

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

<p>Virginia Starin 2113 Simpson Street #2 Madison, WI</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Elks Club 711 Jennifer Street Madison, WI</p> <p style="text-align: center;">Respondent</p>	<p><b>RECOMMENDED DECISION</b></p> <p>Case No. 2871</p>
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A complaint was filed with the Madison Equal Opportunities Commission (MEOC) on September 23, 1982 alleging discrimination on the basis of age in regard to employment. Said complaint was investigated by MEOC Human Relations Investigators Renee Payne and Mary Pierce, and an Initial Determination dated February 16, 1982 was issued concluding that probable cause existed to believe that discrimination had occurred or was occurring as alleged.

Conciliation failed or was waived, and the matter was certified to public hearing. A hearing was held commencing on August 16, 1982. Attorney Roger Buffett of BUFFETT, DEW, BLANEY and OLSON, appeared on behalf of the Complainant who also appeared in person. Attorney Thomas W. Pierce appeared on behalf of the Respondent. Based upon the record of the hearing, the Examiner proposes the following Recommended Findings of Fact, Conclusions of Law and Order:

**RECOMMENDED FINDINGS OF FACT**

1. The Complainant, Virginia Starin, is an adult female, 51 years of age, who resides in the State of Wisconsin.
2. The Respondent, Elks Club, employs persons within the City of Madison to perform work at its dining facility located at 711 Jennifer Street, Madison, Wisconsin.
3. The Complainant was first hired to work as a waitperson (waitress) at Respondent's dining facility in September, 1975 by Billie and Ed Egstad, a couple who had contracted with the Respondent to operate its dining facility.
4. The Complainant was later employed by CJ's (or Charles Meyer) and then by Charlie Kneip, successor operators of the Respondent's dining facility.
5. On January 1, 1979, the Respondent assumed management of its own dining facility and the Complainant became employed by the Respondent. Although the Complainant had worked at the Respondent's dining facility since September of 1975, she had not become an employee specifically of the Respondent until January 1, 1979.
6. From January 1, 1979 to the time of her discharge in August of 1981, the Complainant and Janet Huff, were the only two "full-time" waitpersons employed by the Respondent. Full-time employees, including waitpersons, were those persons who worked an average of 30 or more hours per week on an annual basis for the Respondent. All other waitpersons were "part-time" employees in that they worked an average of less than 30 hours per week on an annual basis.

7. From January 1, 1979 until his departure sometime in or around October, 1980, Andy Eckmeyer was employed by the Respondent to manage and supervise the dining area and the employees who worked there. Eckmeyer followed a seniority practice which had been followed at least since the time that the Egstad's operated Respondent's dining room in September, 1975, that practice being to allow certain work assignment preferences to waitpersons on the basis of the greater number of years the employee had served in the Respondent's dining facility without regard to who the dining facility operators had been.
8. The Respondent did not have any written policies regarding the seniority of waitpersons from January 1, 1979 through the time of the Complainant's discharge.
9. On April 1, 1981, approximately five to six months after Eckmeyer had departed from the Respondent's employ, Dick Lewis was given complete authority by the Respondent to supervise the waitpersons, including the authority to hire and fire individuals. Lewis had been employed at the Respondent's dining facility as a cook (and kitchen supervisor) since sometime in October, 1980, shortly before Eckmeyer left.
10. On Easter Sunday in April of 1981, the Complainant was scheduled to work. She came to work but immediately requested that Lewis permit her to go home. Lewis refused to let her go home, informing her that 200 reservations were remaining to be served. The Complainant complained bitterly to Lewis, but worked her shift. The Complainant also spoke to Mary Reisdorf, a co-waitperson who was trying to inform her regarding assignment that evening. Reisdorf, as a result of some remarks made by the Complainant, went crying into the bathroom and was unable to work for a brief period of time that Easter Sunday.
11. Lewis called a meeting of the waitpersons sometime in April of 1981 shortly after Easter Sunday. The meeting was called in order to give the waitpersons a chance to discuss any complaints they might have so that Lewis could consider the complaints. At the meeting, which the Complainant attended, Lewis informed the waitpersons that he would not tolerate waitpersons not getting along with each other and that he would not tolerate waitpersons who thought it was not worthwhile to come to work, indicating that such attitudes may lead to discharge. Lewis' comments were made to the group of waitpersons as a whole and were not specifically addressed to any individual.
12. Also discussed at the April meeting of waitpersons (see Finding of Fact 9) were complaints that some waitpersons were favored in the assignment of tables by night hostess Julia Kindelberger, specifically that night hostess Kindelberger assigned some waitpersons more tables than other waitpersons. While the Respondent did not make any policy changes in its assignment of table rotation, Lewis worked with Kindelberger on a number of shifts after the April meeting to assist her in making more equitable assignments.
13. In early August of 1981, at least sometime prior to August 18, 1981, a "Shrine" convention was held in Madison and a group of Shriners frequented the Respondent's dining room for a period of four or five days. At the end of the four or five day period, the Complainant was heard by Lewis to remark in the kitchen, "I hope we never see these cheap bastards again."
14. On August 18, 1982, a Tuesday evening, the Complainant was scheduled to serve a prime rib dinner to a party at the Elk's Club. Hostess Kindelberger actually served the dinner. (There exists a dispute as to whether the Complainant was too busy to serve the dinner or whether Kindelberger failed to properly inform the Complainant that the party was ready to be served.)  
  
