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

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<tr><td>Elizabeth Hagland
6441 Linden Circle
Windsor, WI 53598

Complainant

vs.

Bancroft Dairy
1010 South Park Street
Madison, WI 53715

Respondent</td><td>RECORDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Case No. 20909</td></tr>
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A complaint of sex discrimination in employment was filed by the Complainant, Elizabeth Hagland, with the Madison Equal Opportunities Commission (M.E.O.C.) on February 12,1988 alleging that she was treated differently than male employees of the Respondent, Bancroft Dairy, in the terms, and conditions of employment.

Pursuant to the complaint, an investigation was conducted by an M.E.O.C. Investigator/Conciliator. Following the investigation, an Initial Determination was issued on December 14,1988 wherein the Investigator concluded that there is probable cause to believe that the Respondent discriminated against the Complainant as charged, in violation of the Equal Opportunities Ordinance (E.O.O.), sec.3.23(7), of the Madison General Ordinances (M.G.O.).

The proceedings in this case were delayed and/or temporarily suspended due to M.E.O.C. personnel changes and other complications. Approximately twenty-six months after she filed her complaint, the Complainant was discharged by the Respondent on March 30,1990. She then filed an amended complaint, again alleging sex discrimination by the Respondent and retaliation for filing her February 1988 complaint, in violation of the E.O.O, sec. 3.23(8), M.G.O.

Pursuant to the amended complaint, further investigation was conducted which resulted in the issuance of an Amended Initial Determination dated September 4,1990, wherein the Investigator concluded that there was no probable cause to believe that the Complainant was unlawfully discharged because of her sex. The matter of retaliation was not addressed.

The Complainant timely appealed the Amended Initial Determination of no probable cause and the matter concerning only the Complainant's discharge from employment was reviewed by an M.E.O.C. Hearing Examiner. The Hearing Examiner's decision on review of the Amended Initial Determination was dated November 22,1991 and reversed the no probable cause second Initial Determination by concluding that there is probable cause to believe that the Respondent discharged the Complainant in retaliation for her filing a sex discrimination complaint with the M.E.O.C. on February 12,1988.

The parties were invited to attempt conciliation regarding the issues raised by the Complainant. Nothing was resolved through that avenue, however, and the case was certified for hearing as of the original certification date of January 13,1989.

The hearing was held before a second Hearing Examiner on January 12th, 13th, 14th, and 19th,1993. The Complainant appeared in person and was represented by Attorney Jacqueline Macaulay of Borns, Macaulay and Jacobson. The Respondent appeared by its Personnel Manager, Terri Engel and by Attorney Ann M. Barry of Buchanan and Barry, S.C. The parties filed simultaneous post-hearing briefs.

Having reviewed the hearing evidence and considered the post-hearing briefs filed by the parties, I now make the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant is an adult female who was employed by the Respondent from March 14,1985 until she was discharged on March 30,1990. She held a variety of jobs in the Respondent's plant during those five years.
2. The Respondent dairy company is a manufacturer of dairy byproducts such as yogurt and buttermilk. It employs over 100 people.
3. When the Complainant was hired by the Respondent's plant superintendent, Dave Arnold, it was suggested too her that her hire was an affirmative action necessitated by the Respondent's government contracts requiring it to increase the number of women and minorities in its work force.
4. The Respondent's plant workers were and are members of the Teamsters Union Local 695 covered under a collective bargaining agreement with the Respondent.
5. The Complainant's first job as an employee of the Respondent was to fill in on the yogurt machine for a male employee who was on disability leave. While in that position she sought assistance in learning her job from two male co-workers in the yogurt department but was ignored, as was her request for training to her shift supervisor, Tim Noll. She complained to her then union steward, Fred Kluever, who also was unsuccessful in securing training on the yogurt machine for the Complainant from supervisor Noll.
6. The Complainant next worked on a packaging machine (NLL) beginning October 7,1985 after the yogurt worker who had been on disability leave returned to his job. She invoked her right to the NLL job, notwithstanding the expressed intention of plant superintendent Arnold to give the job to a male employee who did not have job bidding rights at that time under the union contract. Arnold reluctantly assigned the NLL job to the Complainant, advising her that she had to prove that she could do the job or else she would be out of a job at Bancroft.
7. Sometime after starting on the NLL cleanup job, the Complainant was told by an efficiency supervisor, Jerry Lapp, that she had to be retrained although she had never been told that she was not operating the machine correctly. Lapp worked with her on the machine the same evening that he informed her of the retraining. On the following two nights a male co-worker and a male lead worker, respectively were assigned to work with the Complainant on the NLL. For the rest of the week she and the lead worker painted the machine which did not involve any training.
8. At the end of February 1987 the Complainant sought a job on the NIMCO buttermilk machine which was being vacated by Jesse Madrigal because he had learned that the hours of work on that job would be changing. His hours had been 7am to 3pm. She got the job only after she requested union assistance. She alleged that the job had been offered to two male employees who had less seniority than the Complainant.

9. The hours of work on the NIMCO machine for the Complainant were changed from 7am-3pm to noon-8pm. That shift made child care arrangements difficult for her after her child was born. She continued on the noon-8pm shift, however, but when an earlier shift NIMCO job opened up she requested a transfer to it which was denied. When she left the NIMCO job and also when she was on pregnancy leave both of her replacements worked from 7am-3pm. According to shift supervisor Bruce Langhoff, the hours were changed to noon-8pm when the Complainant held the job for "organizational reasons".
10. A co-worker of the Complainant's on the NIMCO machine was Roger Thompson. Although he worked an earlier shift than the Complainant, they frequently overlapped. Both he and the Complainant were responsible for the cleanup of the machine although Thompson had other duties as well that were different from the Complainant's.
11. Control of e-coli bacteria in dairy operations is a major, recurrent problem. The Respondent's quality control supervisor for the control of e-coli in early 1988 was Lloyd Ward. He investigated clean-up practices and did spot checks to determine the e-coli count. He did not supervise individual employees responsible for clean-up on the machines.
12. 12. In mid-January 1988, Ward inspected the NIMCO machine cleaned by the Complainant and Roger Thompson. He found that an O-ring had not been removed and cleaned. The Complainant and Roger Thompson both disclaimed knowledge of the existence of the O-ring in question. On January 19,1988, separate meetings on the NIMCO clean-up problems were held with the Complainant and Roger Thompson. Present at both meetings were a union representative, Dave Arnold, Bruce Langhoff and the Respondent's personnel director at that time, Ross Reinhold. The meeting with Roger Thompson resulted in a non-disciplinary verbal admonishment about his clean-up practices. The meeting with the Complainant resulted in a disciplinary warning letter from assistant plant superintendent Bruce Langhoff formally reprimanding her for failure to follow appropriate cleanup procedures on the NIMCO machine. The letter noted that it would remain in her personnel file for nine months.
13. Roger Thompson expressed great surprise that he was given an informal 'talking to' while the Complainant was given a formal warning letter on the clean-up matter.
14. Although the record shows that at least four male employees responsible for clean-up of machines (including Jesse Madrigal whom the Complainant replaced on the NIMCO machine) have acknowledged that they have sometimes failed to remove O-rings for cleaning, but have never been issued a disciplinary warning letter for failure to do so.
15. On January 20,1988, the Complainant filed a grievance with the union asking for withdrawal of the warning letter and an apology from the Respondent. On February 12,1988 she filed a M.E.O.C. complaint charging the Respondent with sex discrimination by disparate treatment in the terms and conditions of employment.
16. The warning letter issued to the Complainant was withdrawn by the Respondent at the end of February 1988 and replaced by an informational letter which essentially stated the same things as the warning letter but is not a formal disciplinary measure. Nevertheless, it was placed in the Complainant's personnel file. The warning letter was withdrawn shortly after the Respondent was notified that the Complainant had filed a complaint with the M.E.O.C.
17. During her five years of employment by the Respondent the Complainant made several requests for a "blue hat" (leadworker) position, all of which were denied by Dave Arnold, who, according to union steward Kluever, stated that there will never be a woman manager as long as he is there. "Blue hats" are not posted job vacancies subject to formal procedures under the union contract. They are assigned to workers on a job when management perceives a need for a leadworker to make decisions to keep multiple product lines running smoothly in a unit. The position carries no formal job description and "blue hats" earn a flat 20 cents an hour over their

wage rate. All "blue hats" are male and there was at least one "blue hat" in a one worker department during the time relevant herein.

18. On one occasion , the Complainant phoned supervisor Langhoff to request a sick day off. When, in response to Unghoff's question, she replied that she was not sick, he denied her request for time off. She took the day off anyway and only informed Langhoff the next day that the purpose of her request was to take her child to a medical appointment.
19. A co-worker of the Complainant, Roger Gehin, once threatened her over a job bid and also threw a ladder at her, in violation of management and union rules. Dallas Christenson, the union shop steward at that time, informed the Respondent's management of the Complainant's troubles with Gehin. No action was taken and no investigation was conducted concerning this matter whereas action to discharge Fred Kluever was taken after he was involved in an altercation with a male co-worker.
20. In January 1990, the Complainant was the only bidder on a posted job cleaning vats in the cheesemake department. She often worked a considerable number of hours of overtime as was permitted by the Respondent's policy. Depending on the workload, she sometimes came to work at 4pm and worked until 4am the next morning. She did not need a supervisor's permission to do so.
21. For March 28-29,1990 (Night 1), the Complainant's time card showed that she was punched in at 3:59pm on March 28th and was punched out at 4:16am on March 29th. For March 29-30,1990 (Night 2), her time card showed that she was punched in at 3:59pm on March 29th and was punched out at 3:41am on March 30th. She does not know who punched her time card out on Night 2.
22. During the week which included Nights 1 and 2, the Complainant initiated light conversations with some employees in the break room regarding the possibility of trading time card punch out favors with them.
23. During Night 1, a post-midnight supervisor, Dick Harmes, began searching for the Complainant in response to an employee who stated he was looking for her. Over a period of several hours he was unable to locate her in person or through the plant paging system. On Night 2, Harmes and another supervisor, Greg Endres, searched for the Complainant again over a period of hours without success.
24. Sometime during the morning of March 30,1990 Harmes communicated his concern about not finding the Complainant on the premises on Nights 1 and 2 to the plant superintendent Arnold. When the Complainant arrived at work on March 30th at 4pm she was summoned to Arnold's office and summarily discharged for "stealing time" from the Respondent by being punched in but not present at work for several hours on the previous two nights. Stealing time is a form of dishonesty which does not require any warnings prior to discharge under the union contract.
25. The Complainant filed a grievance with the union on the morning of April 2,1990. The first stage of the grievance was denied on April 5,1990. Before any investigation of the circumstances surrounding her discharge was underway, the Complainant's job was posted for bidding.
26. On April 10, 1990, when the Complainant's M.E.O.C complaint of February 12, 1988 was still pending, she filed an amended complaint charging the Respondent with sex discrimination and retaliation for discharging her for failure to punch out on the time clock on March 30, 1990. In fact, her discharge was for "stealing time" from the Respondent by falsifying her punch out times on two consecutive nights.
27. During her tenure as an employee of the Respondent, the Complainant filed several grievances and sought assistance from the union in getting access to and training for certain plant jobs, sometimes without success. She received a written warning/reprimand for her clean up practices when her male co-worker on the NIMCO machine and other male employees with

similar responsibilities did not. She experienced emotional distress and often felt frustrated and "picked on" by male management personnel over the course of the five years that she was employed by the Respondent.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is an adult female who was employed by the Respondent from 1985 to 1990. She is a member of a protected class under sec. 3.23(7),M.G.O. which prohibits discrimination against any individual with respect to the terms, conditions or privileges of employment because of his/her sex, among other categories.
2. The Respondent is a manufacturer of dairy by-products in Madison, is an employer that employs over a hundred people and is subject to the provisions of sec. 3.23(7), M.G.O.
3. The Respondent discriminated against the Complainant in the terms, and conditions of employment by treating her differently than some of her male co-workers in violation of sec.3.23(7),M.G.O.
4. The Respondent did not discriminate against the Complainant in retaliation for filing a complaint with the M.E.O.C. in February, 1988.

RECOMMENDED ORDER

IT IS HEREBY ORDERED

1. That Respondent shall pay the Complainant the sum of Five Thousand dollars (5,000.00) in compensatory damages for emotional distress.
2. That the Complainant is awarded costs and reasonable attorney's fees. She shall file a petition for the same with the M.E.O.C. together with all supporting affidavits and documents and serve copies of the same upon the Respondent within thirty days of the date of this Order.
3. That the portion of the complaint charging the Respondent with sex discrimination and retaliation in discharging the Complainant for dishonesty ("stealing time") is dismissed.

MEMORANDUM DECISION

This is a sex discrimination in employment and retaliation case in which the Complainant has charged that the Respondent treated her differently than male co-workers in the terms and conditions of employment in violation of sec. 3.23(7), E.O.O. She further charges that the Respondent retaliated against her by discharging her for filing an amended complaint against it in 1988, in violation of sec. 3.23(8) E.O.O.

There is no dispute that the Complainant was a competent employee of the Respondent during the five years that she worked in the Respondent's plant. Under the analysis widely used in federal Title VII disparate treatment in employment cases, the Complainant met her burden of establishing a prima facie case of discrimination by showing the probable existence of facts which, if otherwise unexplained, raise a presumption of discrimination. <u>Texas Department of Community Affairs v. Burdine</u>, 450 U.S.248,254(1981). The Complainant was ignored by male co-workers when she sought training from them in learning a new job on the yogurt machine. Later she was told that she had to be retrained on the NLL machine although the retraining period included some days of painting the machine with a lead worker. She had difficulty in securing a job on the NIMCO machine for which she was eligible and for which she had seniority until she sought union assistance. When she finally got the job with union help, she was told by the plant superintendent that she would have to prove herself on the machine or else she would be out of a job. There is no evidence that similarly situated

male employees were treated in this manner. Finally, the treatment by the Respondent that was the impetus for the filing of an M.E.O.C. complaint in February 1988 was the disciplinary warning letter she received regarding her cleanup practices on the NIMCO machine while her male co-worker, who also was responsible for cleanup on the NIMCO, received only a verbal admonishment for his cleanup practices.

Fred Kleuver, a union steward during the period in question, testified at the hearing that he heard Dave Arnold, the plant superintendent, state that there would never be a female manager in the plant as long as he was there. When a male co-worker of the Complainant threw a ladder at her during an argument, contrary to union rules, she complained to management personnel about the incident, without result. The result of an altercation between two male employees was an action to discharge one of the males.

Although in his testimony Dave Arnold denied that he made discriminatory remarks about women as workers in the Respondent's plant and, in particular, about the Complainant, that testimony was sparse and, to a great degree consisted of repeated statements of "I don't remember." Overall credibility was lacking and there is sufficient evidence in the record to find that the Complainant was treated differently than her male co-workers in the terms and conditions of her employment because of her sex.

With respect to the Complainant's amended complaint charging the Respondent with retaliation against her when she was discharged on March 30, 1980, two factors militate against the Complainant's charge. First, the passage of approximately two years between the filing of the Complainant's initial complaint and the filing of her amended complaint strongly negates an inference of a retaliatory motive of the Respondent. Clark v. Chrysler Corp. U.S. Court of Appeals, 7th Circuit, March 5,1982. Second, the Complainant has acknowledged in her brief that the Respondent has met its burden under Burdine by offering a legitimate, nonretaliatory reason for discharging her in 1990. At the same time, she maintains that the reason proffered -"stealing time"- was pretextual, in light of the disparate treatment by the Respondent over a five year period during which she filed several grievances through her union and acted assertively to claim her job rights.

Notwithstanding the Complainant's credible evidence of disparate treatment over a period of several years, she did not present witnesses or supportive evidence other than her own testimony to confirm that she was present and working in the plant between midnight and 4:21am on Night 1. The corroborative statement by co-worker Roger Thomson that he had coffee with the Complainant at about 4:30am on Night 1 does not account for the hours before 4:30 am that her supervisor tried but was unable to locate the Complainant in the plant despite paging her and physically searching for her. As to Night 2, the Complainant did not adequately reconcile her assertion that she forgot to punch out when she left the plant at 12:15am and the fact that her time card was punched out at 3:41am. Finally, the allegedly jocular conversation initiated by the Complainant in the break room in which she suggested that she and others trade time card punch outs to secure pay for overtime not worked, undermines her testimony regarding her presence in and absence from the plant on Nights 1 and 2. Accordingly, I find that the evidence, on the whole, does not support a conclusion that the reason given by the Respondent for its discharge of the Complainant was pretextual. and was in retaliation against her for filing an M.E.O.C complaint of sex discrimination in 1988.

Damages

The E.O.O provides that where the Commission finds that discrimination has occurred "it shall order such action by the Respondent as will redress the injury done to the Complainant in violation of this

ordinance . . .", sec.3.23(9)(c)2.b., M.G.O. E.O.C. Rule 17 expressly authorizes compensatory damages for discrimination as follows:

> Compensatory losses, reasonable attorney fees and costs may be ordered along with any other appropriate remedies where the Commission finds that a Respondent has engaged in discrimination.
>
> This rule does not - by express reference to compensatory losses, attorney fees and costs - limit in any way the Commission's authority to order any other remedies permitted or required under sec 3.23, Madison General Ordinances.

An award of compensatory damages for emotional distress is considered to be within the broad language of the E. O.O.'s relief provision along with awards for housing discrimination, Chomicki v. Wittekind,128 Wis. 2d,188(1985). In Chomicki, the testimony of the victim of housing discrimination alone was sufficient to establish emotional distress. Id. at 201.

During the five years that she was employed by the Respondent the Complainant, in her testimony, indicated that she often felt frustrated and "picked on" by by male management personnel as well as by certain male co-workers. She struggled to gain access to jobs in the plant for which she was qualified. She felt she was treated unfairly at times, particularly when she received the disciplinary warning letter in January, 1988. In consideration of her emotional distress over a period of five years, an award of $5,000 as compensatory damages is appropriate.

Signed and dated this 15th day of April, 1993.

EQUAL OPPORTUNITIES COMMISSION

Sheilah O. Jakobson
Hearing Examiner

MADISON EQUAL OPPORTUNITIES COMMISSION

Elizabeth Hagland vs. Bancroft Dairy MEOC Case No. 20909 Recommended action to the MEOC on the appeal of the Hearing Examiner's decision pertaining to discrimination on the basis of sex in the terms and conditions of employment.

This matter was brought before the Equal Opportunities Commission on appeal from the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order issued on April 26, 1993. The Hearing Examiner, Sheilah O. Jakobson, ruled, in part, that the Respondent discriminated against the Complainant because of her sex in the terms and conditions of her employment. The Hearing Examiner also ruled that the Respondent did not discriminate against the Complainant in retaliation of her filing a complaint with this agency when they terminated her employment with them.

At its November, 1993 meeting the Commission voted to remand the retaliation issue. The termination part of the case was incorrectly before the Commission. The procedural background on the termination issues is confusing, hence a brief explanation is in order.

PROCEDURAL BACKGROUND

On March 30, 1990, the Respondent terminated the Complainant. The Complainant timely filed an amended complaint alleging that the Respondent terminated her because of her sex and in retaliation for filing the sex discrimination complaint with this agency.

An amended Initial Determination was issued on September 4, 1990 concluding no probable cause to believe that the Complainant was unlawfully terminated because of her sex. The retaliation issue was not addressed.

The Complainant filed a timely appeal of the amended Initial Determination of no probable cause. The Hearing Examiner issued a decision on November 22, 1991 reversing the amended Initial Determination of no probable cause, but not based on sex, which was the issue addressed by the amended Initial Determination, but on retaliation. Hence, the Hearing Examiner erred in two ways: 1) a reversal was made on an issue not properly before him because the Investigator made no conclusions of law on the retaliation issue; and 2) the Hearing Examiner failed to address the no probable cause because of her sex, which was properly before him.

Nevertheless, a public hearing was held on January 12, 13, 14 and 19, 1993 on the termination issues because of the Complainant's sex and in retaliation for filing her initial complaint.

Neither termination issue was properly before the Hearing Examiner. The only appropriate issue was sex discrimination in the terms and conditions of employment. Consequently, on November 11, 1993, this Commission remanded both termination charges and ordered the Investigator to issue an amended Initial Determination on the retaliation claim, and ordered the Hearing Examiner to review the sex discrimination no probable cause decision.

On November 11, 1993 oral arguments were heard by the Commission on the terms and conditions claim. The Commission adjourned from their meeting without discussing the merits of the appeal and set discussion for its December 9, 1993 meeting.

RECOMMENDATIONS

Commissioner Booker Gardner has considered all the appropriate and relevant parts of the record in this matter as well as the oral arguments made, and makes the following recommended action to the full Commission:

That the Hearing Examiner's conclusions of law finding that the Respondent discriminated against the Complainant because of her sex in the terms and conditions of her employment is hereby:

AFFIRMED

Further, that the Hearing Examiner's Recommended Order awarding the Complainant damage for emotional distress and reasonable attorney's fees and cost is hereby:

AFFIRMED

The above recommendations are based on the following recommended findings and legal conclusions, after a thorough examination of the transcript, documents and briefs submitted herein:

1. Approve Recommended Findings of Fact #1 and 2. Neither party made exceptions to these findings.
2. Approve Recommended Findings of Fact #3. This finding is a result of the Hearing Examiner weighing the credibility of the testimony provided by each party. The record contains sufficient evidence for a reasonable person to arrive at this Finding. (See Tr. at 30-31, 263, 278, 281-82, 431, 463, 819, 1012; Compl. Ex. 16)
3. Approve Recommended Findings of Fact #4. Neither party excepted this Finding.
4. Approve Recommended Findings of Fact #5 as amended below. There is sufficient credible evidence to support the Hearing Examiner's Findings.

   Amended Finding: The Complainant's first job as an employee of the Respondent was to fill in on the yogurt machine for a male employee who was on disability leave. While in that position she sought training from two male co-workers in the same unit on cleaning the machine but was refused, as was her request for training to Tim Noll, her supervisor at that time. In general, the two male co-workers refused to work with the Complainant in any way or to give her direction upon her request so that she could adequately perform her job duties in the yogurt department. (See Tr. at 460-63, 472, 630, 952-53, 1077-80, 731-33)

5. Approve Hearing Examiner's Recommended Findings of Fact #6 as amended below. The record contains sufficient credible evidence for a reasonable person to reach these findings.

   Amended Finding: ... bidding rights at that time under the Union Contract. Arnold asserted that the male employee to whom he wanted to offer the job was more qualified than the Complainant. He had attempted to ignore the Union Contract regarding bidding rights. However, Arnold reluctantly assigned... (See Tr. at 434-35, 460-66; Compl. Ex. 16)

6. Approve Hearing Examiner's Recommended Finding of Fact #7. The record contains sufficient credible evidence for a reasonable person to reach this Finding. The Commission shall not second-guess the Hearing Examiner's decision of what evidence is credible or otherwise if the record contains sufficient evidence for such Findings. (See Tr. at 438, 467-70; Compl. Ex. 18)
7. Approve Hearing Examiner's Finding of Fact #8 as revised below. The record contains sufficient credible evidence for a reasonable person to reach this Finding. (See Tr. at 474-485; 632-34; 660-65; 672-73; 679; 753-54; 853-54; Compl. Exs. 16, 11C)

   Amended Finding: Complainant requested the NIMCO job after the employee she had been replacing on an emergency relief returned to work. She sought the job because Jesse Madrigal had heard from other co-workers that the hours of work on that job would be changing, from 7:00 a.m.-3:00 p.m. to 12:00 p.m.-8:00 p.m. The NIMCO job was part running of the NIMCO buttermilk machine and part processing (pasteurizing). Dave Arnold did not want her to take the job. The processing part of the job involved heavy work, written calculations and working with a difficult co-worker (Brian Santos). Arnold said he'd never had a woman in processing. After the job was offered to two males with less seniority than the Complainant, she was offered the job, but with union assistance. (See Tr. at 474-79, 632-33, 753-54; Compl. Exs. 11C, 16 and Kleuver's notes)

8. Approve Hearing Examiner's Recommended Findings of Fact #9 as revised below. The credible evidence as supported by the record provides a reasonable person the basis to make this finding.

Amended Finding: When Complainant started on the NIMCO job, but not before, she discovered that the hours were noon-8:00 p.m., not 7:00 a.m.-3:00 p.m. as it had been for Madrigal (Compl. Ex. 11D). The job transfer notice had listed the work hours as "variable" (Compl. Ex. 11C). That shift made child care arrangements difficult for her after her child was born. The Complainant continued on the noon-8:00 p.m. shift, however, but when an earlier shift NIMCO job opened up she requested a transfer to it, which was denied. A male was offered the job. When she left the NIMCO job, and also when she was on pregnancy leave, both of her replacements, who were males, worked the 7:00 a.m.-3:00 p.m. shift, different from the Complainant's noon-8:00 p.m. shift. Shift Supervisor, Bruce Langhoff, states the hours were changed to noon-8:00 p.m. when she held the job "for organizational reasons". However, eventually, she was able to effect an informal change to an earlier starting and leaving time, without any objection from management. (Compl. Exs. 11C, 11D; Tr. 475, 480, 483-85, 625, 634, 700, 734-35, 853-855, 885)

9. Approve Hearing Examiner's Recommended Findings of Fact #10, 11, 12, 14, 15, 16 and 27. Amended Finding #13 as amended below.

   Amended Finding "...on the clean-up matter." Thompson thought that both he and the Complainant were equally responsible for the dirty o-ring because he was primarily responsible for cleaning the machine on that day. After the o-ring was discovered, Thompson and the Complainant removed and cleaned it when doing clean-up thereafter, as instructed by Ward on January 14, 1988. (See Compl. Exs. 3, 11D, 14, 18, 13A, 13C, 13D, 13E, 15, 19, 10, 24; See Tr. at 14, 15, 145, 147-50, 101-113, 163, 170, 273, 301, 492-507, 553, 639-40, 663-677, 699-703, 736-755, 769-802, 848, 887-900, 954-55)

   Although there was some conflict in the testimony as to the circumstances surrounding the o-ring and subsequent discipline, the record contains sufficient evidence for a reasonable person to determine that Thompson and the Complainant were equally responsible for cleaning the NIMCO machine on 1/14/88; that the o-ring in the float valve was not removed and cleaned by either person; that Thompson was treated differently than the Complainant with respect to discipline; that other male employees did not remove and clean o-rings, and "talked back" at Ward but were not disciplined as was Complainant; and that the reason offered by the Respondent for the difference in treatment was pretextual and discriminatory.

10. Reject Hearing Examiner's Recommended Finding of Fact #17 and restate as follows:

    Finding: No male in the buttermilk dept. was promoted to a "blue hat" position during the relevant time in question, nor did any "blue hat" opportunities occur. (See Tr. at 173-74, 91, 409-13, 683, 729, 867-72, 950-51)

11. Approve Hearing Examiner's Recommended Finding of Fact #18. Respondent simply made a general exception to this Finding without argument in their brief. Hence, the Commission is reluctant to reverse this Finding.
12. Reject Hearing Examiner's Recommended Findings of Fact #19. The record is vague at best as to whether Roger Gehin actually threw the ladder at the Complainant. The record lacks any credible evidence to arrive at this finding. (See Tr. at 94-96, 139-40, 447)
13. Approve Hearing Examiner's Recommended Findings of Fact #20. The Respondent makes no exception to this Finding.

14. Approve Hearing Examiner's Recommended Findings of Fact #27. The record contains sufficient evidence found credible by the Hearing Examiner such that a reasonable person could make this Finding. This particular Finding was based in great part on testimony the Hearing Examiner found credible. The Commission shall not second-guess the Hearing Examiner's Findings of credibility without consulting with the Hearing Examiner first.
15. Approve all Conclusions of Law pertaining to the terms and conditions parts of the case, except as amended below.

    3. ... with respect to disciplining her more severely than a male co-worker under similar circumstances; by creating a hostile work environment for not only the Complainant, but also other females; by not providing training to the Complainant which was offered to male employees;

    3a. The Respondent did not discriminate against the Complainant because of her sex in the terns and conditions of employment regarding promotional opportunities, i.e. "blue hat" The Complainant has failed to establish a prima facie case on this issue in that no promotional opportunities as a "blue hat" ever existed in the buttermilk dept.

Respectfully submitted on this 3rd day of December, 1993 by:

Booker Gardner, President
Madison Equal Opportunities Commission

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

Elizabeth Hagland 6441 Linden Circle Windsor, WI 53598 Complainant vs. Bancroft Dairy 1010 South Park Street Madison, WI 53715 Respondent	DECISION AND ORDER Case No. 20909

The Madison Equal Opportunities Commission (Commission) met on December 9, 1993 to consider the Petitioner's and Respondent's cross-appeals of the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order in the above-captioned matter. Present and participating in the Commission's decision were: Commissioners Anderson, Gardner, Houlihan, Miller, Rodriguez, Sowatzke, Verridan and Washington.

BACKGROUND

The Complainant, Elizabeth Hagland, filed a complaint of discrimination with the Commission on February 12, 1988 against the Respondent, Bancroft Dairy. The Complainant alleged that she had been discriminated against because of her sex in the terms and conditions of her employment. A Commission Investigator/Conciliator investigated the allegations of the complaint and issued an Initial Determination on December 14, 1988 concluding that there was probable cause to believe that discrimination had occurred. The parties were offered the opportunity to conciliate the complaint. Conciliation either failed or was declined.

The Complainant filed an amended complaint of discrimination with the Commission on April 10, 1990 alleging that she had been terminated from her employment by the Respondent on the basis of her sex and in retaliation for filing the initial complaint with this agency. A Commission Investigator/Conciliator investigated the amended allegations and issued an amended Initial Determination on September 4, 1990 concluding that there was no probable cause to believe that the Respondent discriminated against the Complainant because of her sex by terminating her. The Investigator/Conciliator did not address the retaliation claim in her conclusions.

The Complainant filed a timely appeal of the no probable cause decision based on sex. The Hearing Examiner issued a Decision on November 22, 1991 reversing the Investigator/Conciliator's conclusion of no probable cause. However, the Hearing Examiner did not base his decision on the sex discrimination claim. Rather, he inappropriately ruled on the retaliation claim and did not address the sex discrimination claim. The parties were offered the opportunity to conciliate the retaliation complaint. Conciliation either failed or was declined.

The entire complaint, including the claim of discrimination in the terms and conditions of employment and the termination because of retaliation claim, was transferred to the Hearing Examiner for the holding of a public hearing. A Notice of Hearing and Scheduling Order were issued and a public hearing was held on January 12, 13, 14, 19, 1993.

The Hearing Examiner issued her Recommended Findings of Fact, Conclusions of Law and Order on April 26, 1993, concluding that the Respondent discriminated against the Complainant because of her sex in the terms and conditions of her employment. The Hearing Examiner further concluded that the Respondent did not discriminate against the Complainant in retaliation for filing her complaint by terminating her. Both parties timely appealed the Hearing Examiner's Decision.

On November 11, 1993 the Commission remanded the termination part of the complaint: the retaliation claim was remanded to the Investigator/Conciliator for a finding of whether there was probable cause to believe that the Respondent discriminated against the Complainant by terminating her; the Commission Ordered the Hearing Examiner to consider whether there was probable cause that the Respondent terminated the Complainant because of her sex. Thereafter, the Commission heard oral arguments on the terms and conditions complaint. Parties were represented by their respective counsel and were present.

DECISION - APPEAL

The Commission, after fully considering oral arguments and the entire record, adopts the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order, as amended (see attached), as its own. The record adequately supports the Hearing Examiner's decision both as to liability and as to remedy, except where indicated by the attached.

ORDER

The Respondent's appeal is dismissed and the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order, as amended, are entered as the final order of the Commission.

The above Commissioners all join in entry of this Order.

Signed and dated this 15th day of December, 1993.

EQUAL OPPORTUNITIES COMMISSION

Paul B. Higginbotham
Acting Executive Director