

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

State of Minnesota, by Irene
Gomez-Bethke, Commissioner,
Department of Human Rights,

Complainant,

V.

The City of Zumbrota,
a Municipal corporation, d/b/a
Zumbrota Municipal Liquor Store,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

The above-entitled matter came on for hearing before Jon L. Lunde, duly appointed Hearing Examiner, commencing at 9:00 a.m. on Tuesday, July 26, 1983, in the Community Room of the Red Wing Public Library in Red Wing, Minnesota, pursuant to a Notice of and Order for Hearing dated May 23, 1983. The hearing continued through July 27, 1983 at the same location. The record closed on November 21, 1983 at the conclusion of the briefing schedule authorized by the Hearing Examiner.

Barry IL Greller, Special Assistant Attorney General, 1100 Bremer tower, Seventh Place and Minnesota Street, Saint Paul, Minnesota 55101, appeared on behalf of the Complainant. David A. Rockne, Zumbrota City Attorney, P.O. Box 7, 385 Main Street, Zumbrota, Minnesota 55992, appeared on behalf of the Respondent.

NOTICE

Pursuant to Minn. Stat. 363.071, subd. 2 (1.982), as amended by Minn. Laws 1983, ch. 301, 201, this Order is the final decision in this case and under Minn. Stat. 363.072 (1982), as amended by Minn. Laws 1983, Ch. 247,

144-145, 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 (1982), as amended by Minn. laws 1983, Ch. 247, 9-14.

STATEMENT OF ISSUE

the issues in this case are whether or not the Respondent discriminated against a female former employee (the Charging Party) with respect to her compensation, contrary to the provisions of Minn. Stat. sec. 363.03, subd. 1(2)(c); whether the Respondent discharged that employee from her position with the Municipal Liquor store on the basis of her sex, contrary to the provisions of Minn. Stat. 5 363.03, subd. 1(2)(b) and (c); whether the Respondent refused to rehire the charging party after her discharge on the basis of her sex, contrary to the provisions of Minn. Stat. sec. 363.03, subd. 1(2)(a); and if any discriminatory actions occurred, the relief, if any, the Charging Party is entitled to receive.

Based upon all of the proceedings herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Charging Party, Kathryn A. Connelly, is a 32 year old woman who resides in White Bear Lake, Minnesota. In December 1980, when a resident of Zumbrota, Minnesota, she applied for work as a waitress at the Zumbrota Municipal Liquor Store. She was interviewed by Harold Blakstad the liquor store manager. Blakstad had authority to hire and fire liquor store employees at that time. He offered Connelly a full-time waitress position at an hourly wage of \$3.90. (Connelly accepted that offer and began working as a full-time waitress on December 15, 1980.

2. At all times relevant to this case the liquor store was an on-sale and off-sale establishment operated by the City of Zumbrota and managed by Blakstad. The liquor store was open from 8:00 a.m. to 12:00 p.m. daily, except Sunday, but off-sales were not made after 10:00 p.m. Liquor store employees worked one of two shifts: the day shift from 7:30 a.m. to 4:00 p.m., or the night shift from 4:00 p.m. to midnight or 1:00 a.m. employees of the liquor store were not union members and the terms of their employment were not governed by any collective bargaining agreements, municipal ordinances or other written personnel policies.

3. During the time of Connelly's employment, all liquor store employees, except Blakstad, were classified as bartenders or waitresses. The wages paid to bartenders and waitresses were governed by salary step plans established by the Zumbrota City Council. There were seven steps in each plan. The hourly wages for waitresses ranged from \$3.65 to \$4.45 in 1980 and from \$4.09 to \$4.98 in 1981. The hourly wage for bartenders ranged from \$4.80 to \$6.50 in 1980 and from \$5.38 to \$7.28 in 1981. The tips received by the individuals in both positions were similar: \$5.00 daily during most of the year and up to \$10.00 on holidays.

4. During Connelly's employment there were no written job descriptions for the waitress and bartender positions and no written personnel policies. Blakstad had a great deal of management discretion in personnel matters until

early in 1981. At that time" Russel Boraas, a city council member, became the "liquor commissioner" and began exercising some limited supervisory authority over Blakstad.

