

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

<hr/> Teri Eastman,)	HRC Case No. 0031010158
)	
Charging Party,)	
)	
vs.)	<i>Final Agency Decision</i>
)	
Eagles Lodge #326,)	
)	
<hr/> Respondent.)	

I. INTRODUCTION:

Terri Eastman filed a complaint against Eagles Lodge No. 326, alleging that Eagles Lodge discriminated against her in employment because of her pregnancy. Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on July 21 and 22, 2003 in Bozeman, Montana. Michael San Souci, attorney at law, represented Eastman. Stephen Pohl, attorney at law, represented Eagles Lodge.

Eastman's exhibits 1 through 16 and 18 through 20, and 22 and 23 were admitted into evidence by stipulation of the parties. Eagles Lodge's Exhibits A, B, G, and I were also admitted by stipulation of the parties. Though initially admitted, the parties by stipulation agreed to withdraw Exhibit 21 from evidence as the document (the findings of the Human Rights Bureau investigator) had no relevance in the contested case hearing. Based upon the evidence adduced at the hearing and the argument of counsel, the hearing examiner makes the following findings of fact, conclusions of law, and final order.

II. ISSUE:

Did Eagles Lodge violate Mont. Code Ann. §§ 49-2-310 and 49-2-311 by refusing to continue Eastman's employment after her maternity leave?

III. FINDINGS OF FACT:

1. Eastman began working for Eagles Lodge as a bartender in August, 1998. In her job, she was expected to wait on customers, maintain the bar area (which included wiping down bottles and glasses and other cleaning), arrive on time for her work, keep the bar open until a certain time, and count out her cash drawer at the end of her shift.

2. Eagles Lodge is a community service organization, controlled by a board of trustees. During Eastman's employment with Eagles Lodge, Dolph Gower, Roger Berna, James DeLaurier, and Phillip Davis, among others, served as trustees. Gower resigned as trustee in 2001. Berna, Davis, and DeLaurier continue to serve as trustees.

3. Dick Jones manages Eagles Lodge and supervised Eastman while she was employed there. Jones did the hiring, training, and firing of employees. Jones also set schedules and informed the employees of employment policy, rules, and regulations. The board of trustees had no part in the hiring or firing of employees.

4. Eastman became pregnant in 2001. Eastman's doctor advised her in January, 2002, that she would have to reduce her working hours and avoid lifting and prolonged standing due to the advanced stage of her pregnancy. Due to her restricted work status, Eastman reduced her hours and covered only Monday shifts.

5. In February, 2002, Eastman determined that she would need to take maternity leave beginning on February 18, 2002.

6. Employee and management practice at the Eagles Lodge for obtaining shift coverage was simple: The employee needing to change shifts had to find coverage through other employees. Eastman, being aware of this policy, spoke to two colleagues, Mary Keys and Sandy Drake, about covering her Monday shift until Eastman returned from her maternity leave. Keys and Drake were willing to do this and in fact took turns covering Eastman's shift while she was on maternity leave.

7. Eastman informed Jones that she would begin her maternity leave on February 18, 2002. Eastman also told Jones that Keys and Drake were willing to cover her Monday night shift while she was on maternity leave. Jones agreed with Eastman's plan and arrangements.

8. Eastman began her maternity leave on February 18, 2002 and had her child in March, 2002.

9. After the birth of her child, but before returning from maternity leave, Eastman was contacted to assist covering Eagles Lodge bar one Sunday evening when the bartender on shift had to leave. Eastman agreed to cover the balance of the bartender's shift and went down to the Eagles Lodge. When she arrived, DeLaurier informed her that her help was not needed and that the bar would be closed down for the rest of the evening.

10. In early May, 2002, Eastman talked to Jones and informed him that she would be returning to work. Eastman told Jones that she had made arrangements for

her child's care while she was at work. Jones raised no objection to Eastman's plans nor did he tell her that she would not be returning to work.

11. Subsequently, Keys talked to Jones about Eastman's return from maternity leave. At that time, to the surprise of Keys, Jones told Keys that Eastman would not be returning as the board of trustees had some problems with her job performance.

