the Complainant asked several of her coworkers if they minded if she left despite still having one or possibly two tables of customers and with other side jobs not having been performed. It is not clear who these coworkers were, but it appears clear that they did not have the authority to release the Complainant. The Complainant's actions in leaving early were in direct contravention of a written note left by Okey for the crew that night. The Complainant believed that Okey had allowed others to leave on other occasions before the end of the nightly business. It is undisputed that the Complainant worked a double shift on February 27, 2009 and that it was the Respondent's practice to allow individuals working a double shift to be the first to leave. However, there is no indication that being the first to leave included being allowed to leave before the end of the shift.

Other members of the work crew complained to Okey about the Complainant's early departure on February 27, 2009. Okey and the Complainant did not work concurrent shifts for the next several days. On or about March 3 or 4, 2009, Okey left a note for the Complainant indicating that Okey wished to meet with the Complainant.

On or about March 2 or 3, 2009, the Complainant and another member of the bar staff, Stephanie Kelley met with Jim Thomas, the golf and pro shop manager, to express their concern or dissatisfaction with their arguably reduced number of work hours. Though the Complainant believed that the reduction in hours was due to her pregnancy, it is not clear that she specifically informed Thomas of this belief. Kelley was not pregnant and offered no explanation for why she believed her hours were being reduced. Both the Complainant and Kelley felt that Rebecca Knutson, a friend of Okey's hired in January of 2009, was being given some of their hours.

The next time Thomas saw Okey, most likely March 3, 2010, he told her of the Complainant's and Kelley's concerns about hours. Thomas did not mention that the Complainant believed her hours were being reduced because of her pregnancy. Okey, in response, indicated that she needed to meet with the Complainant about some performance issues. Later, on March 3 or 4, 2010, Okey left a note for the Complainant indicating that Okey wished to meet with the Complainant.

On March 5, 2009, the Complainant appeared at the Respondent's facility to meet with Okey. They met at a table in the restaurant away from customers. The meeting lasted less than five minutes and did not go well. Both sides spoke in raised voices and both parties were angry about their treatment by the other.

That the dispute was cantankerous was corroborated by a customer, Carl Nolan. While, Nolan was not in a position to see or hear both sides of the dispute, he nevertheless attributed the beginnings of the confrontation to be the responsibility of the Complainant. Taking the record as a whole, however, it is clear that both the Complainant and Okey were engaged in conduct that contributed to the argument.

The meeting ended with the Complainant standing and walking off threatening to consult an attorney and Okey stating something to the effect that the Complainant would not be placed on the schedule again.

The Complainant, realizing that she had greatly angered Okey during the March 5, 2009 meeting, waited to contact Okey. On or about March 10, 2009, the Complainant emailed Okey apologizing for her conduct and emphasized her desire to continue to work for the Respondent.

The March 10, 2009 email, Complainant's Exhibit 6/Respondent's Exhibit 8, can be read either to indicate that the Complainant wished reinstatement to the schedule with some reduction in hours or that she wished to be placed back on the schedule once her baby was born. The email recognized that the Complainant had been distracted in recent weeks. The March 10, 2009 email was sent to Okey's personal email address not her email at the Respondent's.

Okey did not immediately respond to the Complainant's email. On or about March 26, 2009, Okey emailed the Complainant and indicated that she (the Complainant) should contact Okey after her baby was born and they could see where things might go from there. The Complainant did not contact Okey about employment subsequent to the March 10, 2009 email.

Between the March 10, 2009 and the March 26, 2009 emails, the Complainant called the bar on or about March 15 or 16 to determine whether she was scheduled to work. She presumeably spoke with Omar Plata, the Kitchen Manager. She was informed that she was not on the schedule. It is not clear from the testimony if Plata was referring to the schedule for that day alone or for the rest of the month.

On or about March 16 or 17, 2009, the Complainant's mother attended a business lunch at the restaurant in the Respondent's facility. One of the reasons for her to attend the lunch was to inquire about why her daughter had not been placed back on the work schedule. Lori Greenwold, the Complainant's mother, asked Jim Thomas, the Respondent's Golf and Pro Shop Manager, about her daughter's status indicating that there seemed to be some dispute or rift between Okey and the Complainant. Thomas told Greenwold that he understood that the Complainant was on maternity leave. Greenwold indicated that was not the case. Thomas indicated that he would look into the matter and contact Greenwold. Thomas did not do either.

Okey did not contact the Complainant about scheduling after her March 26, 2009 email. The Complainant's baby was born on May 11, 2009. The Complainant did not contact Okey

directly after the March 10, 2009 email nor did she contact any other person at the Respondent's indirectly after Greenwold's conversation with Thomas on March 16 or 17, 2009.

On April 16, 2009, the Complainant filed a complaint with the Department of Civil Rights Equal Opportunities Division (EOD) charging that she had been discriminated against by the Respondent in her terms and conditions of employment and by way of her termination because of her sex/pregnancy and because of her physical appearance. The Complainant also charged that she was treated less favorably than others and was constructively terminated as a result of her exercise of rights protected by the Equal Opportunities Ordinance sections 39.03(8) and (9), most particularly her complaints to Jim Thomas that she was being treated less favorably with regard to scheduling than others because of her pregnancy. After an investigation, a Division Investigator/Conciliator issued an Initial Determination on July 24, 2009 concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant in her terms and conditions of employment and by causing her constructive termination from employment on the basis of her sex/pregnancy. The Initial Determination also concluded that there was no probable cause to believe that the Respondent had discriminated against the Complainant on the basis of her physical appearance or that the Respondent had retaliated against the Complainant for her exercise of rights protected by the ordinance. Those allegations for which there was a finding of no probable cause were dismissed after no appeal was filed with respect to them. As will become clear, this is unfortunate.

