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

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| Stacy Dickson<br>813 Washington Ave.<br>Sauk City, WI 53583<br><br>Complainant<br><br>vs.<br><br>Woodman's<br>711 S. Gammon Road<br>Madison, WI 53719<br><br>Respondent | HEARING EXAMINER'S<br>RECOMMENDED FINDINGS OF FACT<br>CONCLUSIONS OF LAW AND ORDER<br><br>Case No. 21919 |

## BACKGROUND

A public hearing on the above captioned complaint was held before Commission Hearing Examiner, Clifford E. Blackwell, III, on July 13, 1994, August 18, 1994 and August 19, 1994 in Room GR 120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard, Madison, Wisconsin. The Complainant, Stacey Dickson, appeared in person and by her attorneys, Kelly and Haus by David L. Resnick. The Respondent, Woodman's Food Markets, Inc. appeared by it President, Willard P. Woodman, and by its attorneys Boardman, Suhr, Curry and Field S.C. by Bonnie A. Wendorff. Based upon the record of the public hearing and the arguments of the parties, the Hearing Examiner makes his Recommended Findings of Fact, Conclusions of Law and Order as follows:

## RECOMMENDED FINDINGS OF FACT

1. The Complainant is a married woman who was pregnant in part of January, and all of February, March and April of 1993. She began her employment with the Respondent on December 19, 1992 and terminated her employment with the Respondent effective on April 12, 1993.
2. The Respondent is a Wisconsin corporation that has its corporate offices in Janesville, Wisconsin. It operates six grocery stores in the state of Wisconsin including two stores within the limits of the City of Madison. The two stores within the limits of the City of Madison are designated as Woodsman's-East and Woodman's-West. The actions that are the subject of this complaint occurred at the Woodman's-West store. The Respondent employs in excess of 2,000 people in its six stores statewide. It employs between 350 and 400 people at its Woodman's-West location.
3. All permanent personnel files are kept at the Respondent's corporate offices in Janesville. Some copies of some personnel records are kept for a short period of time at each store. Attendance records are compiled and maintained by the corporate office based upon information provided to the corporate office from each store. The corporate office issues Management-Employee Meeting Records (MEMRs) setting forth discipline where the submitted records require it. MEMRs are also called grievance records and are to be distinguished from grievances that may be filed by the union representing the employees to enforce rights guaranteed by the collective

bargaining agreement between the union and the Respondent. Store managers may also issue MEMRs for more local infractions of policy or duties such as fighting or insubordination.

4. When a MEMR is issued by the corporate office, each store manager may exercise a considerable degree of discretion to implement the discipline as set forth by the corporate office, to reduce the suggested discipline or to increase the discipline based upon the store manager's knowledge of the employee and the circumstances leading to the discipline. Where several events requiring discipline occur within a short period of time and the manager is unable to speak to the employee about one incident before another or others occur, the manager may combine the discipline into a single incident in order to afford the employee notice of the problem and to prevent the employee from reaching the level of layoff or termination too quickly.
5. The Respondent uses a system of progressive discipline running from the least harsh to termination. The steps are: verbal warning, written warning or policy reminder, one day disciplinary layoff, three day disciplinary layoff, demotion and termination. Some violations may start at a higher level of discipline than others. If an employee keeps his or her record clean for various periods of time, a new instance of discipline may be reduced or a previous level repeated rather than progressing to the next level of discipline.
6. The Respondent generally uses three or four designations to identify employees in the grocery portion of its stores. These designations are: utility clerk, bagger-checker, department clerk and clerk or general clerk. Employees in each category have specific types of jobs or duties that they may perform. Utility clerks are the most restricted and clerks are the least restricted. A utility clerk may have nothing to do with the handling or sale of merchandise. Department clerks may stock or otherwise handle non-grocery items while only clerks can stock any item or handle money. Bagger-checkers are somewhat of a hybrid that represent an intermediate step or route between utility clerk and clerk. Persons first hired at the Respondent's stores routinely and with few exceptions start as utility clerks. Utility clerks are assigned to jobs such as bagging groceries, staffing the information desk, sorting and distributing merchandise misplaced by customers, cleaning, collecting and breaking down cardboard boxes, taking groceries out to the drive-in lane and loading them into cars and collecting and returning empty carts from the parking lot.
7. An employee cannot become a Checker without having been a Bagger-Checker for some period of time. A Bagger-Checker is essentially a Bagger who occasionally checks from time to time. The purpose of this progression is to provide training and experience for Baggers who wish to advance and become Checkers.
8. A Bagger must lift individual items and place them in bags attempting to balance the ultimate load. Many individual items such as bags of dog food, turkeys or bags of charcoal or salt may weigh substantially in excess of ten pounds. When groceries are bagged, the combination of items in any given bag may easily exceed ten pounds. However, a Bagger is lifting from a fixed point. Baggers may have to lift the same item up to three times. Once to place the item in the bag. A second time to place the bagged item in a cart and third, possibly to move the bagged groceries from the cart to the customer's car.
9. A Checker or Bagger/Checker when performing the duties of a Checker, may have to lift items weighing more than ten pounds. The Checker does not simply push items over the price scanner because to do so could damage the scanner. Each item must be lifted and passed over the scanner at a height of one or two inches. If the scanner does not read the price the first time, the Checker must bring the item back to a position in front of the scanner and run the item over the scanner a second or third time until the scanner reads the price. This manipulation of items generally occurs in one hand though two hands may be required. A Checker must lift items including those weighing in excess of ten pounds from all parts of a grocery cart including

racks under the cart. This may require bending and lifting items or lifting from an off-balance stance items weighing substantially in excess of ten pounds.