12. Keys informed Eastman that Jones had stated that Eastman would not be returning to work. Eastman then contacted Jones. Jones informed her that he did not know what Keys was talking about and that he would get back to her.

13. Jones and Eastman spoke again on May 26, 2003. Jones told Eastman that the trustees had decided not to allow Eastman to return to work for Eagles Lodge after she completed her maternity leave. Jones gave no specifics as to why the trustees had made that decision, other than to say that she had angered some of the trustees.

14. During her tenure working as a bartender for Eagles Lodge, Eastman received no verbal or written reprimands from Jones. Dolph Gower complained one time when Eastman closed the bar early. When Eastman apprised Jones of the complaint, Jones responded to her that she should "consider the source."

15. Eastman had previously worked for Jones at the Elks Club in Bozeman. Eastman had been a good employee in that position and received no complaints. Indeed, Jones' knowledge of Eastman's work at the Elks Lodge precipitated Jones' hiring Eastman at Eagles Lodge.

16. After learning that she would not be allowed to return to her job, Eastman suffered emotional distress. She had just had a child and now she was faced with the prospect of having to care for the child but having no employment income.

17. Eastman made efforts to mitigate her loss of employment at Eagles Lodge by looking for other comparable employment. In June, 2002, she sought employment at the Crystal Bar in Bozeman working as a bartender. She also sought work at the Greenwood Academy, working with pre-school children. In July, 2002, Eastman applied for work as a bartender at the Cats Paw and the Molly Brown. In August, 2002, Eastman applied for work at the Head Start program in Bozeman, a job which also involved working with pre-school children. In September, 2002, Eastman applied for work at Yellowstone Processing. None of these applications was successful.

18. Eastman made no applications for employment between October, 2002, and March, 2003.

19. In April and May, 2003, Eastman applied for various positions including bartending and working with preschool children. Finally, in May, 2003, Eastman obtained employment first as a receptionist and then as a hair stylist at Great Clips salon in Bozeman. She began her first day as a stylist on June 27, 2003.

20. Eastman's hourly wage income while working at Eagles Lodge steadily increased over the three year period of her employment there. In 1998, Eastman reported \$618.40 in income from the job in 1998, \$2,644.40 in 1999, \$3,923.08 in 2000 and \$5,242.70 in 2001. Eastman reported \$496.98 in income from the job during the one and one half months of 2002 that she worked before going on maternity leave.

21. Eastman also made income from tips that she received while working at Eagles Lodge. She did not report these tips as income, but estimates that she made \$506.00 in tips each month.

IV. OPINION

An employer may not terminate a woman's employment because of her pregnancy. Mont. Code. Ann. § 49-2-310(1). Furthermore, an employer is required to reinstate a woman in her job following maternity leave in the absence of a legitimate reason for not doing so. Mont. Code. Ann. § 49-2-311. Eastman contends that Eagles Lodge has violated each of these statutory requirements. Eastman must initially demonstrate either that Eagles Lodge terminated her employment because of her pregnancy or that Eagles Lodge failed to reinstate her in her position and had no legitimate basis for doing so. If this burden is met, then Eagles Lodge must show that it had a legitimate non-discriminatory reason for its action. If Eagles Lodge can do this, then the burden will then shift back to Eastman to show that the proffered reasons were mere pretext. Eastman has shown that Eagles Lodge refused to reinstate her after her maternity leave. Eagles Lodge has shown no legitimate basis for doing so.

Eastman Established a Prima Facie Case of Discrimination Under Mont. Code. Ann. § 49-2-310(1)

Where there is no direct evidence of discrimination, Montana courts have adopted the three-tier standard of proof articulated in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See, e.g., Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813, 816 (1988); *Johnson v. Bozeman School Dist.*, 226 Mont. 134, 734 P.2d 209 (1987); *European Health Spa v. H.R.C.*, 212 Mont. 319, 687 P.2d 1029 (1984). Eastman did not present direct evidence of discriminatory motive. She has, however, demonstrated a prima facie case of discrimination under *McDonnell Douglas*. The credible testimony in this matter shows that (1) Eastman was in a

protected class (pregnant woman), (2) completed her work satisfactorily, (3) left for maternity leave with the employer's explicit agreement that she would be reinstated upon completion of her maternity leave, and (4) that she was terminated during her maternity leave without a legitimate reason. She has proven a prima facie case under these facts.

Eagles Lodge Has Failed to Show A Legitimate Basis for Discharging Eastman During Her Maternity Leave.

Because Eastman has established a prima facie case, the burden then shifts back to the employer to establish a legitimate non-discriminatory basis for its decision to terminate Eastman during her maternity leave. The Eagles Lodge insistence that Eastman performed her work poorly and engaged in improper conduct (which included theft of money) borders on the incredulous. Not once in a period of three years did Eastman's supervisor inform her that she was not performing satisfactorily. Nor did her supervisor even hint that she was suspected of taking liquor from the bar and cash from the cash register. Yet at the hearing, Eagles Lodge maintained that Eastman had been talking on the phone too much, had closed the bar too early too many times, and had stolen liquor and had taken cash from the cash register.¹ In light of the Eagles Lodge's strict policy on completing satisfactory work, arriving on time, and not engaging in any form of criminal misconduct, it is certain that if Eastman had engaged in such conduct to the extent claimed by the Lodge, she would have been fired long before she became pregnant.

Having failed to demonstrate a legitimate basis for firing Eastman, Eagles Lodge has failed to dispel Eastman's prima facie case of discrimination. Eastman has, therefore, shown that Eagles Lodge violated Mont. Code. Ann. § 49-2-310(1).

Eastman Established Discrimination Under Mont. Code. Ann. § 49-2-311.

Eastman has also established a violation of Mont. Code. Ann. § 49-2-311. Eastman unquestionably signified her intent to return to her position to Jones. She made arrangements with Keys and Drake to cover her Monday shifts during her absence with Jones' knowledge. Eagles Lodge failed to demonstrate any legitimate basis for discharging Eastman during her maternity leave. Eagles Lodge discriminated against Eastman by failing to reinstate her in her job with no basis for doing so.

¹ The parties permitted the hearing examiner to view a surveillance video tape which the Lodge contends shows Eastman removing money from the cash register drawer. The tape shows nothing of the sort. It merely shows Eastman counting out her cash drawer.

Eastman Is Entitled to Recover Her Lost Wages

Upon a finding of illegal discrimination, the Montana Human Rights Act mandates an order requiring any reasonable measure to rectify any resulting harm to the complainant. Mont. Code Ann. § 49-2-506(1)(b). Pre-judgment interest is properly part of that award to compensate for lost wages. *P. W. Berry Co. v. Freese*, (1989), 239 Mont. 183, 779 P.2d 521.

Eastman was required to make reasonable efforts to mitigate harm from discrimination by seeking other comparable employment. *Ford Motor Co. v. EEOC* (1982), 458 U.S. 219, 231. Eagles Lodge had the burden of proving a lack of reasonable diligence in mitigating damages from lost wages and benefits by at least a preponderance of the evidence. *P. W. Berry, Inc, supra*, 239 Mont. at 187, 779 P.2d at 523.

Eagles Lodge contends that Eastman failed to mitigate her damages in this case by failing to look for work between October, 2002 and March, 2003. In this regard, Eagles Lodge pointed out in cross-examination that Eastman did not apply for several jobs that were available in the Bozeman job market. Some of these jobs, such as positions available at a local Burger King restaurant, would not have placed her in a similar position with an income comparable to that she had while working as a bartender at Eagles Lodge. Others, however, provided a similar wage and would have put her in a similar position. She did not seek employment in these jobs. She did not seek to mitigate her damages during the time period of September, 2002 to March, 2003.

She did, however, attempt to mitigate her damages during the months of June, July, August, and September, 2002. For these months, the income she lost by having been unlawfully terminated from her position at Eagles Lodge amounts to \$3,768.00 (\$942.00 monthly income x 4 months = \$3,768.00). Prejudgment interest on this amount at 10% per annum amounts to \$394.25.²

Eastman Is Entitled to Recover For Emotional Distress.

Eastman is also entitled to damages for emotional distress inflicted upon her as a result of Eagles Lodge's unlawful discrimination. The Montana Supreme Court has

²The hearing examiner calculated interest on the amount of wages by determining the daily value of interest on the monthly income lost by the unlawful discharge (10% per annum divided by 365 days = .00027% x \$942.00 = \$.25 per day) and then calculating the number of days that have elapsed between the month of lost income and the date of the judgment in this matter, September 10, 2003. This process was applied to each of the four months of lost income, and then the interest value for each of these separate months was added together to arrive at the total amount of interest due on the lost income, \$394.25.

ruled that compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶ 33, 308 Mont. 8, 38 P.2d 836, 841. The severity of the harm governs the amount of recovery, not the availability of recovery. *Id.* In *Foss*, the claimant had difficulty finding work, lost sleep given his economic hardship, had to move in with relatives, and was besieged by collection agencies due to late payments resulting from his loss of income. Like the claimant in *Foss*, Eastman in this case was beset by the distress of having to care for a newborn with little or no source of employment income to help with that responsibility. This caused emotional distress to Eastman. Eastman also had some difficulty finding work. Unlike *Foss*, however, there is no evidence that Eastman suffered any additional economic consequences as a result of the discrimination. In this case, compensation in the amount of \$1,500.00 due to the emotional distress inflicted by Eagles Lodge unlawful discrimination is appropriate.

Affirmative Relief Is Proper

The finding of a discriminatory motive requires affirmative relief in order to prevent future discriminatory acts by Eagles Lodge. Mont. Code Ann. § 49-2-506(1)(a).

V. Conclusions of Law

1. The Department has jurisdiction over this case. Mont. Code Ann. § 49-2-509(7).
2. Eagles Lodge unlawfully discriminated against Eastman when it terminated her employment due to her pregnancy in violation of Mont. Code Ann. § 49-2-310(1). Eagles Lodge also discriminated against Eastman by failing to reinstate her after her maternity leave in violation of Mont. Code Ann. § 49-2-311.
3. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), Eagles Lodge must pay Eastman the sum of \$3,768.00 in unpaid wages and \$394.25 in pre-judgment interest on those unpaid wages through September 10, 2003. Eagles Lodge must also pay Eastman the amount of \$1,500.00 in damages for emotional distress caused by its illegal act.
4. The circumstances of the illegal discrimination mandate imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1).
5. For purposes of Mont. Code Ann. § 49-2-505(7), Eastman is the prevailing party.

VI. ORDER

1. Judgment is found in favor of Terri Eastman and against Eagles Lodge as Eagles Lodge illegally discriminated against Eastman in employment because of her pregnancy and failed to reinstate her to her original job or to an equivalent position with equivalent pay.

2. Within 90 days of this order, Dick Jones, manager of the Eagles Lodge must attend four hours of training, conducted by a professional trainer in the field of personnel relations and/or civil rights law, on the subject of sexual equality in pay and terms and conditions of employment. Upon completion of the training, Jones shall obtain a signed statement of the trainer indicating the content of the training, the date it occurred and that Jones attended for the entire period. Jones must submit the statement of the trainer to the Human Rights Bureau within two weeks after the training is completed.

3. Eagles Lodge is enjoined from taking any adverse employment action against any female employee because of her pregnancy.

4. Within 90 days of this order, Eagles Lodge shall implement and maintain a written maternity leave policy that comports with Mont. Code Ann. §§ 49-2-310(1) and 49-2-311. Eagles Lodge shall submit a copy of this written policy within 120 days of this order to the Human Rights Bureau (ATTN: Ken Coman, P.O. Box 1728, Helena MT 59624-1728). Eagles Lodge is also required to follow any direction of the department regarding the implementation of an appropriate maternity leave policy. The department's jurisdiction over Eagles Lodge extends for one calendar year beyond the date of final decision (whether this order or subsequent order on appeal from this order) of this case.

5. Eagles Lodge must pay Terri Eastman \$5,662.25 (\$3,768.00 in unpaid wages, \$394.25 in pre-judgment interest on those unpaid wages, and \$1,500.00 as compensation for emotional distress.)

DATED: September 10, 2003

/s/ GREGORY L. HANCHETT

Gregory L. Hanchett, Hearing Examiner
Hearings Bureau, Montana Department of Labor and Industry