The Complainant's allegations that remained at the time of hearing involved her scheduling of hours, her general treatment or harassment subsequent to November of 2008 and her constructive termination from employment by her not being scheduled after the beginning of March 2009. Central to the Complainant's allegations is the relationship between the Complainant and Okey. The Complainant asserts that it was a fundamentally important characteristic of the wait staff to be physically attractive, "eye candy" in the words of the Complainant, and that as her pregnancy progressed, she believed that the Respondent, especially in the person of Okey, viewed the Complainant as not being so physically attractive as prior to her pregnancy.

The Respondent contends that Okey's treatment of the Complainant, to the extent that it was less favorable than that of other employees, was motivated by Okey's observations of the Complainant's work habits and performance. While there is no indication that the Complainant was ever disciplined in writing or even with a formal oral warning, Okey observed the Complainant to be less diligent than other employees and more prone to needing supervision and prompting.

With respect to the number of hours for which the Complainant was scheduled from November 2008 through February 2009, the Respondent indicates that the Respondent's business was slower during the non-golfing season and all employees hours were reduced or even eliminated. To the extent that the Complainant's hours were reduced more substantially, if at all, than others, Okey indicated that the Complainant's performance did not support being scheduled more frequently and the Complainant did not seek to be assigned evening hours.

With respect to scheduling of the Complainant after March 5, 2009, the Respondent asserts that after the Complainant's March 10, 2009 email, Okey assumed that the Complainant did not wish to be scheduled until the birth of her child. Once the Complainant gave birth to her daughter, the Complainant did not call Okey to request to be placed on the schedule.

This matter was presented as one of indirect evidence and accordingly the Hearing Examiner will use the McDonnel Douglas/Burdine burden shifting paradigm to analyze the positions of the parties. In this approach, the Complainant must first establish by the preponderance of the evidence facts sufficient to demonstrate a *prima facie* claim of discrimination for the bases alleged. In the present matter, that would be that the Complainant is a member of a protected class(es); and that the Complainant experienced one or more actions that represent an adverse action for her employment. Finally, the Complainant must demonstrate that there is evidence demonstrating a causal connection between the Complainant's membership in a protected class and the adverse action or actions that she experienced.

Though the ordinance does not contain a specific prohibition against discrimination on the basis of pregnancy, the Hearing Examiner has, in the past, accepted that the ordinance does prohibit discrimination against a pregnant woman as a form of "sex plus" pregnancy discrimination. See Dickson v. Woodman's, MEOC Case No. 21919 (Ex. Dec. 10/23/95). This interpretation of the ordinance maintains the ordinance's balance with Title VII and the Wisconsin Fair Employment Act both of which contain a specific prohibition against discrimination on the basis of pregnancy. Under the ordinance, such a claim is recognized as a subset of claims for sex discrimination. See id.

There is no controversy over whether the Complainant was pregnant or whether the Respondent knew of the Complainant's pregnancy. In September of 2008, the Complainant told her then supervisor, Stephanie Gosewehr, of her pregnancy shortly after the Complainant became aware of her pregnancy. The testimony makes it clear that Okey became aware of the Complainant's pregnancy shortly after she began work for the Respondent. It appears that, initially, Okey was made aware of the Complainant's pregnancy by one of the Complainant's coworkers. However, the Complainant also informed Okey of her pregnancy shortly after the commencement of Okey's employment. As part of informing Okey of her pregnancy, the Complainant also told Okey that she (the Complainant) might need to sit down or rest occasionally due to the usual physical effects of pregnancy such as swollen feet and back fatigue/pain.

It should be noted that the Complainant believes that Okey's reaction to the news of the Complainant's pregnancy was typical of their relationship and set the stage for what followed. In the mind of the Complainant, Okey did not express any enthusiasm or curiousity or support for the Complainant's disclosure. This was very different from the positive reactions and support given the Complainant by Gosewehr and her coworkers when the Complainant first made her pregnancy known in September of 2008.

Given the record as a whole, there is no question that the Complainant is a member of the protected class sex/pregnancy and that the Respondent knew of the Complainant's status. The Complainant did not seek to hide her pregnancy. The Respondent does not deny knowing of the Complainant's pregnancy. There is no indication that any other employee of the Respondent was pregnant during the period of time in question.

The second step in the analysis is determining whether the Complainant presents evidence that she experienced an adverse employment action. In the present matter, the Complainant alleges three separate and distinct adverse actions. First, the Complainant asserts

that Okey was extremely critical of her personally and that Okey was rude to the point of creating a hostile work environment. Second the Complainant alleges that her hours were reduced without her consent and that created a loss of income for the Complainant. Third, the Complainant asserts that after March 5, 2009, Okey did not schedule her for work effectively terminating her employment with the Respondent.

The Respondent contends that any reduction in the Complainant's hours resulted from reduced demand during the winter season. With respect to the Complainant's termination, the Respondent states that it did not terminate the Complainant, but did not hear from the Complainant about wishing additional hours after the birth of her child and assumed that the Complainant had quit her employment. The Respondent indicates that any criticism of the Complainant by Okey stemmed from the Complainant's work performance and not because of the Complainant's pregnancy.

Analysis of the second element of the *prima facie* case, an adverse employment action, is often a clear point and little discussion need occur. In the present matter, the Hearing Examiner will discuss each claim as it may not be quite as clear as in some cases. Generally speaking, the Hearing Examiner finds that an objective approach is easiest and that such an approach will tend to avoid mixing in discussion of the final element with the finding related to adverse action.

