

**EQUAL OPPORTUNITIES COMMISSION  
CITY OF MADISON  
210 MONONA AVENUE  
MADISON, WISCONSIN**

<p>Connie Bruhn 1623 East Street Black Earth, WI 53714</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Badger Expediting 4202 Robertson Road Madison, WI 53714</p> <p style="text-align: center;">Respondent</p>	<p>NOTICE OF RIGHT TO APPEAL</p> <p>Case No. 2826</p>
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Attached are the Recommended Findings of Fact, Conclusions of Law, and Order of the Equal Opportunities Commission's Hearing Examiner. The Rules of the EOC provide for appeal of this decision in the following terms:

10.1 Either party may appeal the Recommended Findings of Fact, Conclusions of Law, and Order of the Commission's designee by filing written exceptions to such Findings, Conclusions, or Order in the EOC offices no later than ten (10) days after receipt of said Findings, except that where the tenth day falls on a Federal holiday or on a non business day, the appeal will be accepted on the first business day thereafter.

10.2 If neither party appeals the Recommended Findings of Fact, Conclusions of Law, or Order within ten (10) days, they become final Findings, Conclusions and Order of the Commission. If an appeal is made to the Commission, it shall consider only the record of the hearing, written exceptions to the Recommended Findings, Conclusions and Order, any brief properly submitted before it, and oral arguments presented by the parties at a review hearing scheduled by the Commission. To be properly submitted, briefs by any party must be served upon opposing parties or their counsel and received by the Commission and served upon the opposing party at least ten (10) days prior to the scheduled review hearing. Any party requesting a written transcript of the proceeding shall pay the actual cost of preparing said transcript including copying costs. The Commission shall affirm, reverse or modify the Recommended Findings and Order. Any modification or reversal shall be accompanied by a statement of the facts and ultimate conclusions relied on in rejecting the recommendations of the Commission's designee. Such decision of the Commission shall be the final Findings of Fact, Conclusions of Law and Order of the Commission.

This Notice, Findings, Conclusions of Law, and Order have been sent to both parties by certified mail, with a dated receipt. Any appeal from these Findings, Conclusions and Order must be postmarked or delivered at the offices of the EOC within ten (10) days of the date of receipt. Dated at Madison, Wisconsin this J day of i4PtJI , 19 g°~ 17 11,42,~ ~eC Allen T. Lawent Hearing Examiner ATL:do Enclosure cc: Attorney Roberta Klein Attorney Gerald Nichol

Dated at Madison, Wisconsin this 1st day of April, 1982.

Allen T. Lawent  
Hearing Examiner

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**EQUAL OPPORTUNITIES COMMISSION  
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MADISON, WISCONSIN**

<p>Connie Bruhn (Laufenberg) 1623 East Street Black Earth, WI 53714</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Badger Expediting, Inc. 4202 Robertson Road Madison, WI 53714</p> <p style="text-align: center;">Respondent</p>	<p style="text-align: center;">RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p style="text-align: center;">Case No. 2826</p>
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A complaint was filed with the Madison Equal Opportunities Commission (MEOC) on June 4, 1981 alleging discrimination on the basis of sex in regard to employment, specifically in regard to terms and conditions' of employment (including layoff) and discharge from employment. The case was investigated by Cindy Wick of the MEOC and an Initial Determination dated August 13, 1981 was issued finding probable cause to believe that discrimination had occurred as alleged. Conciliation failed or was waived, and the matter was certified to public hearing. A hearing was held beginning on December 15, 1981. Attorney Roberta Klein of CULLEN AND WESTON appeared on behalf of the Complainant who also appeared in person. Attorney Gerald C. Nichol of LEE, JOHNSON, KILKELLY AND NICHOL, S.C. appeared on behalf of the Respondent who also appeared by employee-representatives Charles Elliot and Leonard Linzmeier.

Based upon the hearing and upon consideration of the post hearing briefs submitted by the parties, the Examiner proposes the following RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER:

**RECOMMENDED FINDINGS OF FACT**

1. The Complainant, Connie Bruhn (formerly Laufenberg), is a female adult residing in the State of Wisconsin.
2. The Respondent, Badger Expediting, Inc. is a corporation employing people and doing business in the City of Madison.
3. The Complainant began employment with the Respondent as a carpenter on July 7, 1980.
4. The Complainant's carpentry experience, prior to her employment with the Respondent, included assembling "pre-fab" roofs and "pre-fab" walls at Wick Homes for one-and-a-half years, a 400 hour "CETA" training program, building a solar home in Mazomanie with Operation Fresh Start for five months, and a woodworking hobby.
5. While employed by the Respondent, the Complainant worked at various job sites including:
  - a. Mt. Horeb
  - b. Mineral Point
  - c. Post Road
  - d. Cottage Grove
  - e. McFarland
6. In October of 1980, the Complainant's job performance was evaluated by her supervisors and her co workers. She received a cumulative average rating of 3.2. All the other of Respondent's construction employees received average ratings from 4.6 to 8.8 on a 10 point scale. Jim Handle at 4.6 and Dave Thering at 4.9 were the only employees other than the Complainant with an average below 5.

7. The Complainant was the only female carpenter (or carpenter/laborer) ever employed by the Respondent at all times prior to the date of the beginning of the hearing in this matter, December 15, 1981.
8. On December 19, 1980, the Complainant was laid off due to lack of work along with two male employees.
9. The Complainant was recalled to work by the Respondent for part of the month of January, 1981. The Complainant was again laid off on January 16, 1981 due to lack of work along with three male employees. Subsequent to her layoff, the Complainant phoned the Respondent several times to find out if she would be recalled. Finally, Chuck Elliott, the Respondent's head supervisor, told her she should look for another job. All the male employees were called back and new male employees were hired.
10. The Complainant made several errors on various tasks she was assigned to perform, including, but not limited to:
  - a. She drilled holes and nailed door handles on a cabinet improperly.
  - b. She did not set walls on a line properly.
  - c. She shingled a roof crookedly and the work had to be redone.
  - d. She skipped nails frequently while doing bridging.She also "did not have her mind on her job" and required supervision for most of the work she was assigned to.
11. The Complainant had the lowest job performance evaluation average of any of the Respondent's laborers and/or carpenters.
12. Due to economic conditions, the Respondent employed an average of 8 to 9 carpenter/laborers in 1981 as opposed to an average of 13 to 14 carpenter/laborers in 1980.
13. The emphasis of Respondent's business shifted from primarily single-home construction to primarily federally-funded construction projects during this period.
14. While other male employees also did cleaning up tasks, the Complainant performed more than her share of cleaning up tasks on those job sites where she was assigned.

#### **RECOMMENDED CONCLUSIONS OF LAW**

1. The Complainant is a member of the protected class of sex within the meaning of Section 3.23, Madison General Ordinances.
2. The Respondent is an employer within the meaning of Section 3.23, Madison General Ordinances.
3. Except as stated in 4 below, the Complainant was not discriminated against on the basis of sex in regard to employment, specifically in regard to terms and conditions of employment (including layoff) and/or in regard to discharge from employment within the meaning of Section 3.23, Madison General Ordinances.
4. The Complainant was discriminated against on the basis of sex by the Respondent in regard to being assigned to more cleaning duties than males, in violation of Section 3.23 Madison General Ordinances.

#### **RECOMMENDED ORDER**

That this case be and hereby is dismissed, except that in the event the Complainant is re employed by the Respondent as a carpenter/laborer she shall be assigned to cleaning up and other duties on an equal basis with males.

#### **OPINION**

Briefly, the Complainant has what appears to be a very strong case for sex discrimination. She was employed by the Respondent for a period of time and was twice laid off along with males for economic reasons. However, after the second layoff on January 16, 1981, a time when three male employees were also laid off, all the male employees were called back at one time or another while the Complainant was not. Also, "new" employees were hired by the Respondent.

The Respondent's proffered reasons for her being laid off and subsequently not being called back essentially were:

- a. She was the least skilled of all carpenters (or carpenter/laborers).
- b. Any new employees hired since the January 16 layoff possessed skills which the Complainant did not have.

### I. EMPLOYEES LAID OFF

On January 16, 1981, the Complainant was laid off (for the second time in less than a month) along with three male employees: Rick Ballweg, James Handel and Dan Gallagher, the latter two of whom had also been laid off on December 19, 1980 with the reason given as lack of work or "no work". Ballweg had requested a layoff.

Under these facts, the Examiner can find no discrimination surrounding the Complainant's two layoffs, as males were laid off as well as the Complainant and the Complainant had the lowest combined job evaluation score of all carpenter/laborers.

### II. EMPLOYEES RECALLED

Ballweg was recalled on January 21, 1981, Handel on January 22 and Gallagher on January 26, 1981. The Complainant had not been recalled up to the time of the hearing.

Both Gallagher and Ballweg were more skilled workers than the Complainant. Handel was the second lowest performer (next to the Complainant) according to evaluations. Handel was later terminated for coming to work drunk.

Another employee, Dave Woods, was never laid off but took a leave of absence from December 16, 1980 to sometime in January, 1981, apparently due to personal difficulties.

The average total number of construction employees on the Respondent's payroll dipped from about 14 in 1980 to about 9 in 1981. While the amount of federally-funded work remained constant, the amount of private work declined. All employees newly hired during 1981 were hired because they possessed special construction skills which the Complainant did not have.

The Respondent stated on the record that it would recall the Complainant when its average employee payroll again increased to the 13 or 14 level, indicating that only in such times would the Respondent have a need for an individual with what the Respondent asserted are Complainant's limited skills.

While the Respondent relegated the Complainant to more than her share of "cleaning up" duties (male employees did the same "cleaning up" duties to the same extent on other job sites; however, the evidence indicates that she did more than her share on job sites she was assigned to), the Complainant failed to carry her burden of proof to show that she was as skilled or more skilled than any of the other workers the Respondent employed, she failed to show that male employees had made similar errors to the ones that she made in performing construction tasks, she failed to show the existence of a formal recall policy that had been violated, and she failed to show any other evidence to support that Respondent's reasons for failing to recall her were pretextual of sex discrimination. While the Complainant may sincerely believe that she was not afforded the same training opportunities nor given the same job and evaluation consideration as males, the burden of proof on the Complainant is a heavy one<sup>1</sup> which she has in this case failed to carry.

Signed and dated this 1st day of April, 1982.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent  
Hearing Examiner

1. Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1084, 25 EPD 31,544 (1981). In Burdine, the U.S. Supreme Court stated, "The Complainant retains the burden of persuasion and must now show that a discriminatory reason more likely motivated the employer than the employer's articulated nondiscriminatory reason or the Complainant must show that the employer's proffered reason is unworthy of credence."

While I have not discussed the prima facie case in my decision, I have decided each issue on the assumption that the Complainant had established her prima facie case which is rather obvious to this Examiner. Except for the issue regarding "cleaning up", however, the Complainant failed to carry her burden to show by a preponderance of the evidence that the Respondent's pro-offered reasons for her layoff and/or discharge were pretextual (or unworthy of credence).

While some of the males recalled were less senior than the Complainant, there is no evidence that seniority was the key factor in layoffs; the evidence showed that and it is not illegitimate for the Respondent to consider job performance.