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

Sabrina Sveum 1401 Trailway Dr. Apt. #5 Madison WI 53704 Complainant vs. La Guanajuatence 1318 S Midvale Blvd Madison WI 53711 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER CASE NO. 20112102 EEOC CASE NO. 26B201100058

On November 15, 2011, the Hearing Examiner for the Equal Opportunities Commission, Clifford E. Blackwell, III, held a hearing on the merits of the above-captioned complaint. The Complainant, Sabina Sveum, appeared in person and without counsel. The Respondent La Guanajuatence Restaurant, appeared by its owner, Miguel Caviedes and his representative/wife, Jane Kelsey, and without counsel. Based upon the record of the proceedings in this matter, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDING OF FACT

1. At all times relevant to this complaint, the Complainant was a pregnant woman.

2. The Respondent is a restaurant located at 1318 Midvale Boulevard, Madison, Wisconsin. The Respondent employed a number of individuals as it prepared to open and as cooks and wait staff once the restaurant opened for business.

3. In May of 2011, the Complainant was employed by the Respondent in preparation for the restaurant's opening. It was anticipated that she would become part of the wait staff upon the restaurant's opening.

4. During her employment with the Respondent, the Complainant was paid $8.00 per hour. For the last pay period for which she worked for the Respondent, the Complainant worked approximately 25 hours per week.

5. Prior to the restaurant's opening in late May of 2011, the Complainant helped with setup and obtained a bartender's license.

6. The weather in late May, but especially early June, 2011, was hot and humid with temperatures in the upper 80s to the mid 90s.

7. Over the Memorial Day weekend, the Respondent's air conditioning unit broke. Conditions for the employees of the Respondent were hot and difficult due to the heat.

8. Despite the Respondent's best efforts, the air conditioning unit could not be repaired and replacement did not take place until June 13, 2011.

9. The owner of the Respondent, Miguel Caviedes, observed that the Complainant was perspiring profusely, seemed pale and lethargic and attributed the conditions to the Complainant's reaction to the heat. Caviedes is originally from Mexico and has experience supervising employees in hot and humid conditions.

10. Though she was pregnant throughout her employment, the Complainant did not inform the Respondent of her pregnancy. The Respondent overheard other employees speaking of the Complainant's pregnancy and became aware of her pregnancy in that manner.

11. After observing the Complainant being in distress from the heat, the Respondent indicated that he was giving the Complainant permission to leave work until the air conditioning was once again operating. The Complainant did not object. It was left that the Complainant would be recalled when the air conditioner was operative.

12. The Respondent observed other employees experiencing some difficulty with the heat. He inquired of them about their condition. No other employee felt that time away from the restaurant was necessary.

13. Though the Complainant did not notify the Respondent of her pregnancy, once Caviedes learned of the Complainant's pregnancy and prior to his permitting the Complainant to leave due to the heat, he told the Complainant that she had not told him of her pregnancy.

14. During the period that the air conditioner was being replaced, the Complainant called the Respondent to find out the status of the repairs. She was told the air conditioner was not yet repaired and she would be called when it was. The Complainant called back several days later to ask when she could return to work, but received no response.

15. Once the air conditioner was replaced and was operational, Kelsey reminded Caviedes that they needed to contact the Complainant to recall her to work. It appears that Kelsey, Jessica Sanchez and other employees attempted to reach the Complainant at the telephone number provided on her employment application. These efforts were unsuccessful. After several attempts to reach the Complainant, the Respondent stopped calling.

16. Prior to allowing the Complainant time off due to the air conditioner replacement, Caviedes was unhappy with the Complainant's performance. He noted that she took frequent breaks to smoke and observed her sitting rather than doing her work.

17. The Complainant resides a short distance from the Respondent's restaurant.

18. The Complainant gave birth to her son in August of 2011.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected classes "sex" and "familial status" by virtue of her being a pregnant female and is entitled to the protections of the Equal Opportunities Ordinance.

2. The Respondent is an employer within the meaning of the Equal Opportunities Ordinance and is subject to its requirements.

3. The Complainant's failure to be recalled to employment after a voluntary, temporary layoff did not violate the Equal Opportunities Ordinance.

ORDER

1. The complaint is dismissed.

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

MEMORANDUM DECISION

The record in this matter is very sparse and frequently confusing. Neither party was represented at the time of hearing. Neither party appeared to grasp what was expected or required for either side to prevail.

The burdens set forth by case law regulate the degree of proof necessary to prevail in a discrimination case, as well as, who must produce evidence in what order. Generally these burdens are known as the burdens of proof and production. While application of these burdens may seem to restrict creativity and a meaningful understanding of the circumstances leading to a complaint, they are necessary to provide a reasoned structure for analysis and create reasonable expectations for the parties about how to present their respective claims and defenses. By setting forth an analytical framework that is to some extent standardized, there is a reduced possibility that a decision will be reached arbitrarily or capriciously rather than being based upon a reasoned consideration of the record.

The decision maker does possess some flexibility in the application of the burdens or in the regulation of the hearing process. However, that flexibility is always constrained by the requirements of due process, equity and fundamental fairness to both parties. In other words, the Hearing Examiner may allow an unrepresented party to present his or her claim in a manner that does not strictly follow customary procedure, but in making such allowances, the Hearing Examiner must remain mindful of his duties to properly apply the accepted standards of proof and determine whether each party has met his or her burden of proof and production.

The first question to be addressed by the Hearing Examiner in this matter is whether this is a case presented by direct or indirect evidence. In the case of a claim presented by direct evidence, the Hearing Examiner must review the facts, weigh the evidence and render a decision without reference or reliance upon inferences appearing in the record. Direct evidence is that which, if believed, demonstrates a fact without reliance upon inference or presumption. In

the case of an indirect claim, the Hearing Examiner will apply the McDonnell Douglas/Burdine burden shifting approach to determine whether discrimination has occurred. See McDonnell Douglas Corp. v. Green. 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). In a claim presented by indirect evidence, the Hearing Examiner will often rely upon inferences and presumptions raised by the evidence, rather than upon direct statements of discriminatory animus.

The testimony and evidence presented in this case create a factual record that more closely fits with a determination of discrimination under the indirect method. In this method, the Hearing Examiner must review the record to determine whether it supports a claim of discrimination or not. This analysis is performed through an application of the facts to the elements of a *prima facie* claim of discrimination and through an examination of whether the Respondent has offered a legitimate, nondiscriminatory explanation for its conduct leading to the claimed of discrimination. The Complainant might still prevail even if the Respondent presents a legitimate, nondiscriminatory explanation, if she/he can produce evidence that demonstrates the Respondent's explanation is either not credible or represents a pretext for an otherwise discriminatory reason. While various burdens shift between the parties in this analytical approach, the Complainant bears the ultimate burden to establish that discrimination has occurred. The standard or degree of proof is by the greater weight of the credible evidence which is more popularly known as by the preponderance of the evidence. The preponderance of the evidence is not so strict a standard as by "clear and convincing evidence" or that "beyond a reasonable doubt" (the standard in criminal cases). The preponderance of the evidence is where the record supports a conclusion that something is more likely than not.

In the present matter, the Complainant presents two allegations of discrimination. First, that she was not called back to work due to her sex/pregnancy. Second, she asserts that the reason she was not recalled was due to her familial status. For the most part, the basic claim of discrimination can be stated in identical terms for both protected classes.

A claim of discrimination requires the Complainant to establish each of the elements of a *prima facie* claim. A *prima facie* claim is a statement of the basic facts necessary to demonstrate that discrimination has occurred. The three elements of a *prima facie* claim can be stated as follows. First, is the Complainant a member of the asserted protected classes. Second, did the Complainant experience an adverse employment action. Third, is there a causal link between the Complainant's protected classes and the adverse employment action. Each of these elements must be demonstrated by the preponderance of the evidence. In other words, the Complainant must present facts and evidence that demonstrate that it is more likely than not that her termination / lack of recall was a result of her being a pregnant woman.

The Complainant is a member of both protected classes, sex/pregnancy and familial status. Her condition as a pregnant woman brings her into both protected classes. As to the protected class of sex/pregnancy, the Hearing Examiner has previously addressed this issue in Dickson v Woodman's, MEOC Case No. 21919 (Ex. Dec. 10/23/95). With respect to the claim of discrimination on the basis of familial status, pregnancy is one of the conditions that forms the definition of the class. See Section 39.03(2)(s) Mad. Gen. Ord.

While there was some discussion of when and whether the Respondent knew of the Complainant's pregnancy, the Hearing Examiner is satisfied that Caviedes was aware of the Complainant's status during her employment. Though there is no question that the Complainant

did not self-identify her pregnancy to the Respondent, it was apparently the subject of conversation among other workers. Caviedes stated at hearing that he overheard discussions of other workers about the Complainant's pregnancy and he was aware of it prior to his releasing the Complainant from work.

The question of whether the Complainant experienced an adverse employment action is somewhat more difficult. The Respondent was preparing to open a new restaurant at the end of May, 2011. Prior to the opening, the Complainant was employed to help prepare the location for business. As part of this work, the Complainant obtained a bartender's license and performed other work around the restaurant. At the end of May, 2011, the weather began to get hot. During or about the Memorial Day weekend, the air conditioner for the Respondent's restaurant broke. Caviedes stated that he observed the Complainant in increasing discomfort due to the heat. He observed that the Complainant needed to take frequent breaks, was perspiring profusely and appeared pale. Caviedes had experience supervising workers in hot climates and he testified that his observations of the Complainant made him concerned for her health, in part because of her pregnancy. Caviedes spoke to the Complainant and indicated that she could go home until the air conditioner was repaired. Caviedes also spoke with his other employees and gave them the same opportunity.

The Complainant did not object to Caviedes offer to release her from work pending the repair of the air conditioner. The Complainant asserts that she was told that once the air conditioning unit was back online, she would be recalled to work. She testified that she had called the Respondent during the time the air conditioning unit was being worked on and was again told that she'd be recalled when the work was completed, but not given a date for her recall. She further testified that she had called another time and asked specifically when she'd be able to return to work, but was not given an answer. The Complainant does not indicate with whom she spoke or precisely when the conversation occurred.

On the other hand, the Respondent indicated at hearing that once the work was completed on the air conditioning unit, that there were several efforts to contact the Complainant by telephone at the telephone number provided on her job application. Jane Kelsey, Caviedes' wife who acted as representative for purposes of the hearing indicated that more than one individual attempted to call the Complainant on more than one occasion. She also testified that she specifically reminded Caviedes to call the Complainant to return. The Respondent indicated that the repeated attempts did not result in either reaching the Complainant directly or in gaining her cooperation to return the Respondent's calls.

The bottom line is that the Complainant did not return to work after she was voluntarily released from work due to the heat and the broken air conditioner. This failure to return represents a loss of income and the opportunity to advance. The Hearing Examiner is satisfied that the circumstances demonstrated in the record represent an adverse employment action.

The final element the Complainant must establish is that it is more likely than not that the Complainant was not returned to work due to her membership in one or more of her protected classes. At hearing, the Complainant stated that she brought her claim of discrimination because Caviedes told her when offering the opportunity to go home due to the heat that the Complainant had not informed him of her pregnancy. It's not entirely clear whether this was intended to mean that the Respondent was not informed by the Complainant at all or if it meant

that Caviedes had not been informed prior to hiring the Complainant. From this statement, the Complainant infers a discriminatory animus for the Respondent's failure to recall her.

While the Hearing Examiner can accept that is one inference that can be derived from the statement testified to by the Complainant, it is not the only inference that might be drawn. The statement may just have been a statement of surprise or disappointment on the part of Caviedes without any implication of potential action to come. There is no indication from the statement, one way or the other, from which the Hearing Examiner can conclude that Caviedes would have declined to hire the Complainant had he known of her pregnancy at the time of her application. The Hearing Examiner cannot assume that Caviedes would have acted illegally had he known of the Complainant's pregnancy prior to her employment by the Respondent.

Though the Complainant does not specifically indicate that the Respondent's apparent failure to contact her after the air conditioning was repaired also supports her claim of discrimination, the Hearing Examiner understands her to be making that argument. This really seems to be an extension of the Complainant's main assertion of discrimination. Essentially, she contends that Caviedes' statement prior to her temporary layoff due to the broken air conditioner demonstrates the intent to discriminate against her when she was not called back from layoff. This is somewhat circular in nature however. It depends almost entirely upon finding that the failure to be called back was an intentional act motivated by a desire not to have the Complainant return to work due to her pregnancy.

The record, in this matter, is extremely mixed. The Complainant's version of events is fairly clear. She agreed to take time off until the air conditioner was repaired. When she did not hear from the Respondent about returning, she called to inquire about returning to work. She testified that the first time she called she was told that the air conditioner was not yet repaired, but that she'd be called. The second time, she called, she testified that she did not ask about whether the air conditioner was repaired, but rather when she could return to work. She received no answer. It is not clear whether she left that message on an answering machine or whether she spoke to someone in person. If she spoke with someone, there is no indication in the record with whom she spoke.

The Respondent sets forth a different explanation of events. Kelsey described the difficulty she had in getting the air conditioner repaired or ultimately replaced. Kelsey testified that when the air conditioner was once again working, approximately two weeks after it first broke that she specifically reminded Caviedes that the Complainant needed to be called so that she could once again be scheduled for work. Kelsey further testified that Jessica Sanchez, an employee of the Respondent, and several other unidentified employees attempted to contact the Complainant without result. The testimony was that the Respondent used the telephone number provided by the Complainant on her employment application. At hearing, the Complainant confirmed that the number was her telephone number at the time in question.

Kelsey stated that after some period of calling without a response from the Complainant, they stopped calling assuming that the Complainant was no longer interested in returning to work.

In Response to Kelsey's testimony, the Complainant could not explain why she would not have received calls from the Respondent averring that her telephone service was in working status. She indicated that she believed that the Respondent's testimony in this regard was false.

She also indicated that she lived only a short distance from the Respondent's restaurant and that the Respondent could have simply come to her home to verify her interest or lack of interest as well as her housing information.

In this regard, the record creates a problem of proof between the parties. There is nothing in the record from which the Hearing Examiner can find one party's testimony more credible than the other's. Both testified in a forthcoming manner and in a manner that was not openly evasive. Neither party appeared to understand how to best present their respective testimony and seemed somewhat confused by the hearing process. The Hearing Examiner attempted, where possible, to clarify the testimony presented through additional questions.

The Hearing Examiner finds that both sides appeared credible, despite the fact, that it seems that one side is likely being less than entirely truthful. However, the record does not permit the Hearing Examiner to determine which party is not entirely forthcoming. Both have reasons for shading their testimony in their particular favor. Neither party presented supporting testimony of other witnesses who might have been able to shed light on the testimony given.

During the investigative phase of a complaint, the Complainant is entitled to an inference of credibility in that factual disputes, such as the Hearing Examiner is presented with here, must be resolved in favor of the Complainant. However, at the hearing stage, the Complainant is not entitled to that same inference of credibility. In other words, the Complainant must demonstrate that her testimony is to be believed over that of the Respondent by a preponderance of the evidence. If she fails to convince the Hearing Examiner that her testimony is more credible, she fails to carry her burden of proof and her complaint will be dismissed.

In the present matter, the Hearing Examiner cannot find the Complainant's explanation to be more credible than that of the Respondent. This does not mean that the Hearing Examiner believes that the Complainant is lying. It simply means that the Hearing Examiner does not have sufficient information to make a reasoned determination that the Complainant's explanation is more likely than that of the Respondent.

The Hearing Examiner does note that during his testimony, Caviedes gave an indication that he was to some degree unhappy with the Complainant's work performance prior to his releasing her due to the air conditioner problem. He indicated that the Complainant took more frequent breaks to smoke or was often observed to be sitting while other employees were working. It seems that Caviedes may not have been entirely unhappy when the Complainant did not return to work. Should Caviedes' negative evaluation of the Complainant's performance factor into a decision not to recall her, it would not represent a discriminatory reason. Failure to meet reasonable performance expectations represents a legitimate, nondiscriminatory reason to terminate an employee. While the record contains this testimony, it does not appear to be the sole or an independent reason for the Complainant not to be recalled.

There was also some indication that the Complainant may not have been recalled due to a lack of business to support her employment. There was really no testimony at the time of hearing with regard to this allegation. However, if there had been supporting testimony, it would have presented a legitimate, nondiscriminatory explanation.

The long and short of this discussion is that the record contains several different explanations for why the Complainant did not return to work with the Respondent once the air

conditioner was replaced. It could have been because the Respondent did not wish to recall a pregnant woman who would have only worked for a short number of weeks. It could have been that the Respondent did not wish to recall an employee who was not sufficiently productive either because of her lack of initiative or because of a lack of business to warrant her recall. It might have been because despite its best efforts, the Respondent could not reach the Complainant to call her back to employment. Finally, it could be that the Complainant simply might not have wished to return to employment and did not respond to the Respondent's contacts. While some of these explanations have more merit than others, the problem for the Hearing Examiner is that the record is insufficient to determine that an explanation favoring the Complainant's claim of discrimination is more likely than any of the explanations favoring the Respondent.

Given the burdens of proof in discrimination claims, the Hearing Examiner must dismiss the complaint for a failure of the Complainant to meet her burden of proof. The Hearing Examiner recognizes that the customary analytical framework was not precisely followed in explaining this outcome. However, the Hearing Examiner finds that any deviation from the strict dictates of the McDonnell Douglas/Burdine method were necessary to fully explore the positions of the parties and to address the limited testimony presented at hearing. The Hearing Examiner does believe that he has given consideration to the arguments and testimony of the parties in this explanation.

Signed and dated this 1st day of August, 2013.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner