

**BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY**

<u>Rhonda Kunschke,</u>)	Human Rights Act Case No. 9901008790
Charging Party,)	
vs.)	<i>Final Agency Decision</i>
<u>Donaldson Bros. Ready Mix, Inc.,</u>)	
Respondent.)	

I. Procedure and Preliminary Matters

Rhonda Kunschke filed a complaint with the Department of Labor and Industry on January 14, 1999. She alleged that Donaldson Brothers Ready Mix, Inc., discriminated against her on the basis of sex (pregnant female) when it laid her off in January 1998, hired her back in April 1998 for part-time work, and then terminated her from her position as Secretary/Receptionist on or about July 20, 1998. On October 12, 1999, the department gave notice Kunschke's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

This contested case hearing convened on December 8, 1999, in Hamilton, Ravalli County, Montana. Kunschke and her attorney, David McLean, Datsopoulos, MacDonald & Lind, P.C., attended. The corporation's designated representative, Charles Donaldson, president, and its attorneys, John D. Greef and Samuel M. Warren, St. Peter & Warren, P.C., attended. The hearing examiner excluded witnesses on Kunschke's motion. Kunschke, Lloyd Omdahl, Cathy Donaldson, Debbie Miller, Jim Van Sickle, Todd Della Silva, Mike Hamlin, Rick Lubke, Ray Chavez, Dana Mortensen, Mike Huus and Charles Donaldson testified. The parties stipulated to the admission of Exhibits 1, 2, 3, 5, 6, 7, 8, 9, 10 and 12.¹ The corporation filed its proposed findings, conclusions and order on December 8, 1999. The hearing concluded on December 9, 1999. The parties filed written closing arguments on December 13, 1999. The hearing examiner deemed the file submitted for a final agency decision on December 13, 1999.

¹ These were the corporation's exhibits, originally listed as 101 through 112. Kunschke did not offer any exhibits, so the hearing examiner simplified the number of exhibits.
Final Agency Decision, Page 1

II. Issues

The legal issue in this case is whether the corporation discriminated against Kunschke when it laid her off in January 1998, hired her back in April 1998 and changed her job to part-time, and then terminated her from her position on or about July 20, 1998. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. At all pertinent times, Donaldson Brothers Ready Mix, Inc., has been a Montana corporation, with its principal place of business in Hamilton, Ravalli County, Montana. The corporation is in the business of manufacturing and selling cement and related products. Charles Donaldson and his brother shared operational responsibility for this family corporation beginning in 1970. In 1995, Charles' brother opted out of the business. Since then, Charles and his spouse, Cathy, have owned and operated the corporation. Charles Donaldson is president and Cathy Donaldson is the secretary/treasurer. Under current management, the company from 1996 to the present has expanded its areas of business into more retail sales and precast sales. In recent years, the corporation has employed a yard worker and outside salesman (1 position), 2 or 3 office and staff workers, and approximately 25 truck drivers. Testimony of Cathy and Charles Donaldson.

2. Dana Mortensen began working for the corporation in 1992, as a member of the office staff. Her responsibilities involved truck dispatch, driver tickets (lading documents), ordering (with Charles Donaldson) and some receptionist and sales work with customers. Mortensen never experienced the seasonal lay offs the corporation gave to most of its employees each winter. Testimony of Mortensen.

3. The corporation employed the charging party, Rhonda Kunschke in August 1993 as a file clerk. She remained an office staff worker throughout her employment, performing secretarial, receptionist, sales and dispatch duties. The corporation usually laid off Kunschke and most of its employees (except the owners, the mechanic and Mortensen) during the winter months. One winter (1996-97)¹, there was enough office work to do so that she worked

¹ Kunschke contends she worked through 2 winters, rather than 1. Her testimony to this effect was confused and not credible. Even if she did work through 2 winters rather than 1, the corporation proved that its practice was to lay off most employees (including Kunschke) unless

through that winter without a seasonal lay off. Final Prehearing Order, IV. Facts and Other Matters Admitted, Par. 1; testimony of Kunschke, Cathy Donaldson, Mortensen and Charles Donaldson.

4. Kunschke and Mortensen did not get along well as co-employees. Mortensen considered Kunschke a marginal employee, who did not progress over the years and learn to accept and discharge the increasing responsibility and workload that came with the growing business. The conflict between them resulted in arguments as early as 1993, Kunschke's first year with the corporation, when Mortensen attempted to talk to her about being brusque with customers. The conversation ended in an argument. Over the years, Mortensen attempted to address Kunschke's tendency to make the same mistakes repeatedly in her work. Kunschke never accepted any criticism or suggestions from Mortensen. Kunschke minimized the problems between them, and considered them personal rather than business-related. Testimony of Kunschke and Mortensen.

5. From 1993 through 1998, the corporation's sales increased by 75%, from 2.5 million dollars in 1993 to 4.4 million dollars in 1998. Office staff responsibilities and workloads increased steadily and substantially during these years. In particular, commencing in January 1996, the corporation by law had to maintain and keep available in its offices files on its drivers, containing such documents as copies of current commercial licenses, copies of results of medical examinations, and verifications of preapplication and subsequent drug tests. In 1997-1998, the corporation had obligations to prepare and timely submit applications and other information under the Montana Clean Air Act. The corporation also had obligations to maintain workers' compensation insurance and to cooperate with its insurer. Increased direct customer sales led to increased responsibility to know the products and understand the kinds of orders and specifications customers would require. Office staff needed also to be able to provide the order and specification information to drivers and other staff, and to dispatch drivers. Testimony of Kunschke, Cathy Donaldson, Mortensen and Charles Donaldson.

6. Cathy Donaldson's work as secretary/treasurer in 1996 and after also included supervision of the office staff. Over time, she came to agree with Mortensen about Kunschke's value to the corporation. Cathy Donaldson could see that Kunschke was a pleasant person, but she became concerned about Kunschke's ability to handle work assignments and follow through to

there were special projects during the winter providing extra work.

complete them. Both Mortensen and Cathy Donaldson observed and learned of Kunschke having problems with following credit policies (collection of payment upon delivery of product), taking accurate order information, quoting accurate prices, competently dispatching trucks, maintaining records, acting as liaison between the corporation and its workers' compensation insurer and sending in government reports. Testimony of Cathy Donaldson, Mortensen, Todd Della Silva, Mike Hamlin, Rick Lubke; Jim Van Sickle and Ray Chavez; exhibits 1, 2, 6, 7 and 9.

7. Kunschke was responsible for the maintenance of the driver files, in compliance with DOT regulations regarding those files. Kunschke believed she knew how to maintain the files. Donaldson was less confident of Kunschke's abilities, and actively reviewed the files and gave Kunschke directions about maintaining them. Kunschke considered the review and direction unnecessary and bothersome. Donaldson's lack of confidence in Kunschke grew because of both Kunschke's performance and attitude. Testimony of Kunschke and Cathy Donaldson; exhibits 5 and 8.

8. Cathy Donaldson gave Kunschke some verbal counseling about problems with her work performance. Kunschke minimized the importance of the conversations. She believed she was doing a good job at work despite suggestions from Cathy Donaldson for improvement. Donaldson decided to reorganize the office. One reason for this decision was to divide tasks between Mortensen and Kunschke. Testimony of Kunschke, Mortensen and Cathy Donaldson.

9. In October 1997, Charles Donaldson gave Kunschke an assignment to prepare an application for an air quality permit to the Department of Environmental Quality. The application was due in February 1998. Kunschke did some preliminary work on the application, but never completed it. She never told Mortensen or the Donaldsons that she had not completed it. Testimony of Kunschke, Cathy Donaldson, Mortensen and Charles Donaldson; exhibit 3.