10. The position of Meat Wrapper requires the preparation and transfer of meat. In performing these duties, a Meat Wrapper may have to carry a tray of meat weighing substantially in excess of ten pounds and push a cart of meat weighing substantially in excess of 100 pounds. A Meat Wrapper does not handle only small cuts of meat by wrapping them into small packages for sale.
11. Woodman's-West is divided into several different departments. Included in these departments are the "front end" and the "meat market". The "front end" consists of the area through which customers pass to check out and have their groceries bagged. It is in this area that Baggers, Bagger/Checkers and Checkers work. There are 31 Check-out stations. While optimally each Checker will have either a Bagger/Checker or a Bagger assigned to him or her, that does not occur at all times. On average, a Checker is without assistance approximately ten percent of the time. On a weekly basis, the Respondent employs approximately 50-55 Checkers, 45-65 Baggers and 7-12 Bagger/Checkers. Reasons for a Checker being left without a Bagger or Bagger/Checker include shift change, break time and temporary assignment to other duties such as drive up or cart retrieval. Men and women hold these positions in approximately equal numbers.
12. Jobs and promotional opportunities are posted on a bulletin board at each store. A typical job posting includes a statement of the position to be filled, the hours or shift for which the position is available and an indication of how many people are to be hired from the posting. It is possible for a store manager to hire more or fewer people from a job posting than indicated on the posting but it is extremely rare. Once a position is filled from a posting, the posting is sent to the office in Janesville. A copy of the posting may be retained in the store for an undefined period of time after the original is sent to the corporate office.
13. When an employee suffers an injury or has a condition that needs to be considered in the employee's work assignment or schedule, he or she is generally required to submit a Residual Work Capacity form. This form indicates what job-related restrictions the employee has. The form may or may not indicate the length of time the restriction must be observed. Where the restriction includes a limitation on the employee's ability to lift, the employee is usually requested to sign a Lifting Limitation form, describing the limitation and indicating the employee's understanding of the limitation and the need to seek help instead of lifting prohibited weight. In general, an employee who has had work-related restrictions must bring a statement from his or her treating physician releasing him or her from those restrictions. This may be required even where the Residual Work Capacity form indicates a specific period of time that a restriction will be in place.
14. Once an employee with restrictions has submitted the necessary paperwork, the relevant information is transferred to the corporate office in Janesville so that it can be factored into the employee's schedule and duties. If an employee's schedule is issued before the corporate office receives information about restrictions or if the corporate office fails to take into account an employee's restrictions, an employee can still have his or her schedule or duties altered at the work site. Woodman's-West maintained a form of log relating to job restrictions in the form of a notebook kept in the office. It is not clear from this record what information was maintained in this notebook or to whom this information was available. It is also not clear that this notebook log was in use during the period involved in this complaint. The Respondent did not have a good process for notifying supervisors of employee's work restrictions. Additionally, the Respondent did not, during the period of this complaint, have a good system for tracking work restrictions and their status.

15. At all times relevant to this complaint, Ken Larson was the store manager of Woodman's-West. He reported to Willard P. Woodman. Reporting to Larson were various department supervisors.
16. During the period of her employment, the Complainant was supervised by several different "front end" supervisors. These included Gregory Holmes, Douglas Adler, Mike Malafa and Jeff Woodman. Jeff Woodman is not related to Willard P. Woodman nor to any owner of the Respondent.
17. Weekly work schedules are prepared in the corporate offices on Thursdays. They are sent to Woodman's-West on the same day. The schedule establishes work assignments by category of employee for the period of Sunday of one week through Saturday of the following week. If an employee is subject to work-related restrictions, these restrictions should be reflected in the employee's assignment on this schedule.
18. The Complainant began her employment with the Respondent on or about December 19, 1992. She was employed as a Utility Clerk performing the duties of a Bagger. Her employment ended on or about April 12, 1993 at least in part because of physical limitations relating to her pregnancy.
19. The Respondent conducts written evaluations of its employees only at the end of their probationary period and from that point on only when the employee starts a new job or position.
20. The Complainant was evaluated on or about January 12, 1993 by Jeff Woodman and separately by Greg Holmes. These evaluations showed the Complainant to be a good employee and somewhat above average in two areas.
21. On or about January 12, 1993, the Complainant experienced some pain while working. Because she had reason to believe that she might be pregnant, she promptly sought medical attention. She went to her clinic and was seen by Dr. Cole instead of her usual physician, Dr. Micke. She took a Residual Work Capacity form to the appointment with her.
22. Dr. Cole provided the Complainant with a note indicating that she could remain working as a Bagger with some limitations. She was not to lift more than ten pounds, not to lift salt blocks or bags and was not to push carts. The note indicates specifically that the Complainant was allowed to continue her job as a Bagger. Dr. Cole's note also indicates that the Complainant was pregnant and that her next appointment was on February 10, 1992 (sic).
23. The working conditions set forth in Dr. Cole's note are contradictory in that many of the items that a Bagger must lift weigh substantially more than ten pounds. Neither the Complainant nor the Respondent sought to clarify this ambiguous restriction though both were in a position to know of the ambiguity.
24. The Complainant presented her note containing the medical restrictions to the Respondent the next day, January 13, 1993. The Complainant does not recall to whom in the Respondent's office she gave the note. In 1993, January 13th fell on a Wednesday.
25. The Complainant continued to perform her scheduled duties as a Bagger. She informed her supervisors when she was scheduled to perform duties outside of her restrictions such as pushing carts. She was not specifically assigned to "light duty" because her restrictions noted that she could still perform the duties of a Bagger.
26. It does not appear that the Respondent has any formal process for notifying an employee's supervisor that an employee has been placed on work restrictions other than through an employee's work schedule. When the Complainant notified her supervisor that she had work restrictions, the supervisor confirmed the restrictions and reassigned the Complainant.
27. The Complainant's note dated January 12, 1993 did not limit the Complainant's restrictions to a specific period of time. The note merely indicates the date of her next appointment. The Complainant's medical records indicate that Dr. Cole intended the Complainant's restrictions to be in effect for only two weeks. This time limitation was not specified in Dr. Cole's note. Though the Complainant may have informed the person to whom she gave Dr. Cole's note of

the two week limitation, that information is not recorded in her personnel file. The Complainant never provided the Respondent nor did the Respondent request a statement indicating that she was cleared from her restrictions.

28. The Complainant was placed on additional work restrictions on March 31, 1993. These restrictions indicated that the Complainant should lift no more than five pounds. The Complainant continued on these restrictions until she effectively terminated her employment on April 12, 1993.
29. Once the Complainant went on work restrictions as of January 12, 1993, they were treated as being continuously in effect.
30. During her employment, the Complainant applied for new jobs on three occasions. On January 2, 1993 and February 6, 1993, she applied for a position as a Bagger/Checker. On March 7, she applied for a position as a Meat Wrapper. She did not receive any of these promotions. The January 2, 1993 application is not a subject of this complaint but the other two applications are.
31. When the February 6, 1993 job posting was taken down, Ken Larson reviewed the list of applicants. It is unclear from this record whether he sought information or recommendations from any of the applicants' supervisors. In general, Janie DiPiazza, a Department Clerk in the office would review the list of applicants and would indicate which were not available because of any of several reasons. These reasons might include not being available for certain hours or not having the requisite job experience. DiPiazza might also review an applicants' record for grievances. Once she or someone else from the office had reviewed the list of applicants, the list would be given to Larson for a final decision.
32. Larson generally would indicate his selection or selections by circling the name or names of his choice. Occasionally he might "star" his selection or use some other form of highlighting.
33. The record contains several different copies of the February 6, 1993 posting signed by the Complainant. There was a second posting on the same day also for a Bagger/Checker position for which the Complainant did not sign. At a minimum, Amy Foell was selected from the posting here in question. The Complainant, Ted Washington and Derrick Thomas were not selected from this posting.
34. On two of the copies of the job posting in question, the names of Ted Washington and Derrick Thomas are circled. On Exhibit 15, these names are circled in a colored pen that is clearly different from that used to circle or highlight the name of Amy Foell.
35. It is not clear whether Ted Washington or Derrick Thomas were selected for a position as a Bagger/Checker from the same posting as Amy Foell. Ted Washington signed for a Bagger/Checker position on a posting dated February 26, 1993. Washington signed for a Meat Wrapper position dated March 7, 1993. The record does not contain a posting signed by Thomas except for the February 6, 1993 posting. Washington and Thomas began training as Bagger/Checkers on or about March 14, 1993.
36. The Respondent maintains a seniority list that is based upon employees' dates of hire. Seniority may be considered when two employees applying for the same position have roughly the same qualifications. Ted Washington and Dave Burnette have significantly more seniority than the Complainant. Derrick Thomas and the Complainant began work on the same day but Thomas has an employee number that is two less than the Complainant giving him slightly greater seniority. Amy Foell has less seniority than the Complainant.
37. The Respondent did not consider the Complainant and Amy Foell to be equally qualified for the position of Bagger/Checker at the time of the February 6, 1993 posting. The Respondent perceived the Complainant to have a higher level of discipline mostly related to attendance problems and to be unavailable as a result of her continuing medical restriction.
38. Despite the fact that there were numerous postings for Bagger/Checkers posted subsequent to February 6, 1993, the Complainant did not sign for any of these postings.

39. On or about March 7, 1993, the Complainant signed for a job posting as a Meat Wrapper. This job was given to Dave Burnette.
40. The Respondent perceived Burnette to be more qualified for the position of Meat Wrapper than the Complainant. The Respondent perceived the Complainant to still be subject to medical restriction. Burnette was senior to the Complainant and had a much better attendance and discipline record.
41. Subsequent to the March 7, 1993 posting for a Meat Wrapper position the Complainant did not sign for or apply for any other position with the Respondent. This was despite her stated desire to get away from the Front End supervisors who she felt were persecuting her.
42. On April 12, 1993, the Complainant terminated her employment with the Respondent for reasons unrelated to this complaint.

## CONCLUSIONS OF LAW

43. The Complainant is a member of the protected class "sex" because she is a woman.
44. The Complainant is a member of the protected class "sex" because she was a pregnant woman during the period of time that is the subject of this complaint.
45. The Respondent is an employer within the meaning of the ordinance.
46. The Respondent did not discriminate against the Complainant on the basis of her sex when it did not promote her to the position of Bagger/Checker in February of 1993.
47. The Respondent did not discriminate against the Complainant on the basis of her sex and pregnancy when it did not promote her to the position of Bagger/Checker in February of 1993.
48. The Respondent did not discriminate against the Complainant on the basis of her sex when it did not promote her to the position of Meat Wrapper in March of 1993.
49. The Respondent did not discriminate against the Complainant on the basis of her sex and pregnancy when it did not promote her to the position of Meat Wrapper in March of 1993.

## ORDER

50. The complaint is hereby dismissed without costs to either party.

## MEMORANDUM DECISION

The Complainant began her employment with the Respondent on December 19, 1992. As with the vast majority of persons hired by the Respondent, the Complainant began her employment as a Utility Clerk. Utility Clerks represent the lowest level of positions in the hierarchical structure used by the Respondent and embodied in the collective bargaining agreement covering the Respondent's unionized workers. Customarily an employee would advance up a job ladder from Utility Clerk to Bagger/Checker, to Department Clerk to Clerk.

The category of Utility Clerk encompasses positions as Bagger and Information Clerk. Utility Clerks are limited in their job duties by the collective bargaining agreement to those not directly related to the stocking of merchandise or the handling of money. Because of the limited nature of the work to be performed by Utility Clerks, persons with injury related work restrictions are generally placed in this category of employment. Virtually all "light duty" jobs are ones performed by Utility Clerks.

When the Complainant began her employment with the Respondent, she was assigned as a Bagger. Her rate of Pay was $5.50 per hour. Her hours were limited to evenings or weekends because she was also employed elsewhere on a full-time basis. Shortly after the beginning of the year, the Complainant became worried that her full-time employment might be in jeopardy. Because she felt good about her

employment with the Respondent, she quit her other job and became available for any hours with the Respondent as of January 10, 1993.

Employees of the Respondent do not receive periodic performance evaluations. Instead, each employee serves a probationary period of 30 days. At the end of that period, the employee is either recommended to pass probation, to be released or to be given an additional probationary period. Employees do not receive additional evaluation unless they take a new position with the Respondent and therefore have a new probationary period.

During the period, January 12, 1993 to January 18, 1993, the Complainant was evaluated by Supervisors Greg Holmes and Jeff Woodman. The evaluation forms in the record show that the Complainant was considered to be an acceptable employee with some aspects that were better than average. The Complainant's supervisors recommended the retention of the Complainant as an employee.

During the Complainant's probationary period, she signed a Job Opportunity posting for a position as a Bagger/Checker on or about January 2, 1993. The Complainant wished to advance within the Respondent's ranks and move to a position higher than that of Bagger. The Complainant was not selected for this position because she was still within her probationary period and the successful applicant had more seniority than the Complainant. This position is not a subject of this complaint. Job availabilities within the Respondent's store were prepared by the Respondent's corporate offices and sent to the store in question. A Job Opportunity posting would be placed on an employee bulletin board so that all employees would have access to the information. A Job Opportunity posting would specify when the posting was to be taken down, the number of applicants that could be selected from the posting and any limitations on who might apply for the position. In general, any employee of the Respondent could apply for any position except where there was a prerequisite for holding the position. For example, an employee who was employed as a night and weekend employee was not eligible for an "any time" position. Similarly, a bagger could not apply for a position as a Checker unless he or she could demonstrate that he or she had prior experience as a Checker or had been a Bagger/Checker for the Respondent.

