

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by  
Linda C. Johnson, Commissioner,  
Department of Human Rights,

Complainant,

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

vs.

James Doherty, d/b/a Doherty's Papa D's,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 9:30 a.m. on Tuesday, April 8, 1986 at the Chisago County Courthouse in Center City, Minnesota pursuant to a Notice and Order for Hearing dated March 6, 1986. Pursuant to Minn. Rule 1400.7200 (1985), witnesses were excluded from the hearing room so that they could not hear the testimony of other witnesses.

Deborah J. Kohler, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Complainant. James Doherty (Respondent), the proprietor of Doherty's Papa D's, 239 Fourth Street, Rush City, Minnesota 55069, appeared on his own behalf and without counsel. The record closed at the conclusion of the hearing on April 8, 1986.

NOTICE

Pursuant to Minn. Stat. 363.071, subd. 2, this Order is the final decision in this case. Under Minn. Stat. 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69.

STATEMENT OF ISSUES

The issues in this case are whether or not the Respondent terminated the employment of Tracie Jo Prudhomme (Charging Party) because she was pregnant, or unmarried and pregnant; and if so, the relief she is entitled to receive under the Minnesota Human Rights Act.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. James Doherty is the proprietor of a small pizzeria in Rush City, Minnesota, which is operated under the name of Doherty's Papa D's (Restaurant). At all times material to this case, the Restaurant was open for business from 4:00 to 10:00 p.m. on weekdays and from 4:00 p.m. to midnight on weekends. Generally speaking, two employees were on duty during normal business hours: a cook and a waitress. In addition, Nancy Hawkinson, the on-site manager, was frequently at the Restaurant during business hours.

2. Tracie Jo Prudhomme worked as a waitress at the Restaurant from November, 1983 to August 1, 1984. On the latter date, Prudhomme was a single woman 17 years of age and approximately four month's pregnant.

3. Prudhomme's normal workweek alternated between three and four day's work. A three-day workweek involved two weekday shifts and one weekend shift. A four-day workweek consisted of three weekday shifts and one weekend shift. Prudhomme always worked from 4:00 p.m. to closing. Thus, she would be scheduled to work approximately 20 hours one week and 26 hours the next. At the time of her termination from employment she earned \$3.00 hourly.

4. During the last three months of her employment, the Charging Party's scheduled hours of work and the hours she actually worked were as follows:

Pay Period	Ending	Number of Scheduled
Hours	Actually	Hours of Work-
Worked	Date	
12	May 14, 1984	26
	May 19, 1984	20
	6	
18.5	May 25, 1984	26
12.5	June 1, 1984	20
	June 8, 1984	26
	20	
20	June 16, 1984	6
26	June 22, 1984	26
6	June 29, 1984	20

24	July 6, 1984	26
15	July 13, 1984	20
25.25	July 20, 1984	26
29.5	July 27, 1984	20
10.5	August 3, 1984	26

As shown above, during the 12-week period ending July 27, 1984, Prudhomme missed approximately 12 day's work. She worked her regular schedule only in the pay periods ending June 22, July 6, July 20 and July 27, 1984. In each of the other pay periods, she missed at least one day's work.

5. In February, 1984, Doherty purchased and began operating a second restaurant in Cambridge, Minnesota. This diverted his attention from the Rush City Restaurant and many administrative tasks were assigned to Dawn Hemmer, the cook. In May, Doherty decided that he needed a manager for the Restaurant and he hired Nancy Hawkinson, a former employee, for that job. Hawkinson soon became dissatisfied with Prudhomme's job performance. Prudhomme frequently called in sick. This required Tamara Sanfellipo, the other waitress employed at the Restaurant, to work for her. Sanfellipo complained to Hawkinson about

Prudhomme's absences. She also complained that Prudhomme was not cleaning up at the end of her shift, causing additional work for Sanfellipo when she came to work the next day. When Hawkinson told Prudhomme to clean up at the end of her shift, Prudhomme was uncooperative and stated that she was not a janitor.

6. Hawkinson and Doherty both received customer complaints about Prudhomme and Prudhomme and Hawkinson had disagreements about Prudhomme's failure to tie up her hair while on duty and her smoking in the Restaurant while patrons were present. Hawkinson discussed these matters with Doherty on several occasions. As a result of these problems, Hawkinson tentatively decided that Prudhomme should be discharged. When she discussed that with Doherty, he told her to use her own best judgment in making that decision.

7. Hawkinson eventually decided to discharge Prudhomme because of her absenteeism and unsatisfactory job performance. However, instead of firing her, she decided to substantially reduce Prudhomme's hours in the hope that Prudhomme would quit. On August 1, 1984, when Prudhomme reported to work, Hawkinson advised her that she was reducing her workweek to one shift. After working an hour or so, Prudhomme approached Hawkinson to discuss the reduction in her schedule some more. Prudhomme accused Hawkinson of reducing her hours merely because she was pregnant, and told Hawkinson that was illegal. Hawkinson denied that Prudhomme's pregnancy had anything to do with her decision to reduce her hours. Prudhomme continued to argue with her, so Hawkinson advised Prudhomme that she was being terminated and that she should turn in her key to the Restaurant. At that point, Prudhomme turned in her key and left.

8. All the employees at the Restaurant in Rush City are females.

9. Doherty has employed pregnant women to work in his restaurants during the terms of their pregnancies on prior occasions. One of them worked at the Rush City Restaurant into the eighth month of her pregnancy, when she quit.

10. Hawkinson and Doherty, as well as other employees in the Restaurant and individuals living in Rush City, were aware that Prudhomme was pregnant at the time of her discharge. However, it was not visually apparent that Prudhomme was pregnant at that time.

11. Prudhomme's pregnancy was not a factor that Hawkinson considered when she decided to terminate Prudhomme.

12. Sanfellipo and Hemmer still work at the Restaurant. However, Hawkinson now works elsewhere.

13. Prudhomme was able to work at the time of her discharge.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Administrative Law Judge has subject matter jurisdiction herein under Minn. Stat. 363.071, subd. 1 and 14.50 (1984).

2. That the Respondent received proper notice of the hearing in this matter and that the Complainant has complied with all relevant substantive and procedural requirements of statute and rule.

3. That the Respondent is an employer for purposes of Minn. Stat. 363.01, subd. 15 (1984).

4. That the Complainant's Motion that its Complaint be deemed admitted as a result of the Respondent's failure to file an Answer should be denied because the Complainant has failed to establish that it was prejudiced by the Respondent's failure to serve an Answer.

5. That the Complainant established a prima facie showing that the Respondent discriminated against the Charging Party on the basis of her sex and her marital status for purposes of Minn. Stat. 363.03, subd. 1 (2)(b), (2)(c) or (5) (1984).

6. That the Respondent articulated a legitimate, nondiscriminatory reason for the Charging Party's discharge.

7. That the Complainant failed to establish by a preponderance of the evidence that she was discharged as a result of her sex, marital status, or pregnancy for purposes of Minn. Stat. 363.03, subd. 1 (2)(b), (2)(c) or (5) (1984).

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that the Complainant's Complaint be and it is hereby dismissed .

Dated this                    day of April, 1986.

JON L. LUNDE  
Administrative Law Judge

Reported: Taped

MEMORANDUM

Minn. Stat. 363.03, provides, in part, as follows:

Subd. 1. Employment. Except when based on a bona fide occupational qualification, it is an unfair employment practice:



(2) For an employer, because of . . . sex, [or] marital status

(b) to discharge an employee; or

(c) to discriminate against a person with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

(5) For an employer not to treat women affected by pregnancy, childbirth, or disabilities related to pregnancy or childbirth, the same as other persons who are not so affected but who are similar in their ability or inability to work.

The Complainant alleges that the Respondent violated these statutory provisions by discharging Prudhomme because she was pregnant or unmarried and pregnant.

In most cases, the order and allocation of proof in a contested case involving alleged violations of the Minnesota Human Rights Act follow the three-step procedure outlined by the United States Supreme Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). In that case, the Court held that the initial burden of going forward with evidence to establish a prima facie case of discrimination rests with the complainant. Once a prima facie violation is established, an inference of discrimination arises, and the burden of going forward with the evidence shifts to the respondent, who is required to articulate a legitimate, nondiscriminatory reason for the action it took. If the respondent establishes a legitimate, nondiscriminatory reason for the action, the complainant may then present evidence showing that the articulated reason presented by the respondent is a mere pretext for illegal discrimination. Under the *McDonnell-Douglas* test, the ultimate burden of persuasion is with the complainant. The three-step procedure outlined in *McDonnell-Douglas* has been adopted by the Minnesota Supreme Court. *Danz v. Jones*, 263 N.W.2d 395, 398-99 (Minn. 1978).

The *McDonnell-Douglas* formula was fashioned to address a charge involving an employer's discriminatory refusal to hire. Consequently, the specific elements of a prima facie case must be modified when discriminatory discharges are alleged. Where discharges are involved, the discharged employee has the initial burden of establishing a prima facie case by showing (1) she is a member of a protected class; (2) she was qualified for the job from which she was discharged; (3) she was discharged; and (4) the employer assigned a nonmember of the protected class to do the same work. *Hubbard v. United Press International, Inc.*, 330 N.W.2d 432, 442 (Minn. 1983). In this case, the Complainant did establish that as an unmarried pregnant women the Charging

Party was a member of several protected classes. The Complainant also established that she was qualified for the job from which she was discharged, that she was discharged, and that another women was hired to replace her as a waitress. Since the Complainant did not show that her replacement was a nonmember of the protected classes to which she belonged (i.e., unmarried and

pregnant) the fourth element of her prima facie case was not established for purposes of the Hubbard case. However, she presented other evidence which was clearly sufficient to raise an inference of discrimination. She testified that at the time of her discharge Hawkinson told her that Doherty wanted her to be discharged by the time she was five month's pregnant. Consequently, a prima facie showing of illegal discrimination was made.

However, the Respondent rebutted the prima facie showing of illegal discrimination by presenting evidence that the Charging Party was an unsatisfactory employee who had a high rate of absenteeism: that she missed at least one day's work in eight of the last 12 weeks of her employment and failed to comply with her manager's directives regarding clean up duties, smoking in the restaurant, and tying down her hair. The Charging Party attempted to show that the nondiscriminatory reasons articulated by the Respondent were a mere pretext, and that she was discharged because she was an unwed, pregnant woman. Nonetheless, the Administrative Law Judge is not persuaded by a preponderance of the evidence that the Charging Party was discharged as a result of her sex, her pregnancy, or her marital status.

When the Charging Party first testified, she stated that she worked three or four days each week on an alternating basis and that she never missed work. However, the Respondent presented evidence showing that the Charging Party did miss at least one day's work in eight of the 12 pay periods ending July 27, 1984. In at least three of those weeks, she missed more than one day's work. The extent of her absenteeism was verified by records which were subsequently introduced by the Complainant. Those records corroborate the testimony of Sanfelliipo and Hawkinson that the Charging Party was frequently absent from work and support Hawkinson's testimony that her absenteeism was a substantial factor leading to her discharge. In rebuttal, the Charging Party testified that any deviation from the three or four workday schedule she initially testified about did not result from her absenteeism but from schedule changes made by Hawkinson. That rebuttal testimony is inconsistent with the thrust of her initial testimony and her damage claim, and is not credible.

To support her charge that the Respondent and his manager, Nancy Hawkinson, discharged her because she was an unwed, pregnant woman, the Complainant also presented testimony from Dawn Hemmer and Jacquelyn Anderson. Hemmer's testimony was impeached and inconsistent in every material respect. Her inconsistent testimony concerning the motives, statements, and comments of Hawkinson and Doherty make her an unreliable witness whose testimony cannot be credited. The only independent corroboration of the Charging Party's allegations came from Jacquelyn Anderson, a customer. Anderson testified that Sanfelliipo told her that the Charging Party was going to be discharged because

she was pregnant and that Hawkinson or Doherty intended to use the excuse that the Charging Party was a poor waitress. Anderson's testimony suggests that the Respondent's stated reasons for Prudhomme's discharge are pretextual. However, the record contains more persuasive evidence that the reasons articulated are genuine. Evidence showing the number of hours Prudhomme actually worked persuasively establishes that she frequently failed to work her regular three- or four-day schedule. The most compelling inference created by those records is that Prudhomme frequently failed to report for scheduled work. That is inconsistent with her testimony to the contrary and substantially diminishes her credibility. At the same time, it enhances the credibility of Hawkinson, Sanfellipo and Doherty as to her absenteeism and

other job-related problems. Therefore, it is concluded that the articulated reasons for Prudhomme's discharge are genuine. Consequently, there was no need for Hawkinson to fabricate grounds for discharge, as Andersons' testimony suggests.

The persuasiveness of Anderson's testimony was diminished by other factors. Her testimony suggests that Prudhomme was to be discharged on pretextual grounds. If that is true, it is unlikely that Hawkinson would tell Prudhomme that Doherty wanted to dismiss her by the time she was five month's pregnant, as Prudhomme alleged. Moreover, Hawkinson did not intend to discharge Prudhomme. Instead, she had decided to reduce her hours hoping she would quit. Hawkinson decided to discharge Prudhomme only after Prudhomme argued with her about the hourly reduction made and it appeared that Prudhomme would not be quitting. Since the testimony Anderson presented cannot be satisfactorily reconciled with that presented by Prudhomme or with the other evidence in the record, it has not been credited.

Similarly, Prudhomme's testimony that Doherty wanted to dismiss her by the time she was five month's pregnant was not persuasive. Prudhomme was not a credible witness. While there may have been discussion about her pregnancy and its relationship to her job performance, the Administrative Law Judge is not persuaded that her pregnancy was a factor in the Respondent's decision to reduce her hours or terminate her employment.

The testimony presented by Doherty and Hawkinson was, on a whole, believable. Hawkinson and Sanfellipo testified to problems with the Charging Party. Doherty verified that those problems had been communicated to him by them. Even Hemmer testified that there were problems between Hawkinson and the Charging Party. Given the absenteeism that was established, and since the testimony of Sanfellipo, Hawkinson, and Doherty as generally more credible, it is concluded that Prudhomme was not discharged for illegal reasons. Quite simply, the Administrative Law Judge is persuaded that the Charging Party was discharged because of inadequate job performance. There is undisputed evidence that the Respondent only employed women in the Restaurant and has

permitted pregnant women to work in his Restaurant in Rush City as well as in his restaurant in Cambridge. This suggests that he does not discriminate against women generally, or pregnant women in particular. The Complainant suggests, however, that the Charging Party was treated differently because she was an unmarried pregnant woman. Complainant implies that even if the Respondent was willing to let pregnant married women work, he was unwilling to let unmarried pregnant women do so. However, the preponderance of the evidence presented does not support such a conclusion. Therefore, the Complaint should be dismissed.

At the commencement of the hearing, the Complainant moved to have the essential elements of the Complaint deemed admitted due to the Respondent's failure to file an Answer. That Motion should be denied. Minn. Rule 5000.1200 (1985), provides:

A respondent shall serve an answer upon the department within 20 days after service of the complaint. The original answer, together with an attached affidavit of service, shall be filed with the panel or administrative

law judge. Failure to answer the complaint shall be deemed an admission of the allegations therein. A respondent may amend an answer at any time.

In this case, the Complainant's Amended Complaint was mailed to the Respondent on March 13, 1986. Under Minn. Rule 1400.6100, subp. 2 (1985), the Respondent had until April 7, 1986, to serve his Answer under Minn. Rule 1400.5100, subp. 9 (1985). That Answer could have been served by mail, in which case, it would likely not have been received by the Complainant prior to the commencement of the hearing on April 8. Moreover, the Complainant did not argue or establish that it was prejudiced in any way by the Respondent's failure to Answer the Complaint, and it did not request an Order requiring an Answer or request a continuance of the hearing until the Answer was filed.

Minn. Rule 5000.1200 contains the mandatory word "shall". However, the Administrative Law Judge is persuaded that it does not require that the allegations be deemed admitted where no prejudice is established. *CF. Jadwin v. City of Dayton*, 379 N.W.2d 194 (Minn.App. 1986). See, also, *Helwig v. Olson*, 376 N.W.2d 763 (Minn.App. 1985). In those cases, the Appellate Court has recognized that the primary objective of the law is to dispose of cases on their merits and before a pleading is stricken and a default judgment is rendered, some prejudice should be established. In addition, the Court has recognized that it is permissible to consider the fact that a party is appearing without counsel when considering the effect of a party's failure to know about or comply with procedural rules. The pro se status of a party in an administrative proceeding is especially relevant. Parties frequently appear pro se in administrative matters and technical compliance with the usual rules of procedure applicable to courts is not rigidly required. Since this matter should be decided on the merits, and since the Complainant has established no prejudice, it is concluded that her Motion should be denied.

J.L.L