10. In November 1997, Kunschke told the corporation that she was pregnant. Kunschke discussed maternity leave with Cathy Donaldson in general terms. Donaldson wanted to know what kind of leave Kunschke wanted, to plan coverage in the office. Kunschke was not sure what leave she wanted. Testimony of Kunschke, Mortensen and Cathy Donaldson.

11. Mike Huus was the corporation's outside sales representative and a co-employee of Kunschke. He observed Kunschke's job performance over the last few years up to 1998. He liked Kunschke, but considered her limited in what she could handle. Huus had taken time from his job to be with his infant son, so he suggested time off work to Kunschke when he learned of her pregnancy. He made the suggestion based on his personal experience, and not on behalf of the corporation. Testimony of Huus.

12. In the winter of 1997-98, in the course of reorganizing the office, Cathy Donaldson made Mortensen the office manager. Kunschke chose to ignore the significance of this reorganization. She continued to believe that she and Mortensen were equals or coworkers. Kunschke's attitude exacerbated her conflict with Mortensen. Testimony of Kunschke, Cathy Donaldson and Mortensen.

13. As part of the office reorganization, Cathy Donaldson asked office employees, including Kunschke, to draft their own job descriptions. Donaldson intended to use the descriptions, when final, for formal evaluations. Testimony of Mortensen and Cathy Donaldson; exhibit 10.

14. In January 1998, the corporation laid Kunschke off for the rest of the winter. Kunschke did not tell the corporation before she left that she had not completed the DEQ application.² Kunschke returned to work, still as a full-time employee, in April 1998. Testimony of Cathy Donaldson, Mortensen and Charles Donaldson.

15. The corporation had no formal policy regarding maternity leave. The corporation addressed requests for maternity leave on an *ad hoc* basis. As employees asked for time off for maternity, the corporation provided what its owner-operators considered reasonable accommodation. The Donaldsons viewed a fixed policy as less likely to meet the particular needs of individual employees. The corporation had accommodated other employees: Cody Burdette (a female employee who took maternity leave) and Lloyd Omdahl (a male employee permitted to change his shift hours so that he could be home with his new baby). Testimony of Lloyd Omdahl and Cathy Donaldson.

16. In April 1998, both Donaldsons and Mortensen met with Kunschke regarding when she would want maternity leave. Kunschke was having some problems with pain and discomfort due to her pregnancy. The office staff knew of her problems. Cathy Donaldson suggested that Kunschke

² As discussed in the "Opinion," Kunschke's testimony that she did tell Charles Donaldson and that he directed her to return the application to him is not credible. *Final Agency Decision, Page 5*

could work part-time until the birth of her baby and then take maternity leave until after Labor Day. Kunschke did not object to the suggestion. The Donaldsons and Mortensen took her silence as acceptance. Kunschke still did not make any suggestions regarding what she wanted or needed for maternity leave. Testimony of Kunschke, Cathy Donaldson, Mortensen and Charles Donaldson.

17. In May 1998, the corporation gave Kunschke an evaluation, with a three-month period after she returned from having her baby for correcting the noted deficiencies. Kunschke did not agree with the evaluation. Testimony of Kunschke, Cathy Donaldson and Mortensen; exhibit 12.

18. On June 5, 1998, Kunschke asked Cathy Donaldson for permission to leave work early, because of pain. By June 5, the corporation had a substitute worker (Cathy and Charles' daughter, home from school for the summer). Because of Kunschke's continuing problems with her pregnancy, Donaldson told her to go ahead and start her maternity leave. Kunschke gave birth to her child six days later. Final Prehearing Order, IV. Facts and Other Matters Admitted, Par. 2; testimony of Kunschke and Cathy Donaldson.