5. From all times material to this case waitresses were responsible for waiting on tables in the on-sale section of the liquor store. Their duties involved taking drink orders, delivering those orders to a bartender and re-turning the drinks ordered to the customers. Waitresses paid the bartenders for such orders from a daily they were provided with and replenished their bank with customer payments. In addition to waiting on tables, waitresses were responsible for keeping the table area clean, answering tele-phones, cleaning rest rooms on Mondays, and, when necessary, filling in as bartenders.

6. Bartenders were responsible for waiting on customers at the bar, mixing all drinks, running cash registers, cleaning glasses and other bar items, stocking the bar, tapping beer kegs located in the basement, cleaning the bottle chute and packaging empties in the basement. At least one bartender was also responsible for operating the off-sale operation and for stocking off-sale liquor and beer items. The most senior bartenders would

normally open and close the liquor store and close out the cash registers at the end of the night. Some bartenders would also assist Blakstad in taking inventory and stocking liquor shipments received.

7. From the time Connelly began working, the liquor store employed five bartenders Carole gjemse, Beverly Blakstad (Harold Blakstad's wife), Phyllis Blakstad (Harold Blakstad's sister-in-law), James C. Stee, and Marshall Peterson. Connelly was the only waitress.

8. Connelly was employed subject to the satisfactory completion of a 90-day probationary period. She satisfactorily completed her probationary period in March 1981. She worked primarily as a waitress during that time period.

9. Blakstad's policy was to give waitresses the opportunity to learn how to tend bar, and he would assign them bartending duties from time to time. Whenever bartender vacancies arose, waitresses would then be able to qualify for them. At the end of February, 1981, Blakstad hired Pozarre (Babe) Sommerfield, the daughter of the Zumbrota Mayor, Audrey Aaker.

10. About the time Sommerfield was hired, Blakstad told Connelly that a bartender job would be opening up and that if she was willing to learn the duties of that position she could have the job. For several weeks after Sommerfield was hired, Sommerfield and Connelly alternated working Thursdays as bartenders on the day shift. Connelly also worked more frequently as a bartender on other shifts as instructed by the more experienced bartenders at the liquor store who, because of their seniority, assumed some limited supervisory duties.

11. On or about April 14, 1981, Blakstad hired Ruby (Kitty) Busby as a waitress. At that time, he offered Connelly a bartender job which she accepted. Connelly had frequently worked as a bartender before that time, but after Busby was hired, she worked almost exclusively as a bartender and worked as a waitress on only three or four occasions prior to September 1, 1981.

12. (At or about September 1, Sommerfield complained to Blakstad that Connelly was always behind the bar and asked that she be given more oppor-

tunities to tend bar. For the next two weeks Connelly was assigned waitress duties one night each week.

13. From and after April 14, 1981, Connelly worked almost exclusively as a bartender and performed all the duties normally assigned to that position.

she did not open or close the liquor store, or ring out the cash registers at night, but not all bartenders were required to do that. She worked five days

each week. She always worked the (lay shift on Thursday and alternated working

a day shift on the weekend. Otherwise, she worked the evening shift. Al-

though Blakstad had offered Connelly a bartender position, Connelly was never

formally approved as a bartender by the City Council and cis never paid the

hourly wage payable to bartenders. (On January 1, 1981, shortly after she

began working she did receive a cost-of-living raise granted to all

employees. Pt that time hner salary was increased to \$4.42 per hour. Her

salary remained at that level throughout the remainder of her employment.

14. In the summer of 1981 the City of Zumbrota was in a financial crisis

an(, the City Council was considering a variety of austerity measures to reduce

expenditures. By September rumors began circulating that along with cuts in

other departments three liquor store employees might be laid off.

15. On September 12, 1981, Connelly was scheduled to work the day shift . She called Blakstad shortly before 8:00 a.m. that morning to advise him that her boys (ages 10 and 11) were sick with the flu and that she would be unable to report for work that day. Later that morning Blakstad learned that one of his relatives saw Connelly and her sister at a garage sale without any children.

16. On the Monday morning, September 14, 1981, at approximately 8:00 a.m. , Connelly, telephoned Blakstad to report that she would be unable to report for work that afternoon because she was sick. Later that morning Blakstad went to her home and advised her that he would have to let her go because all city departments were cutting back . He did not advise her of his dissatisfaction with her work performance and her absenteeism although his decision to terminate her was attributable to these factors, too.

17. On September 24, 1991 the Zumbrota City Council voted to freeze the step plans applicable to liquor store employees and to lay off all waitresses (two) and one bartender. On or about September 27, 1993, Phyllis Blakstad and Sommerfield were laid off . Blakstad did not lay off a bartender because one of them (Peterson) quit when he learned of the council's decision to freeze salary plans.

18. the Zumbrota City Council's resolution (of September 24, was that Blakstad should cut all waitresses. Blakstad did not do that. Instead, he laid off his sister-in-law (a part-time bartender) rather than Busby, whom he retained as a waitress.

19. By early October, the City Council realized that it was not feasible to operate the liquor store at the staffing levels which resulted from past layoffs. Blakstad was authorized to fill several positions. the positions were all advertised in the local newspaper. On October 31, the Council approved Busby's application for a bartender position and approved the applications of Candice Ostrem and Terry Goddard, respectively, as full-time and part-time waitresses.

20. On November 23, 1981, the City Council determined that Blakstad would

not be authorized to hire an assistant manager. Blakstacl had requested per- mission to hire an assistant who could help him take inventory and share the heavy lifting involved when liquor shipments were received. However, die Council aid authorize the hiring of one bartender, one full-time waitress and one part-time waitress. James wamberg, a former City Clerk, was hired as a bartender and Sharon Nielsen was hired as a waitress. Wamberg had no prior bartenling experience.

21. Connelly was unaware of the vacancies that occurred in the liquor store subsequent to her termination. She never applied for any of those po- sitions and was not considered for diem.

22. In early February, 1982, after Connelly learned that new individuals had been hired at the liquor store she had a conversation with Blakstad. At that time she asked him why she had not been recall-ed to work. Blakstal told her he had nothing to do with it and indicated that the decisions had all been made by the City Council. Connelly immediately called Mayor Aaker and asked her about her layoff and die reasons why she had not been recalled. Aaker told Connelly that she heard from Blakstad that Connelly had quit the job. When Connelly asked Aaker if Blakstad wanted a man for the job, Aaker advised

her that he had expressed an interest in hiring a man, but that she did not believe that was the reason Connelly was let go.

23. Marshall Peterson, a man, was employed as a bartender on December 2, 1980. During the times that Connelly worked as a bartender Peterson was paid \$5.37 hourly, or .95cents more than Connelly, who was paid \$4.42 hourly.

Based on the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. That the Complainant gave proper notice of the hearing in this matter and has fulfilled all relevant substantive and procedural requirements of law and rule.

2. That the Hearing Examiner has jurisdiction herein and authority to order the relief granted pursuant to Minn. Stat.

363.071, subd.

2 (1978), as amended, and 14.50 (1982).

3. That the Respondent is an employer for purposes of Minn. Stat. A 363.01, subd. 15 (1980).

4. That the Charging Party filed a timely charge against the Respondent for purposes of Minn. Stat. 363.06, subd. 3 (1980).

5. That the Complainant established a prima facie showing that the Respondent discriminated against the Charging Party on the basis of her sex and with respect to her compensation by paying her less than it paid male employees for performing substantially equal work contrary to the provisions of Minn. Stat. 363.03, subd. 1(2)(c.) (1980).

6. That the complainant established a prima facie showing that the Respondent discriminated against the Charging Party on the basis of sex and with respect to her discharge under Minn. Stat. 363.03, subd. 1(2)(b) (1980).

7. That the Respondent articulated legitimate non-discriminatory reasons for Connelly's discharge.

8. That the Complainant failed to establish that the articulated reasons for Connelly's discharge were a pretext for discrimination and failed to establish, by a preponderance of the evidence that Connelly's discharge was based on her sex.