First with respect to the Complainant's claim of harassment on the basis of her pregnancy, it is not sufficient to simply point to rude, unprofessional or boorish behavior to establish the element of an adverse employment action. In analyzing claims of harassment, regardless of the claimed basis, the Hearing Examiner uses the elements for establishing a hostile workplace claim of sexual harassment as a guide. Essentially, what a Complainant must demonstrate is a pervasive pattern of patently offensive language or conduct relating to the identified protected class that adversely affects the Complainant's ability to perform his or her job duties. Where harassment comes at the hands of a supervisor, the Commission has taken a harsher view of some of the requirements to demonstrate harassment than have the federal courts. See Vance v. Eastex Packaging, MEOC 20107 (Ex. Dec. 5/21/85). Vance relates primarily to the requirement of pervasiveness and what is sufficient to establish that part of the element.

The record in the present matter is at best mixed. The Complainant testified that she experienced an unrelenting pattern of abusive and degrading comments from her supervisor, Okey, prior to her termination. However, while the Complainant asserts such a pattern, she identified only a very few statements or conduct which she believes were aimed at her due to her pregnancy. The comments most frequently mentioned by the Complainant were to the effect that Okey felt the Complainant was lazy or perhaps "f—king lazy". With the exception of the meeting on March 5, 2009, the record is not clear when or on how many occasions this comment was made by Okey. The Complainant also contends that Okey's presentation of duties to be performed represented a form of harassment.

The testimony of the Complainant and her mother indicate that the Complainant was very troubled about her treatment at work. The Complainant would return home in tears, not socialize and not eat. At work, the Complainant asserts that she did her best to perform her duties despite Okey's criticisms, but that she did occasionally need to rest from the effects of her pregnancy.

The problem for the Hearing Examiner is the lack of testimony concerning the specifics of Okey's alleged harassment of the Complainant. Generally speaking, Okey's criticisms, assuming them to be unwarranted, fall short of being patently offensive and do not appear to have adversely affected the Complainant's ability to perform her duties. While the Hearing Examiner concedes that no one wants or likes to be called lazy, whether there's a profanity connected with it or not, the record in this matter falls short of demonstrating the type of hostile workplace that supports a claim of harassment or a difference in the terms and conditions of the Complainant's employment due to her treatment. This failure is despite the Commission's somewhat more relaxed test for pervasiveness as outlined in the Vance case. While the record indicates that the relationship between the Complainant and Okey was neither warm nor cordial, the record fails to establish the type of intolerable working conditions necessary to support a claim of harassment due to a hostile workplace.

With respect to the Complainant's claim that her hours were reduced, it does appear that her hours were slowly reduced starting in October of 2009 which was after she disclosed her pregnancy. A loss of hours does represent an adverse employment action. In reaching this conclusion, the Hearing Examiner makes no finding, at this point, of the cause for such a reduction.

Finally, regarding the Complainant's termination claim, the fact that the Complainant did not return to work after March 5, 2009 does appear to represent an adverse employment action. It is unquestioned that the Complainant did not work for the Respondent after that date. What is at question is the reason for that circumstance. Given the record as a whole, the Hearing Examiner accepts that the Complainant's claim on termination should move forward to analysis of the final element.

The final element of the *prima facie* case is whether there is a causal connection between the Complainants's protected class or classes and the adverse employment action(s). As with all elements of a discrimination claim, the Complainant must demonstrate this element by the greater weight of the credible evidence.

Essentially, the Complainant seeks to make this showing by establishing the following points: (1) She was pregnant at all times relevant and the Respondent knew of her pregnancy; and (2) No other employees of the Respondent during the relevant period were pregnant or, at least, were not known to be pregnant. As part of this argument, the Complainant asserts that as a pregnant woman, she was physically less attractive than the other non-pregnant employees and that physical attractiveness was an important job consideration or possibly a requirement.

The Respondent contends that, while the Complainant and Okey never had a close or cordial relationship, the Complainant's status as a pregnant woman played no role in Okey's treatment of the Complainant. Rather, the Respondent asserts that problems with the Complainant's work performance were not up to Okey's standards or those of the Respondent. Work performance was a consideration in Okey's scheduling of workers especially as during the winter period when there were fewer hours to assign. Finally, the Respondent asserts that the Respondent had expected the Complainant to contact it for work again after the birth of the Complainant's baby, but that the Complainant did not contact the Respondent for reinstatement.

Assuming for the moment that the Hearing Examiner had found that the Complainant had established that she had experienced an adverse employment action in her terms and conditions of employment resulting from a hostile workplace, the Hearing Examiner has difficulty in finding that the Complainant's pregnancy played a motivating role in whatever hostility she experienced while employed by the Respondent. There was no testimony that anyone made any inappropriate references to her pregnancy. The Complainant testified that when she disclosed her pregnancy to Okey and that Okey was not particularly excited for the Complainant or as demonstratively happy for her. While that may have been disappointing to the Complainant or even poor labor relations, it does not demonstrate any form of animus based upon the Complainant's pregnancy.

There is no doubt, given this record, that the Complainant and Okey did not like each other or get along well. That this lack of cordiality may have manifested itself as condescension on the part of Okey towards the Complainant does not necessarily demonstrate a discriminatory attitude by Okey. That Okey felt the Complainant did not exhibit the same level of commitment to the job that Okey may have felt and that the Complainant needed additional supervision, by itself, does not demonstrate intent to discriminate on Okey's part.

The problem for the Complainant is that although she may well have felt that Okey did not value her contribution or her work, she fails to present any credible evidence showing that Okey's attitude was premised upon the Complainant's pregnancy. The Complainant seems not to be able to comprehend that Okey's attitude may have been simply personal or that the Complainant's own conduct may have formed the basis for Okey's disapproval.

Part of the Complainant's general contentions regarding her pregnancy is that the Respondent wanted to hire only physically attractive, young women to be the wait staff. The Complainant contends that such an environment was desired to attract well paying male customers. It is the Complainant's contention that as her pregnancy became more noticeable, she no longer fit the model of an attractive, young woman and that the Respondent desired to remove her from the work force.

