

In the Matter of
BENN ENTERPRISES, INC.,
dba Timeout Sports Bar & Restaurant, Respondent.

Case Number 33-97
Final Order of the Commissioner
Jack Roberts
Issued July 2, 1997.

SYNOPSIS

Respondent, which operated a restaurant and bar, did not reduce complainant's work hours or discharge her because of her pregnancy. Although respondent's bar manager requested medical verification of complainant's ability to perform her job as a cocktail waitress after he learned she was pregnant, the Commissioner found that this request did not constitute discrimination because of sex in violation of ORS 659.030(1)(b). ORS 659.029, 659.030(1)(a) and (b); *former* OAR 839-07-510; OAR 839-007-0510(5), 839-006-0235.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 18, 1997, in the offices of the Oregon State Employment Department, 119 N. Oakdale, Medford, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Seree M. Allen (Complainant) was present throughout the hearing. Benn Enterprises, Inc. (Respondent) was represented by Eugene Piazza, Attorney at Law. Angela Benn, the Respondent's representative, was present

throughout the hearing.

The Agency called the following witnesses: Seree Allen, Complainant; and Jane MacNeill, Senior Investigator with the Civil Rights Division of the Agency.

Respondent called the following witnesses: Angela Benn, Respondent's co-owner; Dennis Mortimer, Respondent's manager; and Dave Pidretti, Respondent's former employee.

Administrative exhibits X-1 to X-17, Agency exhibits A-1 to A-5 and A-7, and Respondent exhibits R-1, R-2, R-3, R-5, R-6, R-7 (pp. 1 and 8), R-8, R-12, R-16, R-17, and R-19 to R-22 were offered and received into evidence. Respondent withdrew exhibits R-4 and R-18. Following the receipt of a replacement exhibit from Respondent, the record closed on May 30, 1997.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT -- PROCEDURAL

1) On September 18, 1995, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondent discriminated against her because of her sex in that, after her manager learned she was pregnant, he cut her hours and on August 5, 1995, terminated her employment.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of unlawful employment practices by Respondent in violation of ORS 659.030(1)(a) and (b).

3) On around January 9, 1997, the Agency prepared and duly served on Respondent Specific Charges which alleged that Respondent had treated Complainant

differently and had discharged her from employment because of her sex. The Specific Charges alleged that Respondent's actions violated ORS 659.030(1)(a) and (b).

4) With the Specific Charges, the Agency served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On January 27, 1997, Respondent filed an answer in which it denied the allegations mentioned above in the Specific Charges.

6) On February 26, 1997, Respondent requested a discovery order requiring the Agency to produce certain documents and permitting Complain- ant to be deposed. The Agency did not oppose the motion and the ALJ granted it.

7) On March 12, 1997, Respondent requested a postponement of the hearing because it believed the Agency had issued amended Specific Charges and Respondent had not received a copy of them. Respondent also requested a postponement to pursue settlement negotiations. The Agency opposed the motion because no amended charges had been issued and because settlement negotiations are not a basis for a postponement. The Administrative Law Judge denied Respondent's request, pursuant to OAR 839-050-0150(5), because Respondent had not shown good cause for a postponement and settlement negotiations do not serve as a basis for a postponement. OAR 839-050-0220(1).

8) Pursuant to OAR 839-050-0210 and the Administrative Law Judge's order, the Agency and Respondent each filed a Summary of the Case.

9) At the start of the hearing, Respondent submitted a prehearing brief.

Pursuant to OAR 839-050-0400, the ALJ allowed the Agency to submit a statement of Agency policy and left the record open until March 27, 1997, for it. The Agency did not submit a statement of policy.

10) At the start of the hearing, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

11) Pursuant to ORS 183.415(7), the Administrative Law Judge verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

12) During the hearing, the Agency moved to amend the Specific Charges to conform the damages requested to the evidence presented. Respondent argued that the claimed back wages were calculated wrong and moved to strike the claim for mental suffering. The ALJ granted the Agency's motion pursuant to OAR 839-050-0140(2) because the amendments reflected evidence introduced into the record without objection from Respondent. The ALJ denied Respondent's motion to strike.

13) Following the end of the hearing, the ALJ discovered that a video tape exhibit offered and received in evidence did not contain what it was supposed to, namely, a deposition of the Complainant. The ALJ reopened the record to allow Respondent to submit the correct exhibit tape. Respondent timely submitted the replacement exhibit, and the record closed on May 30, 1997.

14) On June 11, 1997, the Administrative Law Judge issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT -- THE MERITS

1) At all times material herein, Respondent was an Oregon corporation

operating an eating and drinking establishment in Medford, Oregon, called the Timeout Sports Bar & Restaurant. Angela Benn was a coowner of Respondent. Respondent was an employer in Oregon utilizing the personal services of one or more persons, subject to the provisions of ORS 659.010 to 659.435.

2) From December 1994 to June 1995, Respondent employed Brandy Becker as a cocktail waitress and bartender. Becker learned she was pregnant in February 1995 and told her supervisor, Dennis Mortimer. In April 1995, Becker nearly suffered a miscarriage and was off work for two weeks. When she returned to work, Becker gave Mortimer a note (dated April 25, 1995) from a certified nurse midwife who permitted Becker to work in accordance with AMA work guidelines, unless she had complications with her pregnancy. Attached to the note was a one page document entitled "How long may women work? General guidelines from the AMA," which described various job functions -- such as standing, stooping, bending, climbing, stairs, and lifting -- and, using a bar graph, showed the number of weeks (of gestation) a woman could perform those functions. Becker also gave Mortimer a note (dated April 26, 1995) from her doctor stating that she could continue working 30 hours per week without restrictions. Mortimer did not restrict Becker's work activities at that time. Sometime in May 1995, Respondent assigned Becker to work at the front door checking identification. The hourly rate of pay for that position was higher than for a cocktail waitress, but the new position did not receive tips. In addition, Becker worked fewer shifts in the new position. As a result her gross income decreased. She did not object to this reassignment and intended to leave her employment around July 1, 1995. Mortimer assigned Becker's duties to comply with the AMA guidelines. He fired Becker in June 1995.

3) Respondent's business was slowest in the summer between June and

August. Everyone's work hours were cut in the summer.

4) Complainant is female.

5) Complainant was employed by Respondent as a cocktail waitress from June 30 to August 6, 1995.

6) Complainant's job duties included taking food and drink orders, delivering food and drinks, and collecting money. The work environment was a "medium size" lounge with one flight of 15 stairs, which Complainant, age 25, climbed regularly. She was in good physical condition.

7) Complainant and Respondent had no agreement about the number of hours per week Complainant would work. The cocktail waitresses' schedules varied from day-to-day and from week-to-week based on the activities occurring in the bar, such as a band playing. On Friday, June 30,¹ 1995, Complainant worked 9½ hours. During the pay period July 1 to 15, 1995, she worked approximately 67 hours in 10 shifts as follows: Saturday, July 1, 8 hours; Tuesday, July 4, 7¼ hours; Wednesday, July 5, 3 hours; Friday, July 7, 7¼ hours; Saturday, July 8, 6 hours; Tuesday, July 11, 8½ hours; Wednesday, July 12, 8 hours; Thursday, July 13, 8 hours; Friday, July 14, 10 hours; and Saturday, July 15, 1 hour. During the pay period July 16 to 31, 1995, she worked approximately 57¾ hours in nine shifts as follows: Tuesday, July 18, 8½ hours; Wednesday, July 19, 4 hours; Thursday, July 20, 8½ hours; Friday, July 21, 6¼ hours; Saturday, July 22, 3½ hours; Tuesday, July 25, 8¼ hours; Thursday, July 27, 5 hours; Friday, July 28, 9 hours; and Saturday, July 29, 4¾ hours. During the period August 1 to 6, 1995, she worked approximately 24¼ hours in three shifts as follows: Tuesday, August 1, 8½ hours; Friday, August 4, 7¼ hours; and Saturday, August 5, 8½ hours. During the entire period of employment, Complainant worked 158½ hours. She was paid \$5.00 per hour. She earned \$792.50 (gross). She reported tips of \$130. Gross

wages plus tips equal \$922.50.

8) Complainant received a total amount of \$922.50 in compensation during her employment. Of that amount, \$130 were tips reported during the first half of July 1995.

9) On her 1995 tax return, Complainant reported \$923 as her gross income from Respondent.

10) At all times material, Dennis Mortimer was an employee of Respondent and was Complainant's direct supervisor.

11) Around mid-July 1995, Respondent, through its supervisory employee Dennis Mortimer, learned that Complainant was about five months pregnant.

12) Mortimer asked Complainant for a note from her doctor concerning any work restrictions because of her pregnancy. He did this because he was aware of job function restrictions recommended in the AMA guidelines and he was concerned about Complainant's safety. Complainant said she would get a note from her doctor at her next monthly appointment. Mortimer agreed. He placed no restrictions on her work. Complainant never gave Respondent a note from her doctor.

13) Because of high employee turnover in the bar and restaurant business, Mortimer constantly accepted job applications. Before August 6, 1995, he hired two employees, Martha Davis and Dee Ann Strang, as backup cocktail waitresses and bartenders. Complainant helped train both.

14) Around August 6, 1995, Mortimer told Complainant that she was laid off because there was not enough work, but that she was not fired. He put her "on-call", meaning that he would try to contact an on-call waitress for work when the bar was busier. Mortimer and Angela Benn were also concerned about Complainant's questionable job performance and attitude. Mortimer did not consider Complainant's

pregnancy when he decided to lay her off, nor did he consider her pregnancy when he assigned her work hours. Complainant was angry because she thought she was doing the job and there was no reason for a lay off. She had bills to pay, little money, and no prospects for another job. She felt that she was laid off because she was pregnant and this embarrassed her.

15) Mortimer tried to contact Complainant for work on a couple of occasions between August 6 and 10, 1995. He received no response from Complainant. If she would have called Mortimer back, he would have put her to work. Mortimer called Dee Ann Strang to work. She worked 29 hours. Her last day of work was August 12, 1995.

16) On September 8, 1995, Complainant took a job with Red Lion.

17) Complainant's testimony was not credible. The Administrative Law Judge carefully observed her demeanor during the hearing and found her testimony to be exaggerated and speculative on important points. For example, she claimed in her testimony and in her statements to the Agency during the investigation that, once Mortimer found out she was pregnant, he cut her hours in half. Her timecards, which she did not dispute, provide persuasive, credible proof to the contrary. See the discussion regarding Different Treatment in the Opinion below. Likewise, Complainant's testimony concerning the average amount of her nightly tips was exaggerated compared to credible testimony from both Mortimer and Pidretti and the documentary evidence. In addition, Complainant's testimony on several points was contradicted by the credible testimony of other witnesses. For example, she testified that occasionally she drank a glass of wine after her shift, but that she had cut down her drinking after becoming pregnant. Other witnesses credibly testified that she drank hard drinks, she drank more than one drink, and that they were concerned about the amount she drank. Pidretti, whom the ALJ had no reason to disbelieve, testified that he had to cut her off,

that is, he had to refuse to serve her additional drinks because she drank too much. For these reasons, the forum gave Complainant's testimony less weight whenever it conflicted with other credible evidence on the record. In some instances, the forum did not believe her testimony even when it was not controverted by other evidence.

18) Dave Pidretti's testimony was credible. He had no relationship with Respondent at the time of hearing and had no apparent personal stake in this matter. He was straightforward with his answers. He offered specifics when he could and made no attempt to fabricate answers when his memory failed.

19) Dennis Mortimer's testimony was credible. His demeanor was forthright, even when his memory was deficient. Due to his former relationship to Respondent and his central role in this case, his potential for bias and his motive to lie were obvious. However, this was not enough to cause the ALJ to conclude that his testimony was not credible. His testimony was generally consistent and was supported by other credible evidence. The ALJ was not sufficiently impressed by other evidence or his demeanor so as to find his testimony not credible.

20) Angela Benn's testimony was not credible on certain issues. Her testimony regarding Complainant's hours worked and pay was inconsistent and unreliable. It appeared to the ALJ that she attempted to create information when she was unsure of the facts. Despite these inconsistencies and some memory loss, her demeanor impressed the ALJ that she was not attempting to deceive the forum. The forum gave Benn's testimony less weight whenever it conflicted with other credible evidence on the record.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent employed one or more persons within

the state of Oregon.