9. That the Complainant failed to establish a prima facie showing that the Respondent discriminated against the Charging Party on the basis of her sex

and as to her recall to employment for purposes of Minn. Stat. 363.03, subd. 1(2)(a.)(1980).

10. That the Respondent failed to articulate a legitimate nondiscriminatory reason for discriminating against the Charging Party with respect to her compensation, and failed to establish any affirmative defense for the unequal compensation she was paid.

Based on One foregoing Conclusions of Law, and for the reasons discussed in the Memorandum attached hereto,

ORDER

IT IS HEREBY ORDERED:

1. That the Respondent pay to the Charging Party \$836.00, being the difference the wages earned by the Charging Party after she became a bartender and the wages paid to Marshall Peterson during that 22-week time period.

2. that the Respondent pay the Charging Party interest, at the rate of

six percent per annum, on the wages she was entitled to receive, from September 14, 1981 through September 14, 1983, or \$103.33.

3. that the Respondent cease and desist from discriminating against Municipal liquor Store employees on the basis of sex in respect to their compensation Where those employees perform equal work.

4. That the complainant's charges of a discriminatory discharge and a discriminatory refusal to rehire be and the same are hereby dismissed.

5. That the Respondent pay the Charging Party \$1,000.00 as punitive damages.

Dated this 6th day of December, 1983.

JON L. LUNDE
Hearing Examiner

MEMORANDUM

Equal Pay Claim

The Respondent is charged with a violation of Minn. Stat. 363.03,

subd. 1(2)(c), which makes it an unfair employment practice for an employer

because of a person's sex:

(c) to discriminate against a person with respect to . . . compensation

In *Danz v. Jones*, 263 N.W.2d 395, 399-400 (Minn. 1978), the Minnesota Supreme

Court held that a prima facie showing of discrimination in compensation was

made if it is shown that an employer pays different wages to employees of op-

posite sexes for equal work on jobs, the performance of which requires equal

still, effort and responsibility, and which are performed under similar

working conditions. It cited with approval the decision in
Corning Glass

Works v. Brennan, 417 U.S. 195, 94 S.ct. 2228, 41 L.Ed.2d 10. In
this case,

the Complainant established a prima facie showing of discrimination
with re-

spect to the Charging Party's compensation.

in determining whether work is equal for purposes of the equal Pay
Act of

1963, 29 U.S.C. 206, and the Minnesota Human Rights Act, it is not
necessary

to show that the work being compared is identical. It is only
necessary to

establish that it is "substantially equal". Schultz v. Wheaton
Glass Co.,

421 F.2d 259 (3rd Cir. 1970), cert. den., 398 U.S. 905. The equality
of the

work performed does not depend on the titles of the positions being
compared,

but on the actual work performed. Brennan v. Braswell Motor Freight, 6
E.P.D.

par. 8689 (5th Cir. 1973). In this case, therefore, the Complainant
need only

show that the Charging Party performed substantially equal work to
that of

male bartenders, for less pay, and the fact that she was
considered as a
"waitress" is immaterial.

Equal work has usually been construed to mean work that is
equal in
"skill, effort and responsibility". Corning Glass Works v. Brennan,
supra.

During the greater part of her employment, Connelly worked as a
bartender and

performed work substantially equal in skill, effort and responsibility to the work male bartenders performed, and did that work under similar working conditions.

In determining whether equal skill is involved, the training, education and experience required by the positions must be examined and not the training, education and experience the individuals hold in those positions happen to possess. *Peltier v. City of Fargo*, 533 F.2d 374 (8th Cir. 1976).

That is, skill is determined by the requirements of the job.

In this case, the evidence shows that the skills needed to perform Connelly's duties were substantially equal to the skills needed to perform other bartending duties at the liquor store. Equal skill was needed in operating cash registers, waiting on customers, mixing drinks, stocking shelves, waiting on tables, and the other jobs performed by all bartenders.

The usual rule is that, when the requisite training for a position can be achieved in a relatively short period of time, a skill differential does not

exist. *Larson, Employment Discrimination*, 30.10, p. 7-42 (1981).

Thus, in *Schutz v. Kimberly-Clark Corp.*, 315 F.Supp. 1323 (W. D. Tenn. 1970), the court found two positions equal in skill because they could be learned by observation and practice without prior specialized education or experience.

In this case, bartenders were not required to have any special qualifications in terms of education or experience, as is evinced by the hiring of the former city clerk after Connelly was discharged. Many of the male bartenders had some prior experience, but Connelly did also. Furthermore, the complexity of the drink requests generally made were not complicated and the recipe for most of the usual drinks ordered could be learned in a short period of time.

The responsibility and working conditions were nearly identical. All bartenders worked during the week and weekends, and worked nights or days, or both, and all were responsible for mixing drinks, running cash registers, cleaning glasses and other bar items, stocking the bar, cleaning the bottle chute and doing other related things. The more experienced bartenders would,

in addition, open the bar and close out the cash registers at the end of the day, and some would help Blakstad in taking inventory and stocking liquor shipments received. Although Connelly did not have a key to the Liquor Store and did not open the bar, and although she did not close out the cash registers or assist Blakstad in taking inventory, not all male bartenders did that and those duties were, for the most part, incidental in nature. For

these reasons, it is concluded that the responsibility and the working conditions were substantially equal.

The equality of effort between two positions pertains to the Physical and mental exertions of the jobs being compared. The relative exertion of the two jobs will depend on the quantity and quality of the work performed. In this case, Connelly's job required more effort in some respects than that required of male bartenders who worked the day shift because the volume of business was greater at night. Furthermore, while she was slower than some of the more experienced bartenders and, therefore, was not stationed at the busiest section of the bar, her job required equal effort because when she was stationed at a less busy section of the bar, she was also responsible for taking care of off-sales.

Although the exact date when Connelly began working as a bartender cannot be set, it is clear that Connelly started bartending on or about March 1, when Sommerfield was hired and worked almost exclusively as a bartender from and after April 14. During the interim six-week period, Connelly became familiar with the duties of her position, and worked more and more frequently behind the bar. After April 14, she was, for all intents and purposes, a bartender and should have received compensation as a bartender. Although she did work as a waitress, on a few occasions after April 14, bartenders were also required to work - as waitresses from time to time, and that work did not destroy the substantial equality of her position, relative to the other bartenders.

the Equal Pay act (29 U.S.C. 206(d)) is applicable to charges of discriminatory compensation under ran 363. Danz v. Jones, supra. It contains specific exemptions for inequalities in pay which are based on seniority, merit or productivity systems, and for inequalities based on any other factor other than sex. the Respondent has the burden of proof to establish any of these affirmative defenses. Corning Glass Works v. Brennan, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974). In this case, Respondent did not allege or establish that Connelly's salary was based on a seniority, merit or productivity system within the meaning of the Equal Pay Act. However, the Respondent implied that Connelly's pay differential resulted from her status as a trainee.

The Equal Employment Opportunity Commission (EEOC) has adopted regulations which give limited recognition to pay differentials for equal work resulting from bona fide training programs. 29 C.F.R. sec. 800.148. Such training programs are normally designed to expose future supervisors or executives to life at the humbler levels of a business. L Larson, Employment Discrimination

31.23, p. 7-72. This type of training program, whereby persons in training receive a higher salary than the persons with whom they work, appears to 'be

the type of program contemplated by the EEOC's regulations and is the only type of program known to have been considered by the courts.

The Respondent cited no authority recognizing the permissibility of paying women less than men who perform equal work because the women are in training, where the jobs performed involve equal skill, effort and responsibility.

Even if such an arrangement might be permissible in a given case, it is concluded that the Respondent failed to establish a bona fide training program exempting it from the requirement of the Equal Pay Act. It was not shown that the Respondent had a formal training program which was designed to teach waitresses to become bartenders or that Connelly, or any other waitress, received any specific training. Moreover, a trainee's progress was not evaluated and no objective criteria for advancement were adopted. In fact, advancement to a bartender's job was wholly fortuitous. It depended on vacancies rather than the skills possessed or the completion of training.

Equally important, it was not shown that Connelly, needed any, specific training. Some bartenders were hired who had no prior experience, like the city clerk, a man, and men were not required to receive training at a lower rate of pay. for all these reasons, it is concluded that the alleged training program was not bona fide for purposes of the Equal Pay Act and does not con-

stitute an affirmative defense for paying Connelly less than men who performed equal work. Therefore, Connelly is entitled to backpay, based on a 40 hour work week, at an hourly wage equivalent to the difference between her salary and the salary that was paid to Marshall Peterson, the most recently hired male bartender.

Effective August 1, 1981, Minn. Stat. 363.071, subd. 2, was amended to provide for punitive damages of not more than \$6,000.00 for violations of the Human Rights Act. Laws of Minnesota, 1981, Ch. 364, 2. As so amended,

363.071, subd. 2, provides, in part:

Punitive damages shall be awarded pursuant to section 549.20. In any case where a political subdivision is a respondent the total of punitive damages awarded an aggrieved party may not exceed \$6,000 and in that case if there are two or more respondents the punitive damages may be apportioned among them. Punitive damages may only be assessed against a political subdivision in its capacity as a corporate entity and no regular or exofficio member of a governing body of a political subdivision shall be personally liable for payment of punitive damages pursuant to this subdivision.

Under Minn. Stat. 549.20, punitive damages can be allowed only upon clear and convincing evidence that a respondent's acts show a willful indifference to a charging party's rights, and only if the agent was employed in a managerial capacity and was acting in the scope of employment when the discriminatory acts occurred. In this case, Blakstad was the Respondent's agent and was employed in a managerial capacity. The work assignments he made in that capacity were within the scope of his employment. Moreover, the Hearing Examiner is persuaded that there is clear and convincing evidence of willful indifference to Connelly's rights under the Human Rights Act. Blakstad knew that Connelly was working exclusively as a bartender after April 14, 1981, and was performing work substantially equal to that performed by male bartenders. However, he took no action to equalize her salary. In fact, he felt that the waitresses were overpaid and should have been happy with the wages they were getting. Likewise, the City Counsel was indifferent to the payment of equal

wages far equal work. It arbitrarily, fixed ceilings on the number of bartenders to be employed without regard to the number of bartenders; needed or the actual work waitresses performed. The job duties of bartenders and waitresses were not specified, and records of the type of work performed by liquor store employees were not kept because it was inconvenient. These facts, and the record as a whole, clearly and convincingly show a willful indifference to the wages and duties of female employees and justify an award of punitive damages.

In fixing the amount of punitive damages, the Hearing Examiner must consider the purpose for awarding them, the profitability of the discriminatory act to the Respondent, the duration of the discrimination the financial condition of the Respondent, and the other factors set out in Minn. Stat. 549.20, subd. 2(6). In this case, the Respondent should pay \$ 1,000.00 in punitive damages. If no punitive damages were payable, an employer would have no incentive to comply with the equal pay requirements of the Human Rights Act. Equal pay claims are unlike other actions for backpay because the

backpay sought does not include claims for lost wages where no services were performed. In equal pay claims the employer has always received services for the backpay ordered. Since there must lie a deterrent to the payment of discriminatory wages, other than the payment of wages that should have been paid and since the Respondent profited from its practice of paying unequal wages to the Charging Party, an award of \$1,000.00 in punitive damages is proper here. The Respondent is financially able to pay that amount and a smaller amount would not effectuate the purposes of the Human Rights Act or act as a sufficient deterrent. a larger amount is inappropriate considering the small amount of damage the Charging Party suffered and the absence of offensive and malicious behavior.

the Respondent argued that since the Charging Party's last actual day of work (September 11, 1981) was 182 days prior to the filing of her charge (March 12, 1982), that her unequal pay charge was not within the 180 day time limit specified in Minn. Stat. 363.06, subd. 3 (1992) and must be dismissed. That argument is not persuasive. The unequal pay claim established here is a continuing violation which should lie considered to have continued through the last day of Connelly's employment, on September 14, 1981. Her charge was filed within 180 days of September 14, 1981 and was timely for that reason.

Discharge on the basis of sex

In *Hubbard v. United Press Intern., Inc.*, 330 N.W.2d 428, 442 (Minn. 1983), the Minnesota Supreme Court held that a discharged employee alleging discrimination establishes a prima facie case by showing: (1) membership in a protected class, (2) qualifications for the job discharged from, (3) assignment of a non-member of the protected class to do the same work. In determining whether the Complainant has established a prima facie showing of discriminatory discharge, it must be kept in mind that the purpose of the prima facie showing is to establish facts from which one can infer that unless such actions are explained, it is more likely than not that

they were based on illegal criteria. Fernco Construction v. Waters, 438 U.S. 567, 17 F.E.P. 1062 (1978). For that reason, the Supreme Court has held that the formula for establishing a prima facie case is not intended to be rigid, mechanized, or ritualistic. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Accordingly, it has been held that a prima facie case of discriminatory discharge can be made by showing: (1) membership in a protected class, (2) qualifications for the job discharged from (3) discharge, and (4) after discharge, the employer sought persons with similar qualifications to fill the discharged employee's job. The latter approach has been endorsed as the better one. 3 Larson, Employment Discrimination, 86.40, In 17-18 (1983). For that reason, it is concluded that the elements of a prima facie case developed in Osborne v. Cleland, 620 F.2d 195, 22 F.E.P. 1292 (8th Cir. 1980) should be applied here. It is clear that Connelly, as a woman, is in a protected class and meets the first element of a prima facie case. In addition, it is concluded that she was qualified for the job she held. In Person v. J.S. Alberichi Constr. Co., 25 F.E.P. 399 (8th Cir. 1981), the court held that a Black employee who was discharged, satisfied the qualifications

element of a prima facie case by providing evidence that he was not told of any work deficiency or that the employer action had anything to do with the alleged lack of qualifications. Larson takes the position that the qualification requirement is usually a mere formality in discharge cases, but argues that this is not unusual and that employees should be presumed qualified for a position the employer hired them to perform. 3 Larson, Employment Discrimination 86.40, p. 17-18.1. In this case, it is concluded that Connelly has established a prima facie showing that she was qualified for the position she held. -Me satisfactorily completed Nor probationary period, had received no warnings regarding her job performance, and her job performance was not stated as the basis for her discharge. Furthermore, her qualifications for the position were corroborated by Marshall Peterson, a fellow bartender, who had ample opportunity to observe her job performance when working with her. The Complainant -has established that Connelly was discharged and after discharger the employer sought persons of similar qualifications to work as a bartender. Consequently, a prima facie showing of Et discharge based on sex has been established.

Once a prima facie case of discrimination has been established, the burden of going forward with the evidence shifts to the Respondent, who must articulate some legitimate, non-discriminatory reason for the employment action taken. Ile Complainant may then show that One reasons preferred by the Respondent are a mere pretext for illegal discrimination. Hubbard v. United Press, Inter., supra, at 441, n. 12. The ultimate burden of Persuasion to

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establish an act of illegal discrimination rests, 'however, at all times with the Complainant.

In this case, the employer articulated a legitimate non-discriminatory reason for Cxmelly's discharge and its reasons were not shown to be a mere pretext for discrimination. It is concluded, therefore, that the Complainant has failed to establish, by a preponderance of the evidence, that Connelly was

discharged on the basis of her sex.

In cases involving an illegal discharge for discriminatory reasons, a review of the merits of the employment action taken by the respondent is not proper. The only legitimate question is whether or not the employee was discharged on the basis of sex. Thus, in *Williams v. Yazoo Valley-Minter, City Oil Mill*, 469 F.Supp. 37, 49 (N.D. Miss. 1978), the court stated:

Whether or not the employer has good cause to terminate an employee is not an issue in a discrimination case. Even if the employee is discharged unnecessarily or in error, the employer is not guilty of racial discrimination unless the plaintiff proves that he was treated differently on account of his race from other employees with the same work history, committing the same type of infraction.