The testimony does not support the Complainant's contention concerning a requirement, either formal or informal, giving a preference to women of a certain physical type. The record indicates that no customers complained about the Complainant's physical appearance as a pregnant woman. Rather it appears that the customers were genuinely interested in the Complainant's pregnancy, inquiring about her due date, etc. Okey testified that other employees did not conform to a physical model intended to be alluring to male patrons of the Respondent. Equally, there appears to have been no dress code that intended to draw attention to the physical endowments of the wait staff. What does seem to be the case is that each employee was expected to be professional and to dress appropriately for a sports oriented facility.

While the Hearing Examiner is sympathetic to the Complainant's feelings that she was being criticized unfairly due to her pregnancy, there is simply insufficient evidence in the record to demonstrate such a fact. Without such evidence, the Hearing Examiner cannot conclude that the Complainant has met her burden of proof with respect to a claim of harassment.

Turning to the issue of declining hours, the Complainant asserts that her hours on the schedule reached a high in August of 2008 and then proceeded to decline throughout the rest of that year and through that portion of the year during which she was employed in 2009. The

Complainant points out that the period of decline in her hours began roughly contemporaneously with her disclosure of her pregnancy in September of 2009. The Complainant asserts that there is a causal connection between her reduction in work hours and her more noticeable pregnancy.

The Respondent points out that the Complainant began her employment at the beginning of the golf season in 2008 and that the reduction of hours is part in parcel of the operation of a golf club or any facility that is dependent, in part, on access to outdoor activities. The Respondent argues that, while it is true that the Complainant's hours declined over the period in question, so did virtually all other employee's hours. The only employee's hours who might have increased were Okey's and Becky Knutson's. In Okey's case, she was directed by the management of the Respondent to work during lunch hours in addition to her supervisory duties. In Knutson's case, it appears that in February 2009, the month in which her hours seem to have increased the most, Knutson assumed hours that would have been assigned to the Complainant had the Complainant not been restricted from work due to a temporary complication of her pregnancy.

It does appear that the Complainant's hours did shrink from August 2008 through February 2009. The Hearing Examiner will separately address the month of March 2009. However, there is no evidence in the record demonstrating that the Complainant's pregnancy played any role in the reduction. It is true that the reduction appears to have begun at about the same time as the Complainant's declaration of her pregnancy, however, it also coincides with the beginning of the end of the golfing season. As noted by the Respondent, the Complainant had not experienced the seasonal reduction in hours for the previous year because she began her employment when the seasonal increase in hours was beginning.

The record clearly demonstrates that virtually all other employees experienced the same kind of reduction in hours. In fact, Stephanie Kelley, one of Complainant's coworkers and someone who was not pregnant, complained about the loss of hours as the seasonal reduction transpired.

While there was much testimony at the hearing concerning what extent hours were tied to performance, there is little in the record to support a finding that any actual or perceived deficiencies in the Complainant's job performance motivated the Complainant's scheduling. It appears, that the Complainant was scheduled for the same types of shifts, i.e. lunch shifts that she had been scheduled for throughout her employment. It is just that there were fewer shifts to be scheduled because of a reduced demand in the offseason. This pattern appears to have been shared across the board with other wait staff. In fact, there were some employees who were simply laid off due to the reduction in hours during the colder months.

For the period from September 2008 through February 2009, the only noticeably more reduced hours for the Complainant occurred in February. It was during this month that the Complainant was placed on bed rest for one week. The reduction in the Complainant's hours for February 2009 from January 2009 directly reflect the amount of time during which the Complainant was prohibited from working by her physician.

Both the Complainant and Stephanie Kelley objected to Okey's hiring of Knutson and the transferring of some of their hours to Knutson. It appears that the primary basis for their objection was that Knutson was a friend of Okey's. While benefiting an acquaintance to the

detriment of other employees may not be good business sense, under the circumstances described in the record, the Hearing Examiner can find nothing discriminatory in such a circumstance. The hours assigned to Knutson were taken from both the Complainant (a pregnant employee) and from Kelley (a non-pregnant employee). Additionally, it appears that Knutson was scheduled to work hours that the Complainant did not normally work, i.e. evening hours due to an experiment to open the restaurant for dinner.

In short, the Hearing Examiner finds no evidence from which one might draw the conclusion that the reduction of the Complainant's hours from August 2008 through February 2009 was a result of the Complainant's pregnancy. Rather, the Hearing Examiner finds that the overwhelming evidence supports a finding that the reduction was based upon the seasonal demand for the Respondent's services and in one instance, the Complainant's medical necessity.

The issue of scheduling for the month of March 2009 presents unique issues/problems. It is clear that prior to March 5, 2009, the Complainant was actually scheduled for at least one day of work (March 2, 2009) and filled in for someone else, likely Okey, on another day (March 3, 2009). The Complainant was not scheduled to work on March 5, 2009, but came in to meet with Okey. The schedule for the rest of the month of March is a mystery, however. It is clear that some schedule was posted in the last week of February 2009 as the Complainant appeared for her scheduled shift on March 2, 2009. The Complainant worked on February 27, 2009, a Friday, and the Respondent was closed for the next two days.

Okey asserts that originally, the Complainant was scheduled to work a typical schedule in the second half of the month. She was unable to explain, however, why the Complainant was not scheduled at all during the second week of March.

The Complainant testified that she never saw her name on any schedule beyond the first two weeks of March 2009. She also testified to having called the Respondent on or about March 15, 2009 and being told that her name was not on the schedule. It is not clear whether the individual answering the phone, presumably, Omar Plata, the Kitchen Manager, was referring to that day or the schedule for the rest of the month. It seems likely that had the Complainant's name been on the schedule at some point after March 16, 2009, Plata would have informed the Complainant of that fact.

Okey testified that she did not retain a copy of the schedule, either electronically or on paper, once a schedule was taken down. Okey's testimony was that the Respondent's software package, Digital Dining, provided her all the information necessary to prepare payroll, so schedules were a waste of space. However, despite Okey's practice, the Respondent produced Exhibit 113 at hearing. Exhibit 113 is a schedule on which the Complainant's name appears on the later half of March 2009 and on two dates in the first half of the month. Okey testified that she did not recall why she had a copy of this exhibit, but that she discovered it in a drawer wile reviewing materials to respond to a discovery request.

The Complainant asserts that the record as a whole indicates that Exhibit 113 is fraudulent and casts doubt on the Respondent's credibility and should be discarded.

The existence and production of Exhibit 113 is troubling to the Hearing Examiner. Given Okey's testimony that she invariably discards old schedules and does not retain electronic

copies, it is hard to accept that the Respondent was able to produce the exhibit. The provenance of the document is further called into question by two additional facts. First, it appears that this, along with schedules for January and February, 2009 which are also in question, were the only schedules discovered after the fact. Second, the exhibit fails to contain the Complainant's name on the schedule during a period of time when one would reasonably expect the Complainant's name to be present, i.e. the second week of March 2009. It seems likely to the Hearing Examiner that if Exhibit 113 was a copy of an actual or a copy of a partially prepared scheduled that there would likely be other schedules for the same period of time or other periods of time in the same location. That does not seem to be the case. It is also troubling that Okey was unable to explain the Complainant's absence from the schedule for the second week of March and then her reappearance thereafter.

On the other hand, Exhibit 113 is also missing the names of other employees whose names one would have expected to see on the schedule. There are also shifts for which no names are entered when shifts had to have been scheduled. There are also names crossed out and written in including the Complainant's. If this was a partially generated schedule, it would seem likely that such adjustments would not be present.

Given the anomalies surrounding the creation and production of Exhibit 113, the Hearing Examiner can give it little credence. The Hearing Examiner cannot conclude that Exhibit 113 was created after the fact, but the questions surrounding it casts grave doubt on aspects of the Respondent's credibility. Despite the Hearing Examiner's doubts, he must hold open that Exhibit 113 is a copy of a partially completed schedule. Unfortunately, even accepting that possibility, it is impossible to determine at what point in time the exhibit was prepared or whether it was posted in its current form or not. Okey's testimony as to whether she printed out a single copy of a schedule or multiple copies was contradictory. The presence of handwritten notations and cross outs on the exhibit further complicate establishing any precise timing or origin of the exhibit.

The impact of a falsified Exhibit 113 would be far from clear. Even accepting that Exhibit 113 was falsified, the sole claim before the Hearing Examiner is whether the Complainant was treated less favorably than other employees because of her pregnancy. Nothing in the record, even a finding of intentional misrepresentation concerning Exhibit 113, moves the Complainant closer to demonstrating a causal connection between her scheduling in March 2009 and her status as a pregnant woman.

The original complaint in this matter included a claim of retaliation relating to objections the Complainant allegedly made to Jim Thomas and others that her hours were being reduced due to her pregnancy. The fact that the Complainant's hours appear to have been reduced further than previously shortly after she allegedly complained to Thomas might support a claim of retaliation. However, at the Initial Determination stage, there was a finding of no probable cause with respect to the Complainant's claim of retaliation and that finding was not appealed. Consequently, the Hearing Examiner is without jurisdiction over such a claim.

Were it found that Exhibit 113 had been falsified, it might have given additional support to the Complainant's retaliation claim. This would be true especially in light of the timing of the schedules appearance.

Production of a falsified Exhibit 113 might also have an impact on Okey's credibility with respect to her testimony concerning the exact events that occurred during the March 5, 2009 confrontation between the Complainant and Okey. However, the precise nature of that conflict is not really central to the determination of this matter. Whether Okey's credibility is key to the remaining claim in this matter remains to be seen.

The final claim presented on this record is whether the Complainant's failure to be recalled to work after the March 5, 2009 confrontation with Okey represents discrimination on the basis of the Complainant's pregnancy or simply the Complainant's abandonment of her employment. An additionally related question might be whether there was simply a misunderstanding with respect to the Complainant's intentions after the March, 5, 2009 meeting between Okey and the Complainant.

There appears to be no dispute that the meeting on March 5, 2009 was short and heated. While there is some question as to who was more upset or who's conduct escalated the emotions during that meeting, there is no doubt that both parties engaged in less than professional conduct.

The Respondent asserts that Okey called the meeting with the Complainant to address performance issues or concerns raised by the Complainant's leaving work early on February 27, 2009. From the Respondent's perspective, this represented a continuation of conduct first observed earlier in February 2009 when the Complainant left the bar/dining area without supervision after her replacement had not appeared on time. It is not entirely clear, but the Complainant seems to assert that the topic of the meeting on March 5, 2009 was to address the concerns the Complainant had raised with Thomas on March 2nd or 3rd about the reduction of her hours.

Whatever the actual agenda for the meeting, it appears that Okey and the Complainant came to the meeting with very different expectations. It is not clear to what extent those differing expectations caused or contributed to the immediate outcome of the meeting or to what extent the obvious personality conflict between Okey and the Complainant played a role.

As there's no real office area, the meeting between the Complainant and Okey occurred at a table in the dining room. The events were observed by a customer at another table. However, it does not appear that the customer was in a particularly good position to observe the dynamics of the meeting.

Once Okey and the Complainant were seated, Okey began the meeting listing her concerns over the Complainant's performance. The Complainant took great offense at Okey's manner and criticisms. The Complainant asserts that Okey was rude and belittling in her manner and used profanity towards the Complainant. The customer, Carl Nolan, testified that it was his observation that Okey appeared to be professional and in control throughout the short meeting. However, he admits that Okey's back was to him and he could not clearly hear both sides of the discussion between the Complainant and Okey.

