

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

<p>Virginia Balch 50 Whitcomb Circle, Apt. Madison, WI 53711</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Snapshots, Inc. of Madison 5614 Schroeder Road Madison, WI 53715</p> <p style="text-align: center;">Respondent</p>	<p>RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p>Case No. 21730</p>
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A complaint of sex discrimination in employment was filed by the Complainant, Virginia Balch, with the Madison Equal Opportunities Commission (M.E.O.C.) on July 1, 1992, alleging that she was discriminated against by the Respondent, Snapshots, Inc. of Madison, when its manager discharged her from her job as kitchen manager because of her sex, in violation of sec. 3.23, Madison General Ordinance (M.G.O.)

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 October 23, 1992, wherein the Investigator concluded that there is probable cause to believe that the Respondent, by its manager, discriminated against the Complainant, as charged, in violation of sec. 3.23(7) of the Equal Opportunities Ordinance (E.O.O.) of the M.G.O.

The parties were invited to attempt conciliation regarding the issues raised by the Complainant. Conciliation was attempted but was unsuccessful and the case was certified for hearing as of December 30, 1992.

A scheduled pre-hearing conference was held in the afternoon of July 7, 1993 at the offices of the M.E.O.C. Both parties and their attorneys were duly notified of the conference by certified mail, return receipt received by M.E.O.C. However, the sole appearance at the conference was the Complainant's attorney.

On the morning of the scheduled pre-hearing conference, the Respondent's manager phoned the M.E.O.C. on behalf of the Respondent and stated that neither an attorney nor any other representative of the Respondent would attend the conference. The Hearing Examiner informed the Respondent's manager that an order for a default judgment might be entered against the Respondent for failure to appear at the pre-hearing conference. Nevertheless, no representative of the Respondent appeared at the conference and a hearing on the merits was scheduled for September 1, 1993 for the purpose of considering the appropriateness of awarding the Complainant payment for lost wages, emotional distress and for punitive damages.

Again both parties were duly notified by certified mail on July 13, 1993 of the hearing scheduled for September 1, 1993 and again no person appeared on behalf of the Respondent. The Complainant appeared in person and by her attorney, Robert J. Gingras. Notwithstanding the Respondent's failure to appear or be represented, the hearing proceeded. A motion by the Complainant's attorney for a default judgment on liability against the Respondent was granted by the Hearing Examiner.

Having reviewed the Complainant's hearing evidence and noted the Respondent's failure to appear at the hearing as well as at the pre-hearing conference, 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 October 1987 until September 8, 1991 when she was discharged from her position as kitchen manager.
2. The Respondent is a sports bar/restaurant corporation which also provides catering services. Prior to July 1990 it was known as Alexander's.
3. The Complainant began working for the Respondent as a full time day line cook in 1987 when it was operating as Alexander's. When Alexander's became Snapshots, Inc. in July 1990, the Complainant became an assistant kitchen manager. She was promoted to kitchen manager in November 1990.
4. In June 1991, the Complainant informed the Respondent's manager, Tom Galante, that she was pregnant and expecting a baby at the end of August. She expected to continue on her job until the day of the baby's arrival. She notified Mr. Galante that when her baby was born, she would take her two weeks paid vacation and return to work immediately thereafter.
5. The Complainant's baby was born on August 23, 1991 without complications. She intended to return to her job as planned in the second week of September.
6. Prior to her scheduled return to work the Complainant stopped by Snapshots to ask the manager what time he wanted her to come to work the next week. He told her to come to a manager's meeting the following Monday but not to plan on working that day.
7. At the manager's meeting on Monday, September 8, 1991, manager Galante informed the Complainant that he and the owners of Snapshots had decided that the Complainant would not be able to handle the kitchen manager's job physically since the birth of her child. He then offered her a job as a cook at a considerably lower wage rate than she had been earning as kitchen manager. Mr. Galante subsequently offered the Complainant additional pay providing she would sign a release of liability by Snapshots and also agree to sever all ties with the corporation. The Complainant declined the manager's offer.
8. Shortly after the Complainant was terminated from her kitchen manager's job, a male wait person who was a friend of the manager replaced her as kitchen manager.
9. The Complainant's last day of work for the Respondent was August 23, 1993, the date she gave birth to her child. Her pay at that time was \$450 per week with two weeks paid vacation time or \$23,400.00 per year.
10. The Complainant began looking for employment immediately after her discharge by the Respondent's manager. Three days after her termination she secured part time employment as a cook at an Ovens of Brittany restaurant in Madison.
11. The Complainant held several restaurant jobs after leaving her employment at the Ovens of Brittany until she secured a position with C.L. Swanson, a vending machine company, in January 1993. She was hired as a supervisor for its regional bakery. Currently, she is still employed by C.L. Swanson where she is earning approximately the same amount as when she left the Respondent's employ.

## RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is an adult female who was employed by the Respondent from 1987 to Sept 8, 1991. She is a member of a protected class under sec. 3.23(7) M.G.O. which prohibits discrimination in employment against any Individual because of his/her sex.
2. The Respondent is a sports bar/restaurant and catering service in Madison and is an employer subject to the provisions of sec. 3.23(7)(a) M.G.O.
3. The Respondent discriminated against the Complainant when it discharged her from her position as kitchen manager approximately two weeks after she gave birth to her child.

## RECOMMENDED ORDER

### IT IS HEREBY ORDERED

1. That the Respondent shall pay the Complainant the sum of Nine Thousand (\$9,000.00) dollars as back pay to compensate her for lost wages between September 1991 and January 1993 when her earnings became equal to those at the time of her discharge from the Respondent's employ.
2. That the Respondent shall pay the Complainant the sum of Ten Thousand (\$10,000.00) dollars in compensatory damages for emotional distress.
3. That the Respondent shall pay the Complainant the sum of Twenty Thousand (\$20,000.00) dollars in punitive damages.
4. 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 each upon the Respondent within thirty days of the date of this Order.

## MEMORANDUM DECISION

This is a sex discrimination in employment case in which the Complainant charges that the Respondent's manager violated sec. 3.23 (7), M.G.O. when he discharged her from her position as kitchen manager on September 8, 1991 because she is female and gave birth to a child on August 23, 1991.

Under the federal Title VII analysis generally followed by the M.E.O.C. in employment discrimination cases, the Complainant has the initial 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. Texas Department of Community Affairs v. Burdine, 450U.S. 248,254 (1981). If she succeeds in establishing a prima facie case, the burden of showing otherwise shifts to the Respondent.

The Complainant was an employee of the Respondent for over four years during which time she was promoted from her initial job as a cook to kitchen manager in November 1990.

In June 1991 the Complainant informed the Respondent's general manager, Tom Galante, that she was pregnant and expected the child's birth at the end of August. She told Mr. Galante that she did not need any extra time off for the birth but would take her regular two week paid vacation when the baby was born and would return to her job two weeks thereafter.

The birth of the Complainant's child on August 23, 1991 was uncomplicated. She felt able to return to her job as kitchen manager two weeks later. In her hearing testimony she stated that she loved her job

and considered herself to be a good worker who took pride in her work. She had never received any reprimands or criticism regarding her work from the manager or owners of Snapshots. Consequently, she was taken aback on September 8th when the manager informed her that he and the owners had decided that she was not capable of doing the job of kitchen manager because the birth of her child made her unable to handle the physical responsibilities of the job.

The Complainant's hearing testimony in which she described the circumstances that led to her discharge by the Respondent's manager was credible and raises the presumption of sex discrimination in employment. A prima facie case of employment discrimination on the basis of sex is thereby established by the Complainant. The Respondent's failure to attend or be represented at both the pre-hearing conference and the hearing on the merits despite proper notification, will result in a default judgment against it.

### Back Pay

Victims of employment discrimination may recover back pay. sec. 3.23(9)(c) 2b, M.G.O. The amount of back pay is reduced by the amount of wages earned by the Complainant from September 1991 up to January 1993 when she began earning wages approximately equal to her earnings of \$23,400.00 per year at the time she was discharged by the Respondent. Based upon her 1991 and 1992 W-2 forms submitted to the M.E.O.C. by the Complainant and including her income from Unemployment Compensation for those years she is entitled to a back pay award of \$1,730.00 for 1991 and \$7,270.00 for 1992, for a total back pay award of \$9,000.00.

### Damages

The Equal Opportunities ordinance 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)2b, 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.

The Complainant is seeking compensatory damages for the emotional distress she experienced when she was discharged by the Respondent. The discharge was unexpected and was a "big blow" to her. She testified that she was emotionally upset and angry and went home and cried. She was depressed about her circumstances for a long while. In addition, the sudden loss of her job caused her to be worried about paying her rent and other bills. Accordingly, in consideration of her emotional distress after she was discharged by the Respondent, she is awarded \$10,000.00 as compensatory damages.

### Punitive Damages

The Complainant is also seeking punitive damages which may be awarded when a plaintiff shows, by clear and convincing evidence, that a defendant's conduct was willful or wanton in reckless disregard of the plaintiff's rights or interests. Brown v. Maxey, 124Wis. 2nd 426.

The Respondent's manager, in willful disregard of the Complainant's employment rights, gave her no indication, warning or prior notice that he was going to discharge her from her job as kitchen manager. The reason he gave to the Complainant that she was too frail to handle her job after the birth of her child appears to be pretextual inasmuch as the Complainant was replaced by a male cook who was a friend of the manager's and who had no previous managerial experience. I find the evidence clear and convincing that the Respondent's manager's conduct was conscious and willful and was in total disregard of the Complainant's employment rights. Accordingly, the Complainant is awarded \$20,000.00 for punitive damages.

Signed and dated this 14th day of October, 1993.

EQUAL OPPORTUNITIES COMMISSION

Sheilah O. Jakobson  
Hearing Examiner

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The Recommended Order entered in this matter on October 14, 1993 awarded the Complainant her costs and reasonable attorneys' fees and established a schedule for the submission of a petition for costs and attorneys' fees together with supporting affidavits and documents.

On November 16, 1993, the Complainant filed her petition and a supporting affidavit for attorneys' fees in the amount of \$1,560.00 and for costs in the amount of \$96.00.

Having reviewed the Complainant's petition and the supporting affidavit submitted by the Complainant, I now make the following:

**RECOMMENDED FINDINGS OF FACT - ATTORNEYS' FEES**

1. On October 14, 1993, the Hearing Examiner entered a recommended order awarding the Complainant her costs and reasonable attorneys' fees in the proceeding.

2. On November 16, 1993, the Complainant submitted to the MEOC her petition for costs and attorneys' fees together with an affidavit executed by her attorney, Robert J. Gingras, which contained reference to the participation of Mr. Gingras' associate, Attorney Paul A. Kinne in the representation of the Complainant in this matter.
3. The Complainant has incurred the following costs in connection with the proceeding:
  - a. For Copies in the amount of \$4.40.
  - b. For Postage in the amount of \$1.60.
  - c. For Investigator services in the amount of \$90.00
4. The Complainant's attorney, Robert J. Gingras, has been engaged in the practice of law since 1981. Since 1985, his practice has been oriented toward litigation in the areas of civil rights and employment law on behalf of plaintiffs. In March, 1992, he became the owner of Gingras Law Office in Madison, Wisconsin, where approximately 60% of his practice involves cases of constitution or civil rights violations. Attorney Paul A. Kinne is an associate in the Gingras Law Office. His legal services in connection with this case were very minor.
5. The usual and customary fee charged by Attorney Gingras for legal services is \$150.00 per hour. The charge for Attorney Kinne's legal services is \$75.00 per hour.
6. The Complainant has filed an itemized bill which shows that her attorneys expended a total of 10.9 hours in representing her in the proceeding. Mr. Gingras services account for 9.9 hours and Mr. Kinne's services account for one hour of the total hours expended by the attorneys. None of the hours billed by the Complainant's attorneys were for duplicative, unnecessary or non-productive time.
7. The reasonable hourly rate for the legal services rendered to the Complainant by her attorneys is \$150.00 per hour for the services of Robert J. Gingras and \$75.00 per hour for the services of Paul A. Kinne.

### **RECOMMENDED CONCLUSIONS OF LAW - ATTORNEYS' FEES**

8. A Complainant in proceedings before the Equal Opportunities Commission is entitled to recover costs and reasonable attorneys' fees on any significant issue on which she or he prevails. MEOC Rule 17; see also, Vance v. Eastex Packaging, MEOC Case No. 20107, Aug. 29, 1985) (citing Hensley v. Eckerhart, 461 U.S. 424 (1983)); Cf. Watkins v. LIRC, 117 Wis. 2d 753, 345 N.W.2d 482 (1984).
9. One of the fundamental purposes of a fee award is to compensate an attorney for her or his efforts. Accordingly, the fee award should be determined by allowing the attorney to recover a reasonable hourly rate for all time reasonable expended in representing her or his client. Copeland v. Marshall, 641 F.2d 880 (D.C. Cir: 1980) (en banc).
10. It is appropriate to use an attorney's or law firm's customary billing rate in setting a reasonable hourly rate in awarding fees to that attorney or law firm. See, Laffe v. Northwest Airlines, Inc., 746 F.2d 4, 15 (D.C. Cir. 1984).
11. The fees awarded to a prevailing Complainant in a civil rights case ought not be limited by any monetary award because substantial non-monetary benefits are also realized by successful Complainants, and because an adequate fee is necessary to attract competent counsel in such cases. City of Riverside v. Rivera, 477 U.S. 561, 573-78 (1986); Copeland v. Marshall, 641 F.2d at 987.
12. A prevailing party is entitled to her or his costs including a reasonable attorney's fee incurred in support of a fee petition. Bond v. Stanton, 630 F.2d 1231, 1235 (7th Cir. 1980) appeal after remand, 655 F.2d 766 (7th Cir.), cert. denied, 454 U.S. 1063 (1981).

**RECOMMENDED ORDER**

13. The Respondent is ordered to pay the Complainant's attorneys' fees in the amount of \$1,560.00.
14. The Respondent is ordered to pay the Complainant costs in the amount of \$96.00.

**MEMORANDUM DECISION**

On October 14, 1993, the Hearing Examiner issued Recommended Findings of Fact, Conclusions of Law and an Order concluding that the Respondent had discriminated against the Complainant on the basis of her sex and ordering various remedies. Among these remedies, the Complainant was directed to file a petition for her costs including reasonable attorneys' fees. On November 16, 1993, the Complainant submitted her petition along with a supporting affidavit.

The attorneys' fees and costs submitted by the Complainant are reasonable. Accordingly, the Hearing Examiner enters the above order for costs and attorneys' fees.

Signed and dated this 14th day of October, 1993.

EQUAL OPPORTUNITIES COMMISSION

Sheilah O. Jakobson  
Hearing Examiner