19. In July 1998, representatives of DEQ came to the corporation's office and threatened to shut down the business, because the corporation had failed timely to file its DEQ application. The corporation faced both possible cessation of business and a substantial fine for its failure to file the application. Charles Donaldson, with his wife and Mortensen, found the incomplete application materials in Kunschke's work area, and hurriedly completed and submitted the application. The Donaldsons decided after this incident to terminate Kunschke's employment, rather than giving her the probationary period noted in her May 1998 performance evaluation. In July 1998, the corporation terminated her employment while she was still on maternity leave. Final Prehearing Order, IV. Facts and Other Matters Admitted, Par. 3; testimony of Cathy Donaldson, Mortensen and Charles Donaldson.

IV. Opinion

Montana law prohibits discrimination in employment because of sex. §49-2-303(a) MCA. This prohibition encompasses discrimination because of pregnancy, since only women get pregnant. Adverse action directed at an employee because she is pregnant can constitute unlawful sex discrimination. *Cf., Lorili Barnett, et al., v. Bankers Life & Casualty Co.*, HRC#9107004331 (April 20, 1992) (exclusion of maternity benefits from comprehensive health

policy violates ban on sex discrimination in insurance), *aff'd sub nom. Bankers Life & Casualty Co. v. Peterson*, 263 Mont. 156; 866 P.2d 241 (1993); *see also, Auto Workers v. Johnson Controls, Inc*, 111 S.Ct. 1196 (1991) (work assignments based on "childbearing capacity" are gender based and prohibited under federal law); *Newport News Shipbuilding and Dry Dock Company v. EEOC*, 462 U.S. 669, 684 (1983) ("[D]iscrimination based on a woman's pregnancy is, on its face, discrimination based on sex.").³

In addition, the Montana Human Rights Act expressly provides protections for pregnant workers that go beyond the general ban on employment discrimination. Under §49-2-310, MCA, it is an unlawful practice for an employer or its agent to terminate a woman's employment because she is pregnant or to require that she take a maternity leave of unreasonable length. It is also unlawful for the employer to refuse or fail to reinstate a worker to her original job or an equivalent position, after her maternity leave, unless the employer's circumstances have so changed that to do so is impossible or unreasonable. §49-2-311, MCA. Consistent with those statutory protections, the Human Rights Commission considers coercive conduct by an employer toward an employee, in order to secure her resignation, to be a violation of the law when the employee's pregnancy was a substantial reason for the conduct. 24.9.1202, A.R.M.

In the present case, Kunschke did not prove that the corporation unreasonably required her to take a maternity leave when it laid her off in January 1998. The corporation laid off most employees every winter. She had no reasonable expectation that she would receive different treatment that winter. The January 1998 adverse corporation action of laying Kunschke off for the rest of the winter was not discriminatory.

When Kunschke returned to work in April 1998, with some physical problems related to her pregnancy, it was reasonable for Cathy Donaldson to suggest part-time work. Kunschke did not tell Donaldson she wanted to remain a full-time employee. Had she done so, Mortensen would have supported her, despite the differences between them, because Mortensen needed the help in the office. Cathy Donaldson's decision to offer Kunschke a part-time option was not discriminatory and did not result in a mandatory reduction in hours. Kunschke's argument that Donaldson knew or should have known she wanted to remain full-time is unpersuasive. The reduction to part-

³ The U.S. Supreme Court decisions in *Johnson Controls* and *Newport News* concerned claims arising under federal law after the passage of the Pregnancy Discrimination Act, 42 U.S.C. §2000e(k) ("PDA"), by which Congress defined pregnancy discrimination as sex discrimination. However, the Court in *Johnson Controls* only discussed the application of the PDA after finding that the company's work assignment policies were discriminatory against women. *First Women Decision*, Page 7

time in April 1998 was not discriminatory. It likewise was not coercive.

When Kunschke asked to leave work due to problems with her pregnancy, directing her to start her maternity leave did not result in an unreasonably long mandatory leave. Kunschke had her baby less than a week later. The corporation had the right to place Kunschke on leave if she could not continue her part-time schedule without physical problems that interrupted her work. The mandatory commencement of Kunschke's maternity leave on June 5, 1998 was not discriminatory.

The corporation had a legitimate business reason, unrelated to pregnancy, to discharge Kunschke while she was on maternity leave. Kunschke placed the company at serious risk by failing to complete the DEQ application and failing to tell anyone it was incomplete. This was a sufficient basis for rethinking the earlier plan to evaluate Kunschke after a three month working period following the May evaluation of her performance. The adverse action of discharging Kunschke was unrelated to her pregnancy and was not discriminatory.

Kunschke testified that Charles Donaldson prevented her from completing the DEQ application in 1997. Her testimony in this regard was incredible. She testified that first he refused to permit her to visit the pit and view the machinery in order to prepare a diagram of its method of operation. Charles Donaldson was ultimately able to draw the diagram without leaving the office. Her account (that his intractability prevented her from doing more with the application) is less believable than his account (that had she asked, he would have prepared the diagram he later provided). Kunschke testified that next Charles Donaldson demanded the application back from her, and she gave it back. This contradicts the testimony of both Mortensen and Cathy Donaldson that they later found the incomplete application in Kunschke's work area. This also presents a bizarre picture of the owner-operators of the corporation risking substantial fines and interruption of their business endeavors in order to make a pregnant employee look bad. Kunschke presented no credible explanation for the self-destructive behavior she attributed to the Donaldsons. The corporation's evidence that Kunschke failed to complete the application but failed to tell anyone is more consistent with the evidence and more credible.

Kunschke likewise offered testimony of casual comments by Mortensen and customers regarding her obvious pregnancy as proof of discriminatory intent. Casual comments may not alone establish discriminatory intent.

Snell v. Montana-Dakota Utilities Co., 198 Mont. 56, 643 P.2d 841 (1982). Kunschke's testimony that Charles Donaldson stopped speaking to her once she announced her pregnancy was internally inconsistent (she had at least two different points in time at which the silence allegedly began) and not credible.

Finally, Kunschke offered evidence of her raise, in November 1997, as proof of her job performance. The corporation presented substantial evidence that Cathy Donaldson planned to retain Kunschke as an employee, giving her a formal job evaluation. After that job evaluation, in May 1998, Donaldson planned to give Kunschke a chance to improve her performance. It was only after the DEQ debacle in July 1998 that the Donaldsons decided to fire Kunschke. Thus, the raise the previous November, given because Kunschke had not received a raise for some time, did not establish satisfactory job performance sufficient to negate the corporation's evidence of unsatisfactory job performance.

A private employer must reinstate an employee who desires to return to work at the end of her pregnancy-related leave, unless the employer's circumstances have so changed as to make that reinstatement unreasonable. §49-2-311 MCA. The language of the statute suggests that it primarily addresses changes in the employer's business (reduced personnel, financial crisis, etc.). Nevertheless, the language is broad enough to include the employer's discovery, during maternity leave, of an instance of misconduct or dereliction sufficiently severe to render reinstatement unreasonable. The corporation here has proved it discovered just such an instance.

Viewing the evidence as a whole, Kunschke has not supported her claim of discrimination with a preponderance of the credible evidence. Kunschke may believe that she was an exemplary employee who lost her job because her employers did not want a pregnant office worker. She did not support this belief with credible evidence either of her job performance or of the discriminatory motive of the Donaldsons. Kunschke failed to prove her case.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. Kunschke did not prove that the corporation discriminated against her in employment because of her sex (pregnant female).

VI. Order

1. Judgment is found in favor of Donaldson Brothers Ready Mix, Inc., and against Rhonda Kunschke on her charges that the corporation discriminated against her on the basis of sex (pregnant female) when it laid her off in January 1998, hired her back in April 1998 and reduced her job to part-time work, and then terminated her from her position on July 20, 1998.
2. The complaint is dismissed.

Dated: March 3, 2000.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry