BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

April Auchenbach,	) Case No. 9401006303
Charging Party,	)
versus	) Hearing Examiner's Decision
Community Nursing, Inc., dba The Village Health Care Center,	)
Respondent.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED ORDER

I. PROCEDURE AND PRELIMINARY MATTERS

April Auchenbach filed a verified complaint with the Montana Human Rights Commission on July 11, 1994, alleging employment discrimination, in violation of §§49-2-303 and 310, MCA. She claimed Community Nursing, Inc., dba The Village Health Care Center, ("Village") forced her to take an unreasonable maternity leave. The Commission certified her complaint for a contested case hearing on December 15, 1995.

The parties appeared for hearing on July 15, 1996, in Missoula, Montana. Auchenbach and her attorney, Peter Michael Meloy, Meloy & Morrison, were present. Suzanne Denend, Village's designated representative, and Village's attorney, Terry J. MacDonald, Garlington, Lohn & Robinson, P.L.L.P., were present.

Village moved to add a mitigation defense and Auchenbach objected. The motion is granted. The parties jointly moved to exclude witnesses. Witnesses and exhibits are listed on the appended docket. Closing arguments were filed on August 15 and 19, 1996.

II. ISSUES[1]

Two issues are important: Must an employer attempt reasonable accommodation of a pregnant employee's temporary physical limitations before imposing maternity leave? Did this employee fail to mitigate her damages?

---

[1] The full issue statement appears at page 4 of the final prehearing order.

III. FINDINGS OF FACT

1. Village hired Auchenbach as a Certified Nurses' Aide (CNA) in August of 1993. Auchenbach also worked at Taco Bell. The income from both jobs was enough for her to be self-supporting.

2. Auchenbach discovered she was pregnant in the spring of 1994.

3. Auchenbach knew Village did not allow employees with less than a year in service to take unpaid leaves of absence. CP 4. She knew of a former employee who, expecting to be fired, had quit because of pregnancy during the first year of employment. She concealed her pregnancy from her employer.

4. Auchenbach's back began to hurt. She consulted her physician, who restricted her lifting to a 30 pound maximum for the remainder of her pregnancy. The restriction prevented her from performing some of her job duties, and she could no longer delay notifying Village of her pregnancy.

5. Auchenbach notified Village that she was pregnant and had a resulting lifting restriction. She met with Denend, Village's Nursing Supervisor, on June 21, 1994. Auchenbach told Denend she wanted to keep working despite her restriction.

6. Village did provide jobs for employees with work restrictions, under a written "Loss Control Program." CP 5. Village modified job duties, assigned lighter jobs, or created temporary light duty jobs for selected employees. The program was offered to employees with work-related injury or work-related illness. It was also offered to employees with permanent disabilities, in order to comply with federal law.

7. Denend reviewed available Village jobs, and told Auchenbach she could no longer work for Village as a CNA because of her lifting restriction. Denend also told Auchenbach that Village had no job openings consistent with her restriction.

8. Auchenbach checked the work roster after leaving Denend's office. She had been scheduled to work that day. Her name had already been removed from the roster.

9. The only action Village took to accommodate Auchenbach was Denend's perusal of current openings during the June 21, 1994, meeting. Denend met with two other management

employees of Village, Mary Denison and Kay Jennings on June 22. The three discussed Auchenbach's situation, but never considered applying the loss control program to Auchenbach. Denend did not investigate modifying job duties. Denend did not consider assigning or creating a temporary light duty job for Auchenbach.

10. Village could have accommodated Auchenbach within the loss control program. Village would have accommodated Auchenbach within that program had she suffered her temporary lifting restriction due to an industrial accident. It is more likely than not that Village could have and would have, without undue expense or risk, modified Auchenbach's CNA position as a temporary accommodation, by changing patient assignments, providing her assistance from other employees for lifting, providing more immediate access to mechanical lifts, or otherwise addressing her lifting restrictions within her existing job.[2]

11. Denend did not consider safety risks to Auchenbach, her unborn child, or the patients. The action of Village was not related to any such concerns. Denend simply followed Village's existing policies.

12. Two days after the June 21 meeting, Denend called Auchenbach and told her that Village would "waive" the requirement for a year in employment and give her an unpaid leave of absence.

13. Auchenbach could not afford to remain in Missoula, where she had hoped to attend school, without the income from both jobs. She increased her Taco Bell hours for two weeks, but it was not enough. She gave notice to Taco Bell and moved home to Condon, Montana, to live with her parents.

14. Auchenbach gave birth in October of 1994, and had no residual limitations as a result of her pregnancy and delivery.

15. After her son was born Auchenbach could have returned to work if she had been in Missoula. She could not afford to move back to Missoula. She continued to live in Condon, and obtained sporadic part-time waitress work, until August of 1995. In August of 1995, her

[2] This was not the only method of accommodation under the loss control program, but on the evidence adduced, it was the most likely accommodation for Auchenbach.

parents provided money to help her move and enroll in a Licensed Practical Nurse training program. Until she enrolled in school, her lost income and moving expenses directly resulted from the mandatory unpaid maternity leave imposed by Village.

16. Village cost Auchenbach $11,804.00 in out-of-pocket expense and lost wages up to August of 1995. Auchenbach computed the amount of take-home pay she would have earned at Village had she not been laid off, then subtracted six weeks' pay for a maternity leave. She computed the amount of take-home pay she would have earned at Taco Bell had she not been forced by insufficient income to quit, then subtracted six weeks' pay for a maternity leave. She added $250.00 incurred in moving expenses to return to Condon, and subtracted her Condon earnings. Her testimony that these losses totalled $11,879.00 was unrebutted. She also admitted, on cross-examination, that she had earned some tips while working in Condon which were not included in her calculations. The tips totalled approximately $75.00 (after splitting tips with other employees). Her net loss of income and out-of-pocket expense was therefore $11,804.00.

17. Auchenbach lost the use of $11,804.00 from August, 1995, to the present. She failed to prove how much of the loss was accrued on a monthly basis prior to August of 1995. At 10% per annum, the interest accrued was $1,180.40 per annum, or $3.234 per day. From August of 1995 to October 15, 1996, the amount of accrued interest was $1,429.42.

18. Auchenbach suffered emotional distress because of the actions of Village. She felt like a failure because she had to move home from Missoula to Condon, and leave the other job she had been working in Missoula. She felt she had to pick up the pieces, start over, with a baby coming. She felt hurt. She felt unfairly treated. She "could not believe it had happened." She did not feel the need to obtain professional help to deal with these feelings. The amount necessary to remedy this distress is $2,500.00.

19. Village kept its written policy denying leaves to employees with less than a year in service. The employee policy manual still contained this policy, without exceptions, on the date of hearing in this case. Village has sometimes made exceptions for pregnant employees, but Village has not so informed its employees. Village has no written policy which recognizes

the right of a pregnant employee to reasonable maternity leave without regard to time in service.

IV. OPINION

A. In Montana, an employer who accommodates work-related limitations **for any reason** must accommodate work-related limitations of a pregnant employee in the same fashion.

Village defended this case primarily by arguing that it did not treat Auchenbach less favorably because of her membership in a protected class. Temporary pregnancy-related restrictions are not disabilities under the Americans with Disabilities Act. Auchenbach was taken off the work roster because of her temporary lifting restriction, not her pregnancy. Village urged that under the Americans with Disabilities Act, maternity leave without accommodation for Auchenbach was proper. Village asked the Commission to follow the federal precedents, and rule that this discrimination was not based on protected class status.

The Commission does look to federal law for guidance when outside guidance is needed. No outside guidance is needed to decide whether the pregnancy-related restriction is protected in this case. Existing Montana case law and Commission regulations protect Auchenbach.

A Montana employer can favor workers with temporary conditions caused by work injuries over other workers with identical conditions if no protected class status is involved.[3] Absent protected class status, the financial incentive to favor industrial accident victims constitutes a legitimate business reason. But favoring industrial accident victims over pregnant employees (work-related restrictions being equal) is not permitted.

The Montana Maternity Leave Act makes it unlawful to require an unreasonably long maternity leave. §49-2-310 MCA. Village could not treat Auchenbach less favorably for "commencement and duration of leave" because she was pregnant. 24.9.1206 A.R.M.

Village differentiated between employees with the same condition, the same physical

---

[3] Under the Americans with Disabilities Act, conditions which interfere with the performance of essential job functions are not always disabilities. *See, gen.*, "EEOC Enforcement Guidance: Workers' Compensation and the ADA," Vol. II, Compliance Manual, following §902 (9/3/96). *See, specifically*, "Light Duty," pp. 20-23 and note 28.

restriction. The distinction was based upon the cause of the condition. Auchenbach was taken off the work roster sooner and left off it longer than she would have been had the same lifting restriction resulted from an industrial accident. Village treated her less favorably because her condition was the result of pregnancy rather than an industrial accident.

Village's argument follows that of the defendant in **Miller-Wohl Co., Inc. v. Commissioner**, 214 Mont. 238, 692 P.2d 1243 (1984); *vac'd and remanded*, 479 U.S. 1050, 107 S.Ct. 919, 93 L.Ed.2d 972 (1987); *jdgmnt reinst'd*, 228 Mont. 505, 744 P.2d 871. Even though all employees not having a year in service were denied leave, not just those who were pregnant, the Montana Supreme Court found the year requirement illegally discriminated against pregnant women. Similarly, in the present case, even though all employees with temporary conditions unrelated to industrial injuries are denied access to the loss control program, this disparate treatment illegally discriminates against pregnant women with resulting temporary conditions.

Village discriminated against Auchenbach because of her protected class status (pregnancy, which caused her restriction). The Commission does follow federal guidelines about illegal distinctions based upon protected class status. The distinction Village made between work-related injury and pregnancy mirrors a distinction prohibited in EEOC guidelines. "EEOC Enforcement Guidance: Workers' Compensation and the ADA," *op. cit.*, pp. 22-23, Example 28. The *Manual* prohibits accommodating an employee with a restriction resulting from industrial injury while refusing accommodation to an employee with an identical restriction resulting from a disability. Disability is a protected status. So is pregnancy, under the Montana Maternity Leave Act and its regulations.

B. Justification on a "safety" basis must be proved by concrete evidence of risks.

Village argued that safety concerns justified mandatory leave for Auchenbach. Danger to the pregnant employee or others can justify mandatory maternity leave. *See*, **Harriss v. American World Airways, Inc.**, 437 F.Supp. 413 (N.D.Ca. 1977). The risks proved in **Harriss** illustrate that facts must demonstrate the danger, 437 F.Supp. at 420:

> 1) Proof of the risk of a disabling medical event in flight which would prevent a flight attendant from performing routine or safety duties;

2) Evidence that a pregnant flight attendant would face a conflict of interest between protecting her unborn fetus and assisting passengers in an emergency;

3) Evidence of the controversy among medical experts as to whether pregnant flight attendants should be permitted to continue to work; and

4) Proof of the risk of harm to the mother and fetus from complications arising in flight at a great distance from medical help.

The evidence adduced of safety risks in the present case is minuscule. A nursing home is not a jumbo jet. The kinds of risks illustrated by the **Harriss** factors are not significant in a nursing home setting. Any risk to patients would be the same for either Auchenbach or a "Loss Control" employee working with the same lifting restrictions. Auchenbach's doctor restricted her lifting. No other medical evidence of risk was offered.

Rhetoric about risk is unpersuasive without actual evidence of how the continued employment of a pregnant employee would create a genuine danger to her, to the unborn child, or to others. Without facts to support the argument, it echoes the prohibited prejudice.

C. Auchenbach did what she could to mitigate her damages.

Village also interposed a mitigation defense, which was permitted. Mitigation is an affirmative defense, to