Eventually, the Complainant admits that she became frustrated with Okey's attitude and after saying some things that she cannot recall, but is not proud of, and that she stormed off. The Complainant understood Okey to say, as the Complainant left, something to the effect that

the Complainant would not be scheduled again. The Complainant may have threatened to consult with an attorney.

The Complainant had not been scheduled to work until around March 14, 2009 or later according to Exhibit 113. This correlates with the Complainant's testimony that she was only scheduled to work two days in March of 2009. The Complainant and Okey had no contact after the March 5, 2009 meeting until March 10, 2009, when the Complainant sent Okey an email. This email is Complainant's Exhibit 6 and Respondent's Exhibit 8.

In this email, the Complainant apologizes for her part in the March 5, 2009 meeting and indicates that she hopes to be able to continue to work at the Respondent. The email is not entirely clear about timing, however. A casual reading gives the clear impression that the Complainant intended to return to the Respondent after the birth of her baby. There is no clear indication of the Complainant's willingness or desire to return to work immediately.

Later in the same email, however, the Complainant does indicate that should Okey wish to reduce her hours due to the Complainant's admitted recent "lack of enthusiasm" that the Complainant would understand. This could be understood to indicate that the Complainant was seeking immediate reinstatement to the schedule or, on the other hand, a reduced schedule upon her return whenever that might be.

Okey testified that she understood the Complainant's March 10, 2009 email to indicate that the Complainant did not wish to be rescheduled until after the birth of the Complainant's baby. This is not an unreasonable interpretation of the email.

The Complainant asserts that no one can reasonably read the March 10, 2009 email, in light of the Complainant's impending single parenthood, to indicate an intent to forego employment until the birth of her child. In this regard, the Hearing Examiner finds that while such a reading is possible it is not the first one arrived at after reading the email. The Hearing Examiner finds that the wording of the email generally indicates a desire for continued employment, but that scheduling should be resumed on a reduced schedule after the birth of the Complainant's baby.

Okey did not immediately respond to the Complainant's email. Okey indicates that the email was sent to her private email address, not her work address and that she checks her personal address less frequently than the work one. Also part of Exhibit 6/8, Okey, in an email dated March 26, 2009, indicated that the Complainant should contact her (Okey) once the Complainant's baby was born and they could take things from there.

There were only two other contacts involving the Complainant and the Respondent that occurred between these two dates. First, the Complainant called the Respondent on or about March 15, 2009 to see if she was on the schedule. She did not speak with Okey. She spoke with a male who answered the phone, presumably, Omar Plata, the Kitchen Manager. The Complainant was told that she was not on the schedule. As previously indicated, it is not clear whether the inquiry or answer was limited to the current day or the rest of the month.

The next contact came on March 17, 2009 during an opening event. The Complainant's mother, Lori Greenwold, asked Jim Thomas why her daughter was not on the work schedule

and that there seemed to be some sort of problem between the Complainant and Okey. Thomas apparently indicated that he believed that the Complainant was on maternity leave.

The record is clear that there were no other contacts between the Complainant and the Respondent whether generated by the Complainant or the Respondent. The Complainant found less desireable work through the assistance of her family. Her baby was born on or about May 11, 2009. After the birth of her daughter, the Complainant took several months of self-imposed leave before once again seeking employment.

The Complainant contends that the above record establishes a de facto or constructive discharge from employment on the basis of the Complainant's pregnancy.

The Respondent asserts that the record demonstrates that the Complainant voluntarily quit her employment and never contacted the Respondent for scheduling once the Complainant's baby was born.

The Hearing Examiner concludes that given the record as a whole, including the exhibits and the testimony of the parties, that the Complainant has failed to carry her burden to establish that her employment was terminated by the Respondent or that even if it was, it was not terminated as a result of the Complainant's pregnancy.

As noted above, the Hearing Examiner understands the arguments of the parties concerning the possible different interpretations of the Complainant's March 10, 2009 email to the Respondent. The Hearing Examiner accepts that the email most reasonably can be read to indicate that the Complainant would like to return to the work schedule at the Respondent after the birth of her baby. That Okey would have taken steps to remove the Complainant from the schedule for the remainder of March given such a reading is not at all unreasonable. Hence, when the Complainant called the Respondent on or about March 15 to check on scheduling, it is not unreasonable that her name would not appear on the schedule that was posted.

Once the Complainant was told that her name was not on the schedule and especially after she received Okey's email of March 26, 2009, the Complainant had some duty or obligation if she wished to return to work prior to the birth of her daughter to contact Okey and explain the misunderstanding.

The Hearing Examiner understands that the relationship between the Complainant and Okey had always been strained, but the failure of the Complainant to clarify the apparent misunderstanding, whether because of pride, embarrassment or anger, creates the inference that the Complainant voluntarily terminated her employment.

That there was a misunderstanding giving rise to a duty to clarify the situation is strengthened by the account of Greenwold's discussion with Thomas on March 17, 2009. Greenwold approached Thomas to inquire about the situation or problem between the Complainant and Okey with regard to scheduling. When Greenwold was told that the Respondent, in the person of Thomas, understood the Complainant to be on maternity leave, the Complainant should have contacted the Respondent or Okey to let her know that a misunderstanding existed and that it could be clarified. However, the Complainant did not do so.

That Thomas did not take steps to clarify the Complainant's status after his conversation with Greenwold is evident from Okey's email of 9 or 10 days later in which Okey still believes that the Complainant does not wish to return until her baby is born. That email again gave the Complainant the opportunity to correct Okey's stated understanding, an opportunity which was not taken by the Complainant.

Ultimately, once the Complainant's baby was born, she did not contact the Respondent as directed in Okey's March 26, 2009 email to see what could be worked out. The Hearing Examiner understands that by that point, the Complainant was angry and embittered by what she viewed as the Respondent's harsh treatment of her, but had she truly wished to return to employment with the Respondent, she would be expected to make that contact.

The Complainant might argue that it was not up to her to clarify what was an ambiguous situation, but was the responsibility of the Respondent. There are three dates when this might appropriately be asserted. First, if Okey had understood the March 10, 2009 email to be ambiguous, she might have been expected to contact the Complainant. However, as discussed above, the Hearing Examiner concludes that the March 10, 2009 email is sufficiently clear that Okey might reasonably not understand that there was a misunderstanding.

The second opportunity for clarification arose when the Complainant called the Respondent on or about March 15, 2009 to check on the schedule. The problem with this incident giving rise to a duty to clarify is that there was no clear identification of who the Complainant actually spoke with and to what extent that individual would have a duty or responsibility to report the conversation to Okey, the Complainant's supervisor. If there is an argument to be made concerning apparent authority, the Complainant fails to appropriately raise the issue.

The third point at which one might argue that the Respondent had a duty to clarify the confusion is when Greenwold and Thomas spoke on March 17, 2009. As with the phone call a day or two earlier, it is not clear what duty or obligation Thomas had to consult with Okey. The record as a whole indicates that Thomas, though individuals consulted with him, was not the Respondent's manager nor did he have authority over other supervisors such as Okey or Plata. To the extent that the Complainant contends that Thomas had apparent authority to act as an agent or as a supervisor of Okey, the Complainant fails to raise or elucidate the argument. Without a foundation in the record, the Hearing Examiner cannot speculate about how Greenwold's discussions with Thomas might affect any duty of the Respondent to clarify a misunderstanding between Okey and the Complainant.

The Complainant briefly discusses the point that there was a practice at the Respondent to call an employee if he or she was on the schedule but failed to appear. The Complainant asserts that this was not done despite the fact that Exhibit 113 shows the Complainant as being scheduled on a number of dates after March 15, 2009. This discussion seems immaterial given the testimony that the schedule is prepared at the end of the prior month and would not reflect decisions or changes that occur during the month covered by the schedule. In the case of Exhibit 113, it would have been prepared at the end of February and would not reflect the changed circumstances stemming from Okey's and the Complainant's confrontation on March 5, 2009 or the Complainant's email of March 10, 2009 or Okey's email of March 26, 2009. That the dates upon which the Complainant is scheduled are not all scratched or crossed out only

adds to the questions about Exhibit 113's provenance, but don't necessarily lead the Hearing Examiner to a conclusion concerning the ultimate issues in this case.

The long and the short of this third claim of discrimination is that the Hearing Examiner cannot find sufficient evidence in the record to support the Complainant's claim that she was terminated by the Respondent and that such termination resulted from the fact that she was pregnant. In this regard, the Hearing Examiner particularly notes that both the Complainant and another employee, Stephanie Kelley, complained about reductions in their work hours to Thomas on March 2 or 3, 2009. The Complainant was pregnant, but Kelley was not. They both were particularly upset that a friend of Okey's, Becky Knutson (not pregnant) seemed to be receiving more hours than the Complainant and Kelley believed they should be working. Even if the Complainant highlighted her pregnancy as the reason for her reduction in hours, it does not eliminate the fact that Kelley who was not pregnant expressed the same concern for her hours.

That Okey asked the Complainant for a meeting on March 5, 2009 which went badly for both parties, might have been in retaliation for the Complainant's complaint to Thomas. However, the record indicates that Thomas did not pass on to Okey the Complainant's belief that her pregnancy was the basis for the reduction in her hours. Unfortunately for the Complainant, the claim of retaliation is not properly before the Hearing Examiner. On the other hand, Okey may have called the meeting to discuss with the Complainant Okey's displeasure with the Complainant's apparent walking off the job on February 27, 2009 along with other performance issues.

Whatever the reasons for the meeting on March 5, 2009, the meeting was a disaster and was poorly handled from both sides. In the aftermath of that meeting, the Hearing Examiner finds that there was a misunderstanding between Okey and the Complainant concerning the Complainant's desire to return to work immediately. For reasons that are not clear on this record, neither Okey nor the Complainant either knew of the misunderstanding or took reasonable steps to correct the misunderstanding. Both sides have some culpability for the failure to clear up the misunderstanding. However, had the Complainant truly wanted her job back, the Hearing Examiner believes that she should have made a greater effort to contact Okey directly to determine her status. Even with both sides of the conflict bearing some responsibility for the failure of communication, the record is devoid of evidence to support the Complainant's contention that her pregnancy was the cause of the misunderstanding or the consequences of it.

In this regrettable series of events, the Hearing Examiner finds no evidence that either demonstrates directly or by inference that the Complainant's status as a pregnant woman played a motivating role in the outcome. That Okey and the Complainant did not get along, and had a less than cordial relationship from the beginning of Okey's employment seems uncontroverted. However, the Complainant's belief that her pregnancy formed the motivation for Okey's attitude is not demonstrated on this record. Essentially, the Complainant's claim rests on the fact that she was pregnant and no other employee was similarly pregnant to demonstrate a discriminatory animus. While the record does not demonstrate that the Complainant was someone who was destined to be fired for incompetence, there is sufficient evidence of a lack of performance to support the Respondent's claim that Okey was frustrated with the Complainant's performance and attitude.

The Complainant attempts to minimize the impact of the two incidents in which she apparently left work early. The Hearing Examiner believes that the Respondent demonstrated remarkable forebearance by not disciplining or terminating the Complainant for either or both of these incidents. Though through the litigation of these claims, various allegations regarding the Complainant's performance were made and disputed, there is no basis for believing that the Complainant's performance or lack of performance provided the basis for the Respondent's actions.

The Hearing Examiner has no doubts that the Complainant's life in the last part of 2008 and the first part of 2009 was characterized by turmoil and periods of unhappiness. That Okey was not the warm and supportive supervisor that Gosewehr was for the Complainant may well have contributed to the Complainant's feelings about work, but the record does not support the Complainant's belief that her pregnancy was a motivating factor in Okey's treatment of her or in the hours of work the Complainant was scheduled during the beginning of 2009.