Though a Job Opportunity posting specified the number of applicants that could be chosen from the posting, it is true that number might not be selected. The corporate office could either raise or lower the number of persons to be selected from a given posting depending upon changes in personnel needs. Also, there were no guarantees that a sufficient number of qualified applicants would sign the posting.

An employee who was interested in a specific job would sign the posting and provide information such as his or her employee number and the hours for which he or she was available. Each employee was assigned an employee number on the date of hire. That number was subsequently used to establish the employee's seniority. The lower the employee number the greater the seniority. Seniority is important to an employee because it represents the tie breaker where two or more employees are roughly equally qualified for a position. Where two or more employees were hired on the same date, employee numbers were assigned and seniority established by the order in which their employment papers were processed or if that was in question, the birth dates of the employees.

Once a Job Opportunity posting was taken down, the posting was reviewed by the local store's office to see if all employees met the minimum requirements for the posted position. After this review and elimination of those not meeting the minimum requirements, the posting was given to the store manager. During the period in question in this complaint, the store manager was Ken Larson. The

office Department Clerk was Janie DiPiazza. It was DiPiazza that would generally review postings for Larson. As part of his selection process, Larson might ask supervisors of the applicants to provide a list of the applicants in order of preference. This did not occur universally but was most likely to happen for positions in the front end. The front end is that area of a store surrounding the check-out lanes. Turnover in employees is highest in this area of the store because of the number of employees. Because of the high turnover, Larson was less likely to know any given employee or to be familiar with an employee's job performance.

After Larson received the above input, he would indicate his selection or selections by circling the name of the successful applicant or indicating his choice or choices by placing a star next to the name. He has some recollection of using a highlighter at some point in the past but has not used that method of selection for a considerable period of time.

After Larson had made his selection, a copy of the Job Opportunity posting was made for the records of the store. The store office would retain its copy of the Job Opportunity posting for approximately a year. The original posting was sent to the corporate office in Janesville. Larson's decisions were generally final, however, the corporate office could override his choice.

It is the Respondent's corporate office that prepared the weekly work schedules for the store. These schedules were prepared and delivered on Thursday and covered the following week beginning on Sunday. The corporate office was responsible for retaining all personnel records including payroll, discipline and records of work restrictions. If an employee had work restrictions, those restrictions would be taken into account when the weekly work schedules were prepared. If the corporate office erroneously scheduled an employee for a job outside of his or her work restrictions, the local store office would reschedule the employee and note the changes in the schedule.

On January 12, 1993, the Complainant felt a sharp pain in her abdomen. This concerned her because she had reason to believe that she was pregnant. She went to her medical clinic immediately. She took along a Residual Work Capacity form from the Respondent. The doctor she saw, Dr. Cole, was not her usual physician, Dr. Micke. Dr. Cole placed the Complainant on work restrictions. The restrictions as stated on the Residual Work Capacity form and a doctor's note permitted her to continue to bag groceries but imposed a ten pound lifting restriction. Additionally, the Complainant was specifically prohibited from carrying salt blocks and bags of salt and pushing carts. Dr. Cole noted on the forms he gave the Complainant that her next appointment was scheduled for February 10, 1992. Dr. Cole wrongly stated the year of the next appointment as 1992 instead of 1993. The Hearing Examiner will use the correct date, February 10, 1993 herein. In the Complainant's medical records maintained by the Complainant's clinic, Dr. Cole indicated that the restrictions were to remain in place for two weeks. This limitation was not included in the forms given to the Complainant.

The Complainant took her doctor's note and restrictions into work the next day, January 13, 1993. The Complainant handed her materials in to the office but does not remember to whom she gave them. The Complainant asserts that she told the person to whom she gave the restriction form that the restriction was to be in place for two weeks. The Complainant states that she provided this information in response to a question asked by the person to whom she gave her restrictions. Nothing in the portions of the Complainant's personnel file that are in the record indicate this limitation, though other restrictions noted on the Complainant's personnel record indicate something about the anticipated length of the restriction such as, "until next doctor's appointment".

When an employee brought a work restriction to the store, the office was to send the corporate office a copy by facsimile transmission, make a copy for the store records and send the original to the

corporate office by mail. If the work restriction included a lifting restriction, the employee was to be given a form acknowledging the lifting restriction and agreeing to comply with the limitation. The record does not contain a copy of this form signed by the Complainant for this particular restriction. In order to be placed back on one's regular work assignment, Larson usually required an employee to provide a written release from a doctor indicating that the employee was cleared from the restriction. This requirement might be waived depending upon the nature of the restriction and whether the restriction stated an ending date on its face. For example, if an employee was restricted from usual job assignments for two weeks because of pneumonia, Larson might not require a written release. It appears clear to the Hearing Examiner that Larson would require a written release from a restriction stemming from a physical injury or similar condition. The Complainant never provided a written release from her January 12, 1993 restriction.

Janie DiPiazza testified that Larson generally required a written release before he would allow an employee to resume his or her duties. DiPiazza stated that the Respondent had not been particularly good about its practice of clearing work restrictions indicating that there had been employees who had remained on restrictions for a lengthy period of time without being required to clarify their status. It was her recollection that the Respondent had improved its practice in the last year of her employment. DiPiazza left her employment with the Respondent in November of 1993. Despite her belief that the Respondent's practices had improved, DiPiazza stated that the forms in the Complainant's personnel record did not correspond to the new forms used by the Respondent. The Hearing Examiner understands DiPiazza's testimony to mean that the Complainant's case had not been handled under the new and improved method for tracking employees on work restrictions.

Greg Holmes, one of the "front end" supervisors who had contact with the Complainant, testified that the Respondent had maintained a log in the form of a notebook indicating which employees were on work restrictions, what the restriction was and when it was scheduled to end. Holmes then indicated that he could not be certain if that practice had been in effect while the Complainant was employed by the Respondent or not. Holmes was the only person to testify about such a log. The Hearing Examiner does not give much weight to this aspect of Holmes' testimony. It is not corroborated by the testimony of other "front end" supervisors nor that of office personnel who were more likely to know of such a log, such as DiPiazza or Larson. Such a log probably existed or exists but it most likely applies to a period of time other than that in question here. In addition to the to the Complainant's work restriction of January 12, 1993, the Complainant was placed on a more significant restriction on March 31, 1993. This restriction lowered the Complainant's previous lifting restriction to five pounds. The record contains an incomplete lifting restriction form signed by the Complainant and Chris Venn. Venn worked in the Respondent's store office during the period of time in question here. The Complainant's personnel record indicates that this restriction was to remain in place until the Complainant's next doctor's appointment. This restriction remained in place until the Complainant left her employment with the Respondent as of April 12, 1993.

The Complainant's complaint revolves around two specific jobs for which she applied while employed by the Respondent. The first position was that of an any time Bagger/Checker. The Job Opportunity posting for this particular position is dated February 6, 1993. There was also a posting for a 5 p.m. Bagger/Checker on the same day. The second position was that of a Meat Wrapper. The posting for this position was dated March 7, 1993.

The Complainant signed both of these postings. She did not receive either position. The Meat Wrapper position was given to Dave Burnette. It is agreed by the parties that the Bagger/Checker position was initially awarded to Amy Foell. The Complainant contends that Ted Washington and Derrick Thomas were both awarded Bagger/Checker positions at a later date but from the February 6,

1993 posting. It is these results that according to the Complainant demonstrate that she has been the victim of discrimination based upon her sex.

The Respondent asserts the Complainant was not so well qualified for the Bagger/Checker position as was Foell and that Washington and Thomas were not selected from the February 6, 1993 posting but from other postings for which the Complainant did not sign. With respect to the Meat/Wrapper position, the Respondent contends that Burnette was more qualified for the position than the Complainant. Additionally with respect to both positions, the Respondent states that it reasonably believed the Complainant's work restrictions from January 12, 1993 remained in effect and precluded Larson from considering the Complainant for either position.

The complaint's allegations with respect to the Meat Wrapper position are the most clear. The Hearing Examiner will address them first. The first question to be answered is to which protected class does the Complainant belong. In general, as a woman, she is a member of the protected class "sex". This is true, at least in part, because the position for which the Complainant applied was given to a man, Dave Burnette. The Complainant also claims membership in the protected class "sex" by virtue of the provisions of' the Pregnancy Discrimination Act of 1978(PDA) which amends Title VII. The Complainant contends that because the Equal Opportunities Ordinance is modeled after Title VII, the Commission should interpret the ordinance to include protections identical with those of the PDA. Finally, the Complainant asserts that she may maintain a sex discrimination claim on the basis of a theory known as "sex plus". The "sex plus" theory was adopted by the federal courts prior to the passage of the PDA as the means for bringing pregnancy and similar claims as sex discrimination claims under Title VII absent clear language authorizing such claims. Phillips v. Martin Marietta Corms., 400 U.S. 542 (1971), Sprogis v. United Airlines, 444 F.2d 1194 (7th Cir.), Cert Denied 404 U.S. 991 (1971).

The basic employment provisions of the ordinance were adopted in 1963 as part of the original Equal Opportunities Ordinance. These provisions were generally modeled on proposals that would become Title VII. This legislation did not extend protection to the class "sex". The City Council amended the ordinance in 1970 to include sex as a protected class. This was prior to Congressional action amending Title VII by adoption of the PDA. Given this sequence of events, it is difficult to find that the ordinance implicitly encompasses the requirements of the PDA. The ordinance has been amended numerous times since the adoption of the PDA, adopting provisions and adding protected classes well beyond those contemplated by Title VII. If the City Council had wished to adopt the specific protections afforded pregnant women by the PDA, it could have explicitly adopted them. It has not despite the opportunity. The Hearing Examiner does not believe that he can adopt the provisions of the PDA as a whole without action by the City Council. Despite the Hearing Examiner's unwillingness to assume that the provisions of the PDA are enforceable as if a part of the ordinance, it does not leave the Complainant without a theory of liability.

At the time that the protected class "sex" was added to the ordinance, the courts had already accepted the "sex plus" theory as stating a viable claim for sex discrimination under Title VII. As a matter of statutory construction, the City Council must be presumed to have had knowledge of the interpretations given to Title VII at the time of its action. Since "sex plus" was accepted by the courts at the time of the City Council's adoption of the protected class "sex", the Hearing Examiner finds it to be encompassed by the provisions of the ordinance. Such a reading of the ordinance is consistent with the ordinance's purpose of preventing and ending the economic dislocations caused by discrimination. MGO Sec. 3.23(1). When interpreting a piece of social welfare legislation such as the ordinance, one must give the legislation the broadest reading consistent with the beneficial purposes of the enactment that falls within the jurisdiction of the body enforcing the enactment. McMullen v.

LIRC, 148 Wis. 2d 270, 434 N.W.2d 830 (Ct. App. 1988). While pregnancy and pregnancy related conditions are not immutable characteristics in the way that are race, color or National origin, the ordinance does not limit its coverage to such immutable factors. The City Council included protection for political beliefs, lawful source of income and one's status as a student. These circumstances or conditions may change several times throughout one's life much like pregnancy. Pregnancy and pregnancy related conditions, though temporary, have traditionally placed women at an economic disadvantage; it is this type of disadvantage based upon an identifiable characteristic that the ordinance intends to redress. To the extent that the facts permit application of the "sex plus" theory of sex discrimination, the Hearing Examiner finds that the ordinance prohibitions of sex discrimination are broad enough to support such a theory.

Though the Hearing Examiner declines to adopt the provisions of the PDA, its provisions and cases decided under the PDA must play a part in giving effect to the "sex plus" theory. The PDA grew out of the cases setting forth the "sex plus" theory of liability. The PDA and cases decided under it represent the logical extension of the "sex plus" theory. As such, the PDA and cases decided under it, will be used to give the Hearing Examiner guidance in developing and applying the "sex plus" theory.

By March of 1993, the Complainant states that she wanted to get away from the supervisors in the "front end" that she felt were being unfair to her. She complained that her supervisors, particularly Jeff Woodman, were unusually strict with her and monitored her work more closely than that of other employees. It was this desire that brought about her application for a position as a Meat Wrapper on March 7, 1993. The Complainant clearly had no understanding of what a Meat Wrapper did on a daily basis. She believed that because her mother had been a Meat Wrapper that she could also do the job. The Complainant's description of the duties of a Meat Wrapper vary significantly from that given by Willard Woodman. Woodman is the president of the Respondent and began his working career in a meat department. Regardless of the Complainant's knowledge of the duties of a Meat Wrapper, she was entitled to apply for the position.

While the Commission customarily uses the McDonnell-Douglas/Burdine burden shifting paradigm, it its only a suggested guide for decision making and is not to be applied too strictly. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). Where a party has had the opportunity to address the claims of discrimination made against it, it is permissible for the decision maker to look at the facts as a whole and decide the ultimate issue of discrimination. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 31 FEP 609 (1983). It seems appropriate to utilize this approach in this case.

The Respondent asserts that Larson selected Burnette over the Complainant primarily because Burnette was significantly senior to the Complainant. Burnette had the highest seniority of all of the applicants except for one, Charles Johnson. Larson testified that he did not consider Johnson for the position because Johnson had recently had a poor attendance record due to matters outside of work. Burnette had been a good employee and had an exceptionally good attendance record in the months prior to his signing for the posting. As Larson explained his decision-making process, he looked for the most senior person on the list and then looked to see if there were reasons not to give that person the job. In Johnson's case, his attendance record provided such a reason. In Burnette's case, the second most senior person on the list, there was no reason for him not to get the job. Under this scenario, the Complainant would not have even received consideration.

Larson testified that he might have considered the Complainant because of the Respondent's interest in promoting women and minorities into the meat department, but for her attendance record which

was significantly poorer than Burnette's at the time of selection. Larson also testified that he believed that the Complainant's work restrictions from January 12, 1993 were still in effect and prevented him from actively considering her.

Willard Woodman's testimony about the heavy lifting required for the position of Meat Wrapper was unrebutted by the Complainant. Woodman testified that virtually all of the tasks performed by a Meat Wrapper required the ability to lift more than ten pounds. He stated that the only light duty type task would be to staff the service counter. Woodman also indicated that a person new to the Meat Department would not be able to perform this job because of the specialized knowledge of meat, meat products and meat preparation necessary for this work. The only other task that Woodman believed could be performed with a ten pound lifting restriction was wrapping individual pieces of meat and placing them into the display case. Woodman testified convincingly that the Meat Wrapper position normally entailed carrying trays of meat weighing significantly in excess of ten pounds and pushing meat carts that might weigh several hundred pounds.

Assuming Larson actually believed that the Complainant's restrictions were still in effect in early March of 1993, it would be reasonable for him to have not considered the Complainant for the position of Meat Wrapper. The Hearing Examiner is convinced that the lifting requirements for a Meat Wrapper would have exceeded the Complainant's limitations.

The Complainant contends that Larson could not have reasonably believed that her restrictions were still in effect in March of 1993. Her argument relies on her having allegedly informed the person to whom she gave her restriction on January 13, 1993 of the two week limitation on the restriction. Additionally, the Complainant asserts that the fact that she was performing the work of a Bagger indicates that the Respondent knew of the limitation's expiration.

Finally, the Complainant contends that it defies common sense for one to believe that the Respondent would have allowed the Complainant to continue working under restriction without some further notice from her doctor after her follow-up appointment on February 10, 1993.

While these contentions are discussed somewhat more fully below, it suffices at this point to indicate that the Hearing Examiner is not persuaded that Larson knew or even should have known that the Complainant was not still on her January 12, 1993 restriction as of March, 1993. The record indicates that the Complainant's statement at the time she turned in her original restriction was never recorded. This gives the Complainant the benefit of the doubt concerning the making of the statement in the first place. Later restrictions are clearly noted on the Complainant's Personnel Record including the anticipated length of the restriction. The Personnel Record does not contain a similar notation of the anticipated length of the January 12, 1993 restriction.

The Complainant's restriction specifically approved the Complainant to perform her duties as a Bagger. The Respondent's continued scheduling of the Complainant consistent with this ambiguous restriction is understandable given the specific words of the restriction.

The record indicates that the Respondent did not conduct its operation well with respect to work restrictions. For instance, the Respondent apparently had no routine method for notifying supervisors about the existence of work restrictions. Equally, DiPiazza noted that the Respondent did not track employees with work restrictions very well. She noted that the Respondent got better in her last year of employment, but the documents in the record were not of the type used when the Respondent began to tighten up procedurally. The Hearing Examiner takes this to mean that even though the Respondent was attempting to improve its tracking of worker's restrictions that the Complainant fell

through the cracks of this effort. DiPiazza's testimony indicated that there had been a number of employees who had either remained on restriction longer than necessary or returned to work without the required written release because their restrictions had not been properly tracked.

DiPiazza further testified that she had told someone that the Complainant was having difficulty obtaining a promotion not because of her pregnancy but because of her restrictions. DiPiazza does not recall to whom she gave this statement or precisely when the conversation occurred. This conversation most probably occurred after the March 7, 1993 posting. DiPiazza's statement refers to promotions and there are only two in question here.

The Hearing Examiner gives significant weight to DiPiazza's testimony. She no longer worked for the Respondent at the time of her testimony and owed it no loyalty. Her testimony was given in a straightforward manner with no obvious indication of discomfort or evasion. Though she apparently left the employment of the Respondent unhappy with the Respondent, those feelings of disappointment did not apparently color her testimony.

Given the above problems along with Larson's preference to have each employee on restriction provide a written release, it does not seem unreasonable for Larson to have believed that the Complainant remained on her January 12, 1993 restriction when she posted for the Meat Wrapper position in March of 1993. She did not provide a written release from her restriction and on this record, Larson did not have a method of knowing that the restriction had lapsed.

Even if the record supported the Complainant's contention that Larson knew of the lapse of her restriction, the other reasons stated by the Respondent for choosing Burnette over the Complainant remain valid. Burnette had a better attendance record and had seniority. When the Respondent ignored seniority requirements to promote Amy Foell to a Meat Wrapper position in June of 1993, it was able to do so because of Foell's good attendance record and her overall work record. At the time the Complainant applied for the Meat Wrapper position, her record had deteriorated somewhat. She had a number of absences in February, most of which appear not to have been pregnancy related. In short, the Complainant was not a good candidate to receive the same sort of "special" treatment afforded Foell.

The record when taken as a whole does not support the Complainant's claim of discrimination on the basis of sex or sex plus pregnancy with respect to her application for the position of Meat Wrapper. The reasons stated for the Respondent's choice of Bumette rather than the Complainant are legitimate and reasonable. The Complainant did not convince the Hearing Examiner that the reasons put forth by the Respondent were either not credible or were a pretext for discrimination.

The Complainant's second claim, that of sex or sex-plus discrimination with respect to the position of Bagger/Checker, is somewhat more complicated than that relating to the Meat Wrapper position. This complication arises from the fact that the Complainant concedes Amy Foell, a woman, was selected from the same posting signed by the Complainant. The Complainant does not contest Foell's selection which would seem to imply her acceptance that Foell was selected because the Complainant was a pregnant woman with pregnancy related complications. The Complainant's complaint is premised upon her belief that Ted Washington and Derrick Thomas were selected at a later date from the particular posting in question here.

In order to prevail the Complainant must demonstrate that Washington and Thomas were selected from the same posting signed by the Complainant, and that their selection was a result of either her sex or because her pregnancy related work restrictions were treated less favorably than were similar

work restrictions of employees who were not pregnant. Foell's selection would seem to significantly undercut the Complainant's claim that she was not selected because of her gender. The record demonstrates that the Respondent selected many women to be Bagger/Checkers. Foell's selection tends to corroborate that the Respondent did not view the Bagger/Checker position as one that required or preferred men. The testimony was that Bagger/Checker positions were held in approximately equal numbers by men and women. This fact does not automatically preclude a finding of discrimination. Absent other facts, however, it is a strong indication that discrimination is not likely.

On this record, there is no evidence indicating that the Complainant's gender, by itself, was the reason she was not selected for the Bagger/Checker position from the February 6, 1993 posting. Assuming Washington and Thomas to have been selected from that posting, Amy Foell was selected prior to either of their selections. A woman was selected from another posting dated the same date as the one in question here. The Complainant had some attendance problems and was considered to be still on a work restriction from January 12, 1993. There is nothing in this record to indicate that these explanations are not credible or are otherwise a pretext for discrimination on the part of the Respondent.

The argument for the Complainant's position that Washington and Thomas were selected from the February 6, 1993 posting is somewhat involved. First, the Complainant contends that the fact that Washington's and Thomas' names are circled on Exhibits 10 and 15 demonstrates their selection, from this posting. Second, the Complainant points to the absence of any posting signed by Thomas other than the February 6, 1993 posting. Finally, the Complainant asserts the date upon which Washington and Thomas began their training is consistent with selection from the February 6, 1993 posting but at a date later than the original posting.

The Respondent asserts that Washington and Thomas were selected from postings not signed by the Complainant. Specifically, Washington was to have been selected from a posting dated February 26, 1993. Though it failed to produce any posting signed by Thomas, the Respondent asserts that there must have been such a posting.

The evidence in the record on most of these points is confused and inconclusive. For instance, Willard Woodman testified under oath that he had placed the circles around the names of Washington and Thomas in an exhibit submitted to the MEOC Investigator, for the purpose of highlighting for her, his response to her questions. His testimony was given without evasion or apparent guile. He would, of course, have the motivation of avoiding liability for lying. However, he did not give the Hearing Examiner the impression of one who was lying. He was not nervous and did not present testimony that conflicted with earlier testimony, either his own or that of others.

In opposition, the Complainant argues that it was possible for someone at the store to have circled the names subsequent to the originals having been sent to the corporate office or that the names were circled on a copy of the original at the corporate office. The purpose of this late circling is to have selected additional candidates from the February 6, 1993 posting for positions that opened subsequently. Everyone testifying on this matter agreed that such a scenario was possible. However no one testified that it was likely or that it had actually happened in this case. It is postulated that the Respondent had additional Bagger/Checker openings after Foell was selected and the posting was sent to the corporate office. In this scenario, the corporate office would have presumably called Larson to tell him to pick two more persons from the February 6, 1993 posting. Alternatively, the corporate office could have called Larson to indicate that it had selected two names, ones with high seniority, to fill Bagger/Checker positions that had occurred subsequent to the original postings arrival in

Janesville. The Complainant claims that Washington and Thomas were selected because the Respondent did not want to promote the Complainant due to her pregnancy and her pregnancy related restrictions.

The strongest single piece of evidence in support of this theory is the absence in the record of a job posting signed by Derrick Thomas except for the February 6, 1993 posting here in question. The absence of this document is troubling to the Hearing Examiner. The Respondent's explanation that it has looked for the document but cannot find it strongly indicates that it does not exist and that the Complainant's proposed scenario is more likely. Additionally, DiPiazza's testimony that the local store retained a copy of postings to guard against loss should prevent exactly this type of situation.

Complicating this analysis is the existence of two postings signed by Ted Washington subsequent to the February 6, 1993 posting. The first of these subsequent postings was for a Bagger/Checker position signed on February 26, 1993. It is from this posting that the Respondent asserts that Washington was promoted. The second posting was the March 7, 1993 posting for a Meat Wrapper also signed by the Complainant. The fact that Washington was still signing for positions particularly the same one at least two weeks after the February 6, 1993 posting was taken down is a strong indication that he had not been promoted as a result of the February 6, 1993 posting. It would not make sense for him to still be applying for the same position, if he had been selected from an earlier posting.

The Complainant points out that the February 26, 1993 posting does not contain any of Larson's typical marks indicating who was selected. DiPiazza corroborates this observation. On Exhibit RR, Washington's name is highlighted with a highlighter marking pen. The Respondent, at hearing, indicated on the record, that it duplicated highlighting such as found on Exhibit RR where it appeared on the original. However, the testimony is clear that Larson did not commonly use highlighting and almost exclusively circled or starred his choices. Larson's testimony indicated that at some point in the distant past, he might have highlighted a selection.

One inference to be drawn is that no one was selected from the February 26, 1993 posting. This would indicate that Washington's name was highlighted at a later date in an attempt to falsify evidence. Another inference is that Larson did not make the selection of Washington but someone else did. Yet another inference is that Larson made the selection but used a method of indicating his selection different from his normal method.

On this record, the Hearing Examiner is unable and unwilling to choose among these different inferences. On one hand, if Washington was not selected from this posting, it would tend to support the claim that he was actually selected from the February 6, 1993 posting. On the other hand, the date of Washington's change to a Bagger/Checker is more consistent with selection from the February 26, 1993 posting. To find that Washington was selected from the February 6, 1993 posting, would require finding that the Respondent operated outside of the norm with respect to selecting names after a posting was taken down.

Unfortunately, the record does not contain the Change of Status forms that would identify exactly when and probably from which posting Washington and Thomas were selected. Both parties could have supported their respective positions with such evidence but neither chose to present it. This failure on the part of both parties prevents the Hearing Examiner from drawing any conclusion about which party would have most benefited from the absence of the evidence. It also means that precise resolution of this factual dilemma must remain elusive and beyond the grasp of the Hearing Examiner.

As noted above, it is possible for the Respondent to have gone back to the February 6, 1993 posting to make additional selections. The documents necessary to truly prove this assertion, namely the Change of Status records for the period, were not offered by either party. From these possibilities, and incomplete facts, the Complainant asks the Hearing Examiner to draw an inference of discrimination. On this record, the Hearing Examiner is unable to do so.

Given the different inferences to be drawn from this record and the lack of any clear method or reason to choose between and among them, the Hearing Examiner must fall back upon the general burden of proof in discrimination cases. The burden remains on the Complainant at all times. Texas Dept.of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), St. Marys Honor Center v. Hicks, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). That burden is to demonstrate discrimination by the greater weight of the credible evidence. Here the Complainant has failed in her burden of proof or persuasion. She has presented possible scenarios that could lead to the conclusion that there was discrimination but she has failed to convince the Hearing Examiner that the possibilities rise to the level of more likely than not.

Even if the Hearing Examiner accepts the Complainant's contention that Washington and Thomas were selected from the February 6, 1993 posting that does not lead automatically to the conclusion that the Complainant was the victim of discrimination. Washington, Thomas and the Complainant all were initially not selected for various reasons. In a later consideration, the reason for disqualifying one or all of them may well have changed. Washington and Thomas were both senior to the Complainant. The record is clear that where all other factors were equal, seniority would be the decisive factor. It is true that Thomas had an employee identification number that was only two lower than that of the Complainant but under the Respondent's system, he was considered to be senior to the Complainant. Larson did testify that if all things had been equal, he would have had some preference for the Complainant over Thomas. However, he testified that things were not equal in his mind.

As part of the Complainant's argument concerning discrimination, she contends that as a pregnant woman with restrictions, she was treated less favorably than other non-pregnant employees with restrictions. It is not entirely clear how this position supports the Complainant's claim since it does not appear that Washington or Thomas had work related restrictions at the time of promotion to Bagger/Checker. Regardless of how this contention fits into the claim of discrimination, it does not appear to be true. Janie DiPiazza testified that when an employee was placed on restrictions such as a ten pound lifting restriction, he or she would normally be demoted down to the position of Utility Clerk for the duration of the restrictions. This is because the type of light duty tasks that could be performed by someone on such a restriction were duties encompassed by the Utility Clerk category. She referred to this as demoting down. This type of demotion often resulted in a loss of pay to the employee. The Complainant asserts that while other employees with restrictions received such demotion, she did not.

The Respondent argues that the Complainant could not be demoted any further than her existing position. She; was a Utility Clerk already and there were no categories of employment to which the Complainant could be demoted, Utility Clerk being the entry level of employment with the Respondent.

DiPiazza also spoke in terms of demotion in duties to light duty. While the Complainant could have been given strictly light duty employment which would have been appropriate to that part of her restriction limiting her to lifting no more than ten pounds, the terms of her restriction specifically stated that she could bag groceries. As noted above, the ambiguous nature of the Complainant's

restriction has needlessly complicated what should have been a clear course of action. Both parties bear responsibility for failing to clarify the problem with the restriction.

The Hearing Examiner cannot find, on this record, that the Complainant was treated differently from other employees with restrictions. As noted above, she could not be demoted to any lower category of employment. She was not assigned strictly to light duty because of the ambiguous statement of her restriction. The Respondent treated other employees with similar restrictions in a similar manner. Kim Schwab was demoted from a Bagger/Checker position to that of a Utility Clerk when she was placed upon a ten pound lifting restriction. Her restriction did not state that she could continue to do her assigned work with some exception. Given the statement of her restriction, Schwab was treated consistently with the Respondent's policy. Equally the Complainant was treated consistently given her specific statement of restriction. Essentially Schwab and the Complainant were not in equivalent positions so that comparison of the two is not entirely fair. Schwab was in a position from which she could be demoted. The Complainant was not. Schwab's restrictions were not ambiguous as were the Complainant's.

The record does not support the Complainant's contention that she was treated less favorably than other employees with non-pregnancy related restrictions. Except for the Complainant, all of the witnesses testified that a ten pound lifting restriction would be treated the same regardless of the cause of that restriction. DiPiazza testified clearly that what was important was the restriction, not the cause of the restriction.

The Hearing Examiner does not wish to convey the idea that he believes that the Respondent treated the Complainant and her restriction well. The record is clear that there was a great deal of confusion over the Complainant's restriction particularly in the period immediately after the restriction was imposed. The restriction went into effect on January 12, 1993 and was presented to the Respondent on January 13, 1993. The Complainant's husband testified that the Complainant was very upset by the Respondent's failure to observe her restriction. He further testified that in response to the Complainant's concerns he spoke to Jeff Woodman on or about January 17, 1993, give or take a day or two, about the problems being caused the Complainant by the failure to observe her restrictions. While Woodman has no recollection of this conversation, the Hearing Examiner is convinced that it occurred. This is evidence of a problem within the Respondent's procedures and operations. The Respondent obviously did not have a good method for communicating the existence of work restrictions to the supervisors. This resulted in the Complainant believing that the Respondent did not care about her well-being and created a work environment of frustration for the Complainant. This cannot be how the Respondent would knowingly wish to treat its employees. This treatment undoubtedly led to the Complainant's belief that she was being singled out for monitoring and her ultimate belief that she had been the victim of discrimination. Despite the Complainant's frustration and anguish, the record does not demonstrate that the Complainant was treated less favorably than others.

The Hearing Examiner is troubled by the state of the record in this case. Both parties have failed to produce important pieces of the puzzle that makes up a claim of discrimination. Due to the burden of proof that failure falls more heavily on the Complainant. While few cases involving claims of discrimination( are clear cut for either side, this case seems to ask the Hearing Examiner to accept leaps of faith from both sides. This would indicate to the Hearing Examiner that this was a case that should have and could have been settled. The Respondent's normal refusal to discuss settlement except on his terms has resulted in the processing of a claim that would have been more efficiently and equitably resolved by mutual consent.

For the foregoing reasons, the Hearing Examiner concludes that the record does not demonstrate that the Respondent discriminated against the Complainant on the basis of her sex or her sex plus pregnancy related restrictions in not promoting her to the position of Bagger/Checker or Meat Wrapper. The complaint is hereby dismissed.

Signed and dated this 23rd day of October 1995.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner