

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

KATHY DONATELLI,

Complainant,

v.

DOCKET NO. ES-479-86

DAIRY QUEEN,

Respondent.

FINAL ORDER

On the 11th day of March, 1987, the Commission reviewed the Proposed Order and Decision of Hearing Examiner, James Gerl. After consideration of the aforementioned, the Commission does hereby adopt said proposed Order and Decision encompassing the Findings of Fact and Conclusions of Law as its own.

Under the subsection titled "Discussion of Conclusions" the Commission has considered and embraces the Hearing Examiner's recommendation which reaffirms the position of the Commission, that an employer who utilizes pregnancy as even one reason for an adverse employment decision violates the West Virginia Human Rights Act, as amended.

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order.

By this Order, a copy of which shall be sent by certified mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 16<sup>th</sup> day of April 1987.

RESPECTFULLY SUBMITTED,

BY Betty A. Hamilton  
BETTY A. HAMILTON  
VICE CHAIR  
WV HUMAN RIGHTS COMMISSION

STATE OF WEST VIRGINIA  
HUMAN RIGHTS COMMISSION

KATHY DONATELLI,

Complainant,

vs.

DOCKET NO. ES-479-86

DAIRY QUEEN,

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on December 8, 1986, in Martinsburg, West Virginia. Commissioner George Rutherford served as Hearing Commissioner. The complaint was filed on March 31, 1986. The notice of hearing was issued on September 8, 1986. Respondent answered on September 22, 1986. A telephone status conference was convened on October 16, 1986. Subsequent to the hearing, both parties filed written briefs and proposed findings of fact.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected.

Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with findings as stated herein, it is not credited.

#### CONTENTIONS OF THE PARTIES

Complainant contends that respondent fired her because of her pregnancy. Respondent maintains that complainant was fired because she was uncooperative and because her work was slow.

#### FINDINGS OF FACT

Based upon the parties' stipulations of uncontested facts as set forth in the joint pre-hearing memorandum, the Hearing Examiner has made the following findings of fact:

1. Complainant submitted an employment application to respondent dated January 30, 1986.
2. Complainant was interviewed for a position at respondent on Wednesday, February 12, 1986, by Vicki Dockeney, Co-Manager of Dairy Queen.
3. Complainant requested to be excused from work the 10th, 11th and 12th of March, 1986. This request was approved.
4. Complainant was paid \$3.35 per hour during her employment with respondent.
5. On March 13, 1986, complainant was terminated as an employee of respondent.

6. Jerry Coyne and Shirley McCarty made the decision to terminate complainant.

7. Complainant worked three (3) days for respondent.

Based upon a preponderance of the evidence, the Hearing Examiner has made the following findings of fact:

8. Complainant is female.

9. Complainant was pregnant when she was hired by respondent.

10. On complainant's first day of work, she was asked by Dockeney when she planned on starting a family. Complainant replied, "In a few months - I'm pregnant right now."

11. During her employment with respondent, complainant was uncooperative. For example, when told how to make a Dairy Queen-style milkshake, complainant would not listen and merely stated that she knew how to make a milkshake. Similarly, complainant resisted instructions regarding respondent's method of wrapping hamburgers and for preparing hamburgers "with everything".

12. During her employment with respondent, complainant was very slow, especially while working at the drive-thru window. Speed is crucial to customer satisfaction in respondent's fast food business.

13. Respondent terminated complainant because she was uncooperative and slow during her training period.

14. Although respondent has no written policy regarding pregnancy leave, respondent allows pregnant employees to work as long as they are permitted to do so by their physician and then take a leave of absence. An employee is permitted to return from

leave when able to do so.

15. The following employees of respondent were pregnant while employed and have been permitted to take a maternity leave: Jones, Price, Folk and Kessell.

16. More than five years ago, respondent purchased a special uniform to be worn by pregnant employees. The maternity uniform is larger than the other uniforms in order to accommodate pregnant employees.

#### CONCLUSIONS OF LAW

1. Kathy Donatelli is an individual claiming to be aggrieved by an alleged unlawful discriminatory practice and is a proper complainant for purposes of the Human Rights Act, West Virginia Code §5-11-10.

2. Dairy Queen is an employer as defined by West Virginia Code §5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Complainant has established a prima facie case of sex/pregnancy discrimination.

4. Respondent has articulated a legitimate, non-discriminatory reason for its termination of complainant's employment.

5. Complainant has not demonstrated that the reason articulated by respondent for firing her is pretextual.

6. Respondent has not discriminated against complainant on the basis of sex/pregnancy by firing her. West Virginia Code § 5-11-9(a).

## DISCUSSION OF CONCLUSIONS

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E.2d 342, 352-353 (W.Va. 1983); McDonnell-Douglas Corporation v. Green, 411 U.S. 791 (1973). If the complainant makes out a prima facie case, respondent is required to offer or articulate a legitimate non discriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Department, supra; McDonnell-Douglas, supra. If respondent articulates such a reason, complainant must show that such reason is pretextual. Shepherdstown Volunteer Fire Department, supra; McDonnell-Douglas, supra.

In the instant case, complainant has established a prima facie case of discrimination by proving facts, which if otherwise unexplained, raise an inference of discrimination. Furnco Construction Company v. Waters, 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). The parties have stipulated that complainant was terminated by respondent after three days of work. Complainant has proven that she was pregnant when hired by respondent, and that she told a co-manager of respondent that she was pregnant only a few days before she was terminated.

Respondent has articulated a legitimate non-discriminatory reason for complainant's termination. Respondent presented the testimony of several witnesses that complainant was slow and uncooperative during her training period at respondent.

Complainant has not demonstrated that the reason articulated by respondent for her discharge is pretextual. The testimony of complainant was less credible than the testimony of respondent's witnesses because of the demeanor of the witnesses.

Respondent contended at first that complainant was fired because she was unable to work Sundays. By the time of the hearing, respondent realized that complainant had been given permission to work another job on Sundays. Coyne, respondent's owner, candidly admitted at the hearing that this was an error. Coyne's candor in admitting this error enhances his credibility.

The only argument complainant raises regarding pretext is that respondent did not inform her of the deficiencies in her performance and, thereby, provide her with an opportunity to improve. Perhaps complainant could have improved her work speed, but complainant was so uncooperative that she would have been extremely difficult, if not impossible, to train. During her short period of employment, she resisted respondent's efforts to train her in the Dairy Queen methods. Her lack of cooperation was apparent in her defiant demeanor during her testimony that the work appeared not to be difficult and that she already had all the skills and training that was necessary.

Respondent, in its post-hearing brief, argues that for a complainant to prevail, pregnancy must be the sole reason for termination. In support of the proposition, respondent cites a decision by the New York state courts. The Hearing Examiner recommends that the Commission expressly reject this argument and hold that an employer who utilizes pregnancy as even one reason for an employment decision violates the West Virginia Human Rights Act. Any other conclusion would frustrate the public policy that all citizens of the State be provided with equal opportunity in employment. West Virginia Code §5-11-2.

In the instant case, however, pregnancy played no part in respondent's decision to fire complainant. That pregnancy was not a factor is clear from the fact that four employees of respondent became pregnant and were permitted work as long as their physician allowed and then were granted a maternity leave. Respondent even created a special uniform to accommodate pregnant employees.

PROPOSED ORDER

Based upon the foregoing, the Hearing Examiner hereby recommends that the Commission **dismiss the complaint in this matter, with prejudice.**



James Gerl  
Hearing Examiner

ENTERED: February 4, 1987

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served  
the foregoing PROPOSED ORDER AND DECISION  
by placing true and correct copies thereof in the United States  
Mail, postage prepaid, addressed to the following:

Lucien Lewin  
Avey & Steptoe  
126 East Burke Street  
Martinsburg, WV 25401

Heidi Kossuth  
Assistant Attorney General  
1204 Kanawha Blvd.  
Charleston, WV 25301

on this 4th day of February, 1987.

  
\_\_\_\_\_  
James Gerl