At the end of the night, Kindelberger was at her hostess station in the main dining room while the Complainant was in the employees' room with Huff. Approximately four customers remained in the dining room. Kindelberger heard the Complainant say in a loud voice, "Who does that bitch think she is, anyway," whereupon Kindelberger walked over to the employees' room, threw the envelope with the tip from the prime rib party onto a table and said to the Complainant, "You have the tip; now stop your bitching." Kindelberger had been given the tip by the consensus of other waitpersons on duty, but the Complainant had not been consulted. Once the Complainant had found out that Kindelberger had received the tip, she became disgruntled. Having now received the tip from Kindelberger, the Complainant forwarded it to the Respondent's office because she felt it was disputed and should be divided equally by the waitpersons but not by Kindelberger.
15. The next day, August 19, 1981, Lewis heard from other waitpersons that a problem had occurred between the Complainant and Kindelberger on Tuesday, August 18. Kindelberger was off work on August 19 and Lewis

did not discuss the matter with her until August 20, 1981. On August 21, 1981, Lewis called the Complainant and informed her that she was terminated effective September 1, 1981.

16. Lewis had never, prior to her discharge, specifically warned the Complainant of any deficiencies in her work performance or in her attitude.

17. Except for possibly Margaret Klagos who was hired virtually concurrently with Julianna Kindelberger, six waitresses and one waiter, all seven of whom were 25 years old or less at the time of hire, have been hired by the Respondent since August, 1979.

18. Dick Lewis hired three of the waitpersons referred to in Finding of Fact, all three of whom were 25 years old or less. The waitpersons hired by Lewis were all hired after April 1, 1981.

19. Since 1979, until the time of her discharge, the Complainant had, on an annual basis averaged the second most number of hours of work in Respondent's dining area next to Janet Huff. These two waitpersons were the only "full-time" waitpersons, i.e., the only waitpersons who worked more than 30 hours per week on the average. Huff worked on the average perhaps 25 hours per year more than the Complainant since 1979.

20. Of the three waitpersons hired by Lewis, none were hired to specifically replace the Complainant or anyone else more than 40 years old. Kelly Howard was hired to replace Barbara Pertzborn, Karen McCarthy was hired to replace Debbie Michelson (who was killed in an auto accident), and Renee Gusman was hired to replace Mary Reisdorf. However, the Complainant's working hours were primarily assumed by employees under 30 years of age, as the waitpersons more senior in age Alton, Klagos, Derer and Ramsfield were already working all the hours they desired.

### **RECOMMENDED CONCLUSIONS OF LAW**

1. The Complainant is a member of the protected class of age within the meaning of Sec. 3.23, Madison General Ordinances.
2. The Respondent is an employer within the meaning of Sec. 3.23, Madison General Ordinances.
3. The Respondent did not discriminate against the Complainant on the basis of her age in regard to either terms, conditions, and/or discharge from employment in violation of Sec. 3.23, Madison General Ordinances.

### **RECOMMENDED ORDER**

That this case be and hereby is dismissed.

### **MEMORANDUM OPINION**

Assuming, arguendo, that the Complainant has established a prima facie case of discrimination,<sup>1</sup> the issue narrows to whether or not the Respondent's articulated reasons for the Complainant's discharge were shown to be pretextual of age discrimination.

The Respondent pointed to essentially three incidents leading to the Complainant's discharge:

- (a) The Easter Sunday incident (see Finding of Fact 10)
- (b) The Shriner's incident (see Finding of Fact 13)
- (c) The prime rib dinner incident (see Finding of Fact 14)

There is no real dispute that these events occurred. The only point of disagreement I will discuss here is whether or not the Complainant made the statement on August 18, 1981 (the night of the prime rib dinner incident), "Who does that bitch think she is anyway." Both the Complainant and witness Janet Huff (called in rebuttal by the Complainant) testified they did not specifically recall that the statements had been made but both did not specifically deny that the statement had been made. Kindelberger testified that she specifically recalled the statement, and Lewis testified that he had heard the statement repeated to him by another employee prior to having discussed it with Kindelberger. Judging the demeanor of each of the witnesses as

well as the testimony in regard to this point, I resolve the issue of whether the statement was made in favor of the Respondent.

While Lewis had never specifically warned the Complainant, verbally or in writing, of any particular deficiencies regarding the three incidents or of any other reservations he might have had about her attitude or work performance, the overall thrust of the testimony convinces this Examiner that these three incidents were not in fact pretenses for a discriminatory motivation<sup>2</sup>. Although younger employees may have de facto benefitted by the Complainant's discharge, the Complainant's discharge was not shown to have been made even in part for the purpose that the Respondent could utilize younger employees on her shifts.

The Complainant was unable to show that other waitpersons used words like "cheap bastards" to describe customers in the presence of Food Service Manager Lewis or that other persons used words like "bitch" to describe a night hostess in a loud voice and within the possible hearing of customers. Further, the Complainant did not show that other employees had complained bitterly to Lewis about wanting to be able to leave a shift or had caused another waitperson to become so upset she had to leave her duties temporarily to go to the bathroom and cry. The best evidence is that Lewis first assumed complete supervisory authority over the waitpersons on April 1, 1981, based his decision to terminate the Complainant on three incidents that occurred after that period, and was concerned about the Complainant's attitude and interaction with other staff and not about her age. While Lewis' failure to at any time specifically warn the Complainant about his dissatisfaction with the three incidents in question is suspect, the Examiner finds that the Complainant has failed to carry her burden of proof to persuade me that the Respondent's reasons were pretextual of discrimination.

However, I find the discharge of the Complainant without warning after 6 years of service in the Respondent's dining facility, over 2-1/2 of those years as the Respondent's employee, by a Food Service Manager who had been in charge of the waitperson staff for a little less than 5 months to be a crude and primitive employment practice which led to a severe misunderstanding and a lack of communication between the parties. Perhaps a revision of the Respondent's employment practices to incorporate more humane standards of treatment would minimize the likelihood of recurrence of a bitter dispute which the parties in this case engaged in.<sup>3</sup>

## II. TERMS AND CONDITIONS

The Complainant presented no persuasive evidence to establish any discrimination on the basis of age in regard to terms and/or conditions of employment (regarding the assignment of customers or tables).<sup>4</sup>

Signed and date this 14th day of September, 1982.

Allen T. Lawent Hearing Examiner

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<sup>1</sup> See Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1084, 25 EPD 31, 544 (1981) for a discussion of the burden of proof in cases of alleged discrimination based on a theory of disparate treatment. While this case is not specifically of a Title VII related matter, as age is not covered by Title VII (and this is a local ordinance violation proceeding), the Burdine precedent is nevertheless persuasive.

<sup>2</sup> The ultimate burden of persuading the trier of fact (in this case, the Hearing Examiner) that the Respondent discriminated against the Complainant remains at all times with the Complainant. The Complainant must show that a discriminatory reason more likely motivated the employer than the employer's articulated non discriminatory reason or the Complainant must show that the employer's proffered reason is worthy of credence. See Burdine, supra.

<sup>3</sup> While I did not find that any discrimination occurred in this case, the Respondent's abrupt termination of the Complainant no doubt left her with a bitter taste and a strong feeling that she had been discriminated against.

<sup>4</sup> It was the Complainant's own testimony that Kindelberger's assignments of tables was based on friendship, and that the Complainant had been at one time the beneficiary of Kindelberger's friendship.