- 2) Respondent employed Complainant from June 30 to August 6, 1995.
- 3) Complainant is female.
- 4) Respondent did not reduce Complainant's work hours because of her pregnancy.
- 5) Respondent did not discharge Complainant from employment because of her pregnancy.

CONCLUSIONS OF LAW

- 1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110.
- 2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein.
- 3) The actions, inactions, and knowledge of Dennis Mortimer, an employee or agent of Respondent, are properly imputed to Respondent.
- 4) ORS 659.030(1) provides in part:
"For the purposes of ORS 659.010 to 659.110, * * * it is an unlawful employment practice:

 "(a) For an employer, because of an individual's * * * sex * * * to refuse to hire or employ or to bar or discharge from employment such individual. However, discrimination is not an unlawful employment practice if such discrimination results from a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business.

 "(b) For an employer, because of an individual's * * * sex * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

ORS 659.029 provides:

"For purposes of ORS 659.030, the phrase 'because of sex' includes, but is not limited to, because of pregnancy, childbirth and related medical conditions or occurrences. Women affected by pregnancy, childbirth or related medical conditions or occurrences shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their

ability or inability to work by reason of physical condition, and nothing in this section shall be interpreted to permit otherwise."

Respondent did not violate ORS 659.030(1)(a) or (b).

5) Pursuant to ORS 659.060(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the specific charges and the complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

ORS 659.030(1)(B) -- DIFFERENT TREATMENT BECAUSE OF PREGNANCY

Complainant contends that she was treated differently by Dennis Mortimer after he learned she was pregnant in mid-July 1995. Specifically, she alleged that Respondent cut her work hours in half.

Respondent denies that it cut Complainant's hours because of her pregnancy. Respondent acknowledges that Mortimer requested a note from Complainant's doctor about any work restrictions due to her pregnancy, but claims that this was done because of work restrictions placed on another pregnant waitress by her doctor and because of a concern for Complainant's safety.

The Agency has the burden of proving unlawful discrimination. *In the Matter of Motel 6*, 13 BOLI 175, 185-86 (1994) (citing *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 890 P2d 475 (1984)); and see OAR 839-005-0010(5). Here, it has failed to carry that burden.

Respondent's pay records for Complainant show that she worked only two full pay periods -- July 1 to 15 and July 16 to 31. She worked 67 hours in 10 shifts during the first period, or an average of 6.7 hours per shift. She worked about 58 hours in nine shifts during the second period, or an average of 6.44 hours per shift. During her final week of work, that is, from August 1 to 6, she worked about 24 hours in three shifts, or an average of 6.0 hours per shift.

There is a difference of 15 minutes between the average number of work hours per day in the first pay period (6.7 hours) and the average number of work hours per day in the second pay period (6.44 hours). Since she worked only three days during August 1995, the average number of hours worked per day in that period is less meaningful. Nevertheless, the difference between the August daily average and the daily average from the last two weeks in July is about 26 minutes.

As noted above, Complainant alleged that Respondent cut her hours in half after learning she was pregnant and claims this was because of her pregnancy. In light of the evidence that (1) she had no agreement with Respondent for any set number of work hours per day or per week, (2) waitresses' hours normally varied each week, and (3) the summer was Respondent's slowest season and everyone's hours were reduced, the Agency has not proved that Respondent cut Complainant's hours significantly, much less in half. The preponderance of credible evidence in the whole record regarding work hours does not prove that Complainant was treated differently than other non-pregnant cocktail waitresses. Nor does it support an inference that Respondent cut Complainant's hours because she was pregnant.

I turn now to the issue of whether Mortimer's request for medical information about any restrictions on Complainant's work due to her pregnancy constitutes illegal different treatment because of sex. The evidence is un rebutted that Mortimer requested this information from Complainant's doctor because previously he had received the AMA guidelines regarding job duties performed by pregnant women from a another pregnant waitress.

Former OAR 839-07-510 (1986) provided that

"(1) The statutes protect pregnant women from sex discrimination in employment; pregnant women must be treated the same as males and non-pregnant females regarding their ability or inability to work by reason of physical condition.

"(2) The statutes prohibit discrimination regarding employee and dependent spouse benefits for pregnancy where employee and dependent spouse benefits exist for other medical conditions."

On March 12, 1996, the rule was amended and OAR 839-007-0510 now provides:

"(1) The statutes protect pregnant women from sex discrimination in employment.

"(2) Regarding the ability or inability to work by reason of physical condition, pregnant women must be treated the same as males, non-pregnant females and other employees with off the job illness or injuries.

"(3) The statutes prohibit discrimination regarding employee and dependent spouse benefits for pregnancy where employee and dependent spouse benefits exist for other medical conditions.

"(4) Women needing to be absent from work because of pregnancy or childbirth may be protected by the Oregon Family Leave Act. See OAR 839-009- 0020 *et seq.*

"(5) An employer may request medical verification of a pregnant woman's ability to perform her job." (Emphasis added.)

As amended, sections one, two, and three of the 1996 rule track sections one and two of the original 1986 rule. Under these sections, it is unlawful to differentiate between pregnancy and other temporary disabilities. Thus, any policy applied to pregnant workers, such as requiring a doctor's statement, must be applied equally to employees with other disabilities. There was no evidence in this case concerning how Respondent treated other employees with temporary disabilities.

Sections four and five of the 1996 rule are new. Section four refers the reader to additional protections for pregnant women available in the Family Leave Act.

Section five, which is important here, adds an interpretation not previously expressed in the rule. It makes clear that an employer may request medical verification of a pregnant woman's ability to perform her job without running afoul of the protections for pregnant women provided in ORS 659.029 and 659.030. This section took effect some seven months after Complainant's employment ended. Therefore, it does not cover this case. Nevertheless, the forum takes guidance from it.

Likewise, the forum takes guidance from the regulations interpreting and implementing Oregon's disability law, ORS 659.425, which, under some circumstances, permits an employer to inquire whether an individual has the ability to perform the duties of the position occupied. See *former* OAR 839-06-235.²

OAR 839-007-0510 (as amended) and 839-06-235 are consistent in that they permit an employer to request medical verification of a worker's ability to perform her job. Under the old rule relating to pregnancy -- OAR 839-07- 510 -- it would be incongruous to find that an employer had illegally discriminated against a pregnant worker by making this request, when the request was permitted by the disability rules. Such a finding of discrimination could not be made under the amended version of OAR 839-007-0510.

Since the facts do not demonstrate that Respondent treated Complainant differently than other workers with temporary disabilities, and since the law permitted Respondent to request information about a worker's ability to perform her job, the forum does not find that Respondent treated Complainant differently because of her sex by requesting medical verification of her ability to perform her job.

ORS 659.030(1)(A) -- DISCHARGE BECAUSE OF PREGNANCY

Complainant contends that Respondent discharged her because she was pregnant. She claims that Mortimer laid her off and she never went back to work.

Respondent contends that Complainant quit her job. Respondent claims that it laid Complainant off because business was slow and, when Mortimer tried to call her back to work twice the following week, Complainant never called back.

This issue boiled down to a test between the credibility of Complainant's testimony and that of Mortimer and Benn. The forum believed Mortimer and Benn when they testified that Mortimer laid Complainant off and attempted to call her back to work,

but that Complainant never returned his calls. Complainant did not dispute this testimony. Mortimer credibly testified that Complainant's pregnancy had nothing to do with the lay off. There was no persuasive evidence that this reason was pretextual. The Agency has failed to prove by a preponderance of the evidence that Respondent discharged Complainant because of her sex.

ORDER

NOW, THEREFORE, as Respondent has not been found to have engaged in any unlawful practice charged, the Complaint and the Amended Specific Charges filed against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

¹Normally, Complainant's shift started on one day (for example, Friday, June 30, at 5:45 p.m.) and ended the next day (Saturday, July 1, at 3:20 a.m.). For the purpose of this Finding of Fact, the forum has listed only the date on which the shift started (in this example, June 30). The hours worked have been rounded to quarter hours.

²At times material, OAR 839-06-235 (BL 2-1984) provided in part:

"(1) An employer may inquire whether an individual has the ability to perform the duties of the position sought or occupied.

" * * * * *

"(3) An employer may require a medical evaluation of an individual's physical or mental ability to perform the work involved in a position:

"(a) The individual seeking or occupying a position must cooperate in any medical inquiry or evaluation, including production of medical records and history relating to the individual's ability to perform the work involved[.]"