The above discussion of the arguments of the parties and the record has strayed somewhat from the traditional McDonnell Douglas analysis. In an attempt to summarize the Hearing Examiner's conclusions in the form of that framework, the Hearing Examiner concludes that the Complainant fails to present a *prima facie* claim of discirimination based upon her status as a pregnant woman in her terms and conditions of employment or in termination. Even if the Complainant had established a *prima facie* claim of discrimination, the Respondent presents legitimate, nondiscriminatory explanations for its actions, i.e. that Okey's attitude towards the Complainant and her perhaps harsh treatment was informed not by the Complainant's pregnancy but Okey's observations of the Complainant's work habits and attitudes; that all employees hours were reduced from September/October through mid-March due to the end of the golf season; and that Okey reasonably understood that the Complainant, after the March 5, 2009 meeting and the Complainant's March 10, 2009 email, that the Complainant did not wish to return to work until after the birth of her baby. The Complainant fails to rebut the Respondent's proffered explanations by casting sufficient doubt on the Respondent's credibility or by establishing that the Respondents explanations are pretextual in nature. In short, the Complainant has failed to meet her burden of proof to establish a violation of the ordinance.

The Hearing Examiner feels compelled to separately address two contentions raised in this record. First, the Respondent argues that because Okey was a working mother who had worked until the end of her pregnancy this fact demonstrates that she would not have taken an adverse action against the Complainant due to her pregnancy. The Hearing Examiner concedes that inference might be raised from that circumstance. However, the Hearing Examiner also believes that other contrary inferences may be raised, i.e. that Okey realized how difficult working while pregnant was and held the Complainant to a higher standard because of her own experience. Given the potentially differing inferences, the Hearing Examiner does not find this argument persuasive.

Both sides make much of the Complainant's contention that the Respondent utilized a form of discrimination in hiring only attractive young women to serve its cliental. The Complainant contends that when due to her advancing pregnancy she no longer fit the perception of the ideal physically attractive server, her hours were reduced and she was ultimately terminated. The Hearing Examiner finds no basis in fact or law for such a contention. As with the claim of retaliation, the complaint in this matter originally set forth a claim for discrimination on the basis of physical appearance. During the investigative stage, there was a

finding of no probable cause. That determination was not appealed and is not properly before the Hearing Examiner. The Hearing Examiner is confused by the Complainant's apparent ready acceptance of a business practice that appears to be essentially pandering to a stereotype. Despite this, the record does not support that such a practice was in place or was the norm.

Finally, while credibility is always an issue to be addressed with each witness and in each proceeding, there are two witnesses in this matter whose testimony is particularly important. For the Complainant, her own testimony forms the lynch pin for her case. Okey's testimony is the same for the Respondent. Both witnesses had positives and negatives as is typical for any witness. Okey's inability to recall with precise events that the Hearing Examiner might expect to be firmly entrenched in her mind cast some doubt on Okey's testimony. However, overall, these difficulties did not appear to be unduly pronounced or stem from an intent to obfuscate. The questions around the production of Exhibit 113 also create some issues of credibility. However, the Hearing Examiner finds that Okey attempted to answer the questions put to her about this document as directly as possible. Though questions linger about Exhibit 113, the Hearing Examiner is satisfied that Okey did not attempt to mislead the Hearing Examiner or the Complainant with its production.

The Complainant's greatest threat to her credibility arises from her testimony about her March 10, 2009 email to Okey. Essentially the Complainant admits that she was in a desperate position and would have said anything to regain her job. While the passage of time may well have done much to mitigate the Complainant's desperation, the Hearing Examiner is left with some doubt about how strongly he may rely on the Complainant's testimony especially when it is not corroborated by external evidence or testimony. The Complainant also exhibited some degree of vagueness in attempting to recall facts that might be detrimental to her as opposed to those that might favor her. Overall, the Hearing Examiner does not favor the testimony of Okey over the Complainant given the record as a whole. Both Okey's and the Complainant's memories may be somewhat excused for a lack of precision due to the lapse of time.

In summary, the Hearing Examiner finds that the Complainant has not met her burden to establish that the conduct of the Respondent in 2008 or 2009 was violative of the Equal Opportunities Ordinance. While Okey and the Complainant were not friends and did not have a cordial working relationship, there is no support for the contention that Okey or others harassed the Complainant for any reason much less her status as a pregnant woman. To the extent that Okey was harsh in her criticism and evaluation of the Complainant, this was due to Okey's perception that the Complainant did not work as diligently as others.

The reduction in hours experienced by the Complainant from September of 2008 through March 2009 had nothing to do with the Complainant's pregnancy but was part of the usual annual fluctuation due to the seasons during which golf is played. In other words, the summer months were busier than the winter months. The Complainant had not experienced this fluctuation in her employment as she was initially hired at the beginning of the busy period in 2008. The reduction in hours was experienced by virtually all other employees regardless of their status as pregnant or not pregnant.

Subsequent to a particularly disruptive conflict between Okey and the Complainant on March 5, 2009, there was a misunderstanding between Okey and the Complainant over when the Complainant wished to be scheduled. While this misunderstanding had disasterous consequences, it was not based upon the Complainant's status as a pregnant woman. While

both sides to the misunderstanding could have taken steps to remedy the misunderstanding, neither did. As the individual with the greatest to lose from the misunderstanding, the Complainant's failure to contact Okey directly stands as the single greatest motivating factor in the Complainant's failure to return to employment with the Respondent.

Given this record, the Hearing Examiner concludes that the complaint is dismissed for a lack of proof of discrimination.

Signed and dated this 27th day of July, 2012.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Victor Arellano
Bonnie A Wendorff