

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0051011473:

JENNIFER ZAK,) Case No. 899-2006
)
)
 Charging Party,)
)
 vs.) FINAL AGENCY DECISION
)
 BITTERROOT ARTS AND CERAMICS)
 d/b/a GROUND HOG COFFEE BAR,)
)
 Respondent.)

* * * * *

I. Procedure and Preliminary Matters

Charging Party Jennifer Zak brought this human rights complaint alleging that her employer, Respondent Bitterroot Arts and Ceramics d/b/a Ground Hog Coffee Bar (BACI), discriminated against her due to her pregnancy in violation of Montana Code Annotated §49-2-310. Hearing Examiner Gregory L. Hanchett convened a contested case hearing on this matter in Hamilton, Montana on April 11 and 12, 2006. J. Tiffin Hall, attorney at law, represented Zak. Elizabeth O'Halloran represented BACI. Zak, Hannah Lewis, Amanda Burns, Jessica Tibbs, Megan Pace, Tim Pulliam, Deaydre Pulliam, Mary Matushev, Claudia Kuznetsov, Debra Chambers and Cathy Brimhall all testified under oath. Zak's Exhibits 1, 11, 17, 18 and 19 and BACI's Exhibits 101 through 103, 105, 106, 109, 111, 115 through 117, 126, 130 through 134, 136 through 139, 141, 143, and 147 were admitted into evidence. The parties were permitted to file post hearing briefs and the last brief was received by the Hearings Bureau on June 26, 2006 at which time the matter was deemed to be at issue.

During the hearing, BACI objected to the testimony of Jessica Tibbs and Hannah Lewis on the grounds that their testimony was not relevant to any of the issues in this case. That objection is overruled. Evidence is relevant if it has any

tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, M.R. Evid. The testimony of both of these witnesses provided relevant evidence about the case.

Having considered the evidence and arguments of the parties, it is evident BACI did not discriminate against Zak in her employment in any way. Rather, the decision to terminate Zak resulted from Zak's performance issues. Accordingly, her claim must be dismissed. The rationale that supports this decision follows.

II. Issues

A complete statement of issues appears in the final prehearing order issued in this matter on April 6, 2006. That statement of issues is incorporated here as if fully set forth.

III. Findings of Fact

1. BACI is a Montana corporation which owns Ground Hog's Coffee Bar located in Hamilton, Montana. Tim and Deaydre Pulliam are the owners of BACI.

2. In August, 2004, the Pulliams hired Bryan Bergstrom to manage Ground Hog's Coffee Bar. The Pulliams took a very hands off approach to managing Ground Hog's, leaving the day to day management to Bergstrom.

3. Soon after his hire, Bergstrom recommended that the Pulliams hire Zak to work at Ground Hog's as a barrista (a person who prepares and serves beverages at a coffee bar). After interviewing Zak, the Pulliams decided to do so. Zak began working at Ground Hog's on September 8, 2004.

4. Bergstrom trained Zak in the operations of the coffee bar and eventually, Zak took over some supervisory duties. These duties included scheduling other employees, directing other employees in their work, and hiring and firing.

5. Ground Hog's is a relatively small operation. In addition to Bergstrom and Zak, Ground Hog's employed other part-time workers, including Debra Chambers and Mary Martushev. Zak had supervisory control over these two barristas and did not treat them well. Zak removed Chambers from her position as a barrista because

Chambers had a small hearing problem and would on occasion make errors in mixing beverages because she misunderstood what was being ordered.

6. Martushev and Zak did not get along. Zak at one point cut Martushev's hours. After doing so, Zak said that "her (Martushev's) mommy and daddy can pay for everything so she didn't need as many hours." Later, in December 2004, Martushev was unable to work one day due to personal illness. Zak told Martushev that Zak did not want her to come in that day due to her illness. Martushev did not appear at work and later that day, Zak fired her, falsely claiming that Martushev had not called in sick.

7. After being fired, Martushev went directly to Deaydre. Deaydre was concerned about Zak's conduct and felt that Zak had improperly fired Martushev. Deaydre then reinstated Martushev.

8. Zak and Bergstrom began to take advantage of their management positions at Ground Hog's by clocking in and then leaving work to run personal errands while still on the time clock. They also asked other employees to clock them out when they were not at the coffee bar. During one instance, they went and saw a realtor about a house they were buying while still on the clock. This conduct was relayed to Tim and Deaydre and caused them both additional concern about Zak's and Bergstrom's conduct while at work. Tim reasonably expected that both Zak and Bergstrom would work and not run personal errands while on the clock. Zak and Bergstrom also would not pay for food that they ordered while on duty at Ground Hog's. Other employees were required to pay for the food that they ordered at the coffee bar.

9. Bergstrom and Zak were boyfriend and girlfriend. Sometime during September, 2004, Zak became pregnant with Bergstrom's child.

10. Zak informed Deaydre in mid October, 2004 that Zak was pregnant. Deaydre was obviously pleased by the news as Deaydre went out and bought Zak a book about pregnancy. At no time did Deaydre ask Zak about when she had conceived. At no time during her pregnancy did the Pulliams ever question Zak's ability to work.

11. Tim Pulliam also soon learned that Zak was pregnant. When he would come into Ground Hog's and see Zak, he would on occasion ask Zak how the "pregnant lady " was doing. Zak unreasonably took offense to these questions, even

though they were clearly borne out of a genuine concern for Zak's and the child's welfare.

12. Tim and Deaydre were more than willing to work around Zak's pregnancy and to accommodate her with the time she would need off of the job after giving birth to her child.

13. In November 2004, BACI bought out a line of gourmet coffee known as Spero Mountain Coffee. This coffee was marketed in large part over the internet. Because to that point the Pulliams had no reason to be concerned about Zak's work, they asked her to take over the marketing and ordering duties of Spero Mountain. In addition, they gave Zak a \$1.00 per hour raise in her salary.

14. Zak's Spero Mountain duties included marketing the coffee both locally and over the internet. In order to ensure a smooth transition in BACI's take over of Spero, the Pulliams decided to provide Zak and Bergstrom with training on the Spero Mountain product by the person who had developed the product, Jeff Messer. To accomplish this, the Pulliams flew Messer to Missoula, Montana, from Colorado. To ensure that Zak's availability, Deaydre asked Zak when she would be available to participate. After securing Zak's assurance that she would be available for training on a particular day, Deaydre arranged and paid Messer to fly into Missoula on the date that Zak had indicated she would be available. Zak failed without excuse to appear at the training.

15. Over the years of the operation of Ground Hog's, other waitresses continued to work through their pregnancies without any trouble. Other than Zak, no barrista has ever been discharged during a pregnancy. Jessica Tibbs, for example, worked for Ground Hog's through her pregnancy, but left after she had her child. Tibbs' testimony shows that the Pulliams tried to give her more work during her pregnancy.

16. Zak's and Bergstrom's increasingly cavalier attitude about work, especially not clocking out, was a growing concern for Tim and Deaydre. Tim had discussions with both Zak and Bergstrom about running personal errands while on the work clock. Tim told them both that their jobs were not part-time positions (a fact corroborated by Bergstrom's testimony at hearing). These discussions apparently fell on deaf ears.

17. On February 25, 2005, Tim came into Ground Hog's and found that both Bergstrom and Zak were clocked in but not on the premises. Tim learned from other employees that Zak was at home painting her house. This was the final straw for Tim and he decided to discharge both Bergstrom and Zak. Later that evening, Tim, Deaydre, Bergstrom and Zak met at Ground Hog's to discuss Bergstrom's and Zak's employment. Tim discharged Bergstrom and Zak for not being at work while clocked in. Zak and Bergstrom were upset and Zak left the premises threatening to sue the Pulliams. At no time during this final conversation was there any mention of Zak's pregnancy.

IV. Discussion and Analysis¹

A. *BACI Did Not Discriminate Against Zak.*

An employer may not terminate a woman's employment because of her pregnancy. 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* (1973), 411 U.S. 792. See, e.g., *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632; *Crockett v. City of Billings* (1988), 234 Mont. 87; 761 P.2d 813, 816; *Johnson v. Bozeman School Dist.* (1987), 226 Mont. 134, 734 P.2d 209; *European Health Spa v. H.R.C.* (1984), 212 Mont. 319, 687 P.2d 1029.

Under the *McDonnell Douglas* test, Zak must first produce sufficient evidence to convince a reasonable fact finder that all of the elements of a *prima facie* case exist in this matter. *Laudert v. Richland County Sheriff's Off.*, ¶ 22, 218 MT 2000, 301 Mont. 114, 7 P.3d 386. If Zak proves a *prima facie* case of discrimination by a preponderance of the evidence, the burden shifts to BACI which must then offer evidence that is sufficient, if believed, to support a finding that Zak's discharge was based on a factor other than Zak's pregnancy. *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 328, 912 P.2d 787, 791 (quoting *Tx. D.C. A. v. Burdine* (1981), 450 U.S. 248, 252-53). Should BACI carry that burden, Zak must then "prove by a preponderance of the evidence that the legitimate reasons offered by [BACI] were not its true reasons, but were a pretext for discrimination." *Id.*; Admin. R. Mont. 24.9.610(3). Zak at all times retains the ultimate burden of persuading the trier of fact that she has been the victim of discrimination. *Id.*, 912 P.2d at 792.

¹ Statements of fact in this discussion and analysis are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Here, there is no direct evidence of discrimination related to Zak's pregnancy. Deaydre testified credibly that she never asked Zak about when she conceived and never stated that Zak was going to quit anyway because she was having a baby. Moreover, even if the statements had been made, the analysis would not change. The alleged comments were at best ambiguous and do not show, under the facts of this case, direct evidence of discriminatory intent towards Zak's condition. Bergstrom had repeatedly stated to Deaydre that Zak would no longer work after the baby was born. Even if Deaydre had stated during the discharge meeting that Zak was going to quit anyway because of her pregnancy, her statement would at most be a reiteration of Bergstrom's stated intent for Zak and not direct proof of discriminatory intent. Thus, the correct analysis in this case is the *McDonnell Douglas* indirect analysis method. The first tier of *McDonnell Douglas* required Zak to prove her prima facie case by establishing four elements:

(i) that [s]he belongs to a [protected class] . . . ; (ii) that [s]he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [her] qualifications, [s]he was rejected; and (iv) that, after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, op. cit., 411 U.S. at 802.

The Court noted in *McDonnell Douglas* that this standard of proof is flexible. The four elements do not apply woodenly to every disparate treatment claim. Zak at a minimum needed to prove that (1) she became pregnant while an employee of BACI; (2) prior to her pregnancy she was qualified and acceptable to BACI in her job; (3) after BACI learned of her pregnancy it began to criticize her job performance and ultimately fired her; and (4) her job performance during her pregnancy was the same as her job performance before her pregnancy. *Cf.*, *Martinez v. Yellowstone County* (1981), 192 Mont. 42, 626 P.2d at 242, 246, *citing Crawford v. West. Elec. Co., Inc.* (5th Cir. 1980), 614 F.2d 1300 (fitting the four elements of the first tier of *McDonnell Douglas* to the allegations and proof of the particular case).

It is on this last factor that Zak's prima facie case fails. Her performance, particularly the issue of remaining on the clock when she was off doing personal errands, deteriorated over the course of her employment. Tim Pulliam hit the nail on the head in his testimony when he stated that both Zak and Bergstrom abused their managerial positions by being off of work and remaining on the clock. Tim discussed this issue with both of them to no avail. The incident of visiting the real estate agent

and the final incident (painting the baby's room while still clocked in), shows that Zak's performance provided a legitimate basis for the discharge.

Zak's assertion that she received no warnings about her job performance is not credible. Tim Pulliam admonished both Bergstrom and Zak that their jobs were not part-time and that the act of engaging in personal business while being on the clock had to change. Both of them ignored this and, not surprisingly, both were fired because of it. Zak, therefore, has failed to make her prima facie case.

Even if it could be argued that Zak had made her prima facie case, BACI showed a legitimate basis for taking the action it did in light of Zak's work performance and Zak has failed to show that reason was mere pretext. After being told not to do so, Zak continued to run personal errands and to engage in personal business while on the clock. The legitimacy of this business decision is further cemented in the fact that BACI fired *both* Bergstrom and Zak, and not just Zak, for engaging in the conduct. Almost certainly, had Zak's pregnancy been the core concern (and not Zak's improper conduct), Zak alone would have been discharged. However, both were discharged and both were discharged for taking liberties with their managerial positions. Zak has failed in her burden of persuasion to show that BACI discriminated against her based on her pregnancy.

B. Attorneys's fees Cannot be Awarded By This Tribunal.

Zak has asked for an award of attorney's fees from this tribunal. Aside from the fact that Zak has not prevailed, this tribunal has no authority to award such fees. Upon a favorable ruling, a request for attorney's fees in these proceedings must be pursued in district court. Mont. Code Ann. § 49-2-505.

V. Conclusions of Law

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7) MCA.
2. BACI did not discriminate against Zak in discharging her from Ground Hog's Coffee Bar based on job performance.
3. Because Zak has failed to prevail on her claim, this matter must be dismissed. Mont. Code Ann. §49-2-507.

VI. Order

Based upon the foregoing, judgment is entered in favor of Respondent BACI and Jennifer Zak's complaint is dismissed.

Dated: September 12, 2006

/s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearing Examiner
Montana Department of Labor and Industry

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