Blakstad testified at the hearing that he decided to terminate Connelly

because she was simply not "cut out" to be a bartender and that he believed

her job performance was unsatisfactory. Specifically, Blakstad felt that

Connelly was too slow and sat around too much when she should have been

waiting on customers. In addition, he suspected that she was giving her boy-

friend free drinks, and he had heard from another employee who quit that

Connelly was stealing liquor. Di at least one occasion, he saw Connelly

serving drinks to a customer who was intoxicated and had been cut off by another bartender and he had heard that she (lid that on one other occasion when he was not present. Blakstal was upset when Connelly wore jeans to work or failed to tie her hair back as she had been instructed -to do. Finally, Blakstal was dissatisfied with Connelly's rate of absenteeism and tardiness and the fact that she often gave him last minute notice. he felt that she was sometimes unnecessarily absent. Her absenteeism was clearly a factor in her discharge, which occurred when Connelly called in sick for the second consecutive work day. the first time she called in, Connelly stated that she was unable to report to work because her children were sick, but later that day she was seen at a local garage sale without her children and Blakstad believed that he saw her and her sister leaving town.

Blakstad's expressed dissatisfactions constitute a legitimate, non-discriminatory reason for Connelly's discharge. Complainant attempted to show that these reasons were a mere pretext for illegal discrimination by showing that Connelly was never warned about her job performance, questioned about possible dishonesty, or threatened with discharge if her job performance did not improve. Complainant also established that- most, if not all of her absences from work, were for valid reasons, and that her rate of absenteeism was not much greater than that of some other employees. Connelly denied any dishonest behavior and generally disputed the dissatisfactions Blakstad listed.

Based on the entire record, it is concluded that the Complainant has failed to establish that Connelly was discharged because of 'her sex. On the contrary, it appears more likely that her discharge stemmed from her absenteeism and tardiness, her general performance as a bartender, as Blakstad perceived it, and the financial crisis faced by the City, and not because Connelly was a woman.

although many of Blakstad's complaints were more imagined than real, the Hearing Examiner is not persuaded that he was motivated by illegal dis-

crimimatory reasons in discharging Connelly. Since Blakstad genuinely dis- charged Cbnnelly, for the reasons he listed, and even though some of those reasons were vague, or mere suspicions of improper conduct, they were not a mere pretext for her discharge and Blakstal was not motivated by illegal dis- crimimatory factors.

the conclusion that Connelly was not a victim of illegal sex discrimi- nation is supported by, evidence of the financial crisis that existed in Zumbrota at the time of her employment and rumors of impending lay offs in the liquor store that Blakstad must have been aware of . It is also supported by, the chain of events (Connelly's two absences from work immediately preceding her discharge) and by the fact that when Connelly's position was filled, it was filled by a woman. The first persons hired as bartenders and waitresses after Connelly was discharged were women.

The Cbmplainant has simply failed to establish that Connelly was treated differently than similarity situated urn or that her discharge was motivated by her sex.

Failure to rehire

the Complainant has failed to establish a prima facie showing that the Respondent refused to recall or rehire Connelly on the basis of her sex. the proper elements of a prima facie showing of a discriminatory refusal to hire or recall an individual consists of the following elements: (1) that the charging Party is the member of a protected class,- (2) that she applied for and was qualified for a position for which the Respondent was seeking applicants; (3) that she was rejected; and (4) after rejection, the employer continued to interview applicants with similar qualifications. McDonnell-Douglas Corp. v. Green, supra. In this case, no employees laid off by the Respondent were recalled to work and those employees had no recall rights under a collective bargaining agreement or other city personnel policies and procedures. In fact, the only persons hired or promoted after Connelly's discharge were those who had applied for positions which had been published in the local newspaper. Connelly never applied for any of those positions and was never rejected for them. Consequently, no prima facie showing of discrimination on the basis of her sex was established by the employer's failure to recall or rehire her.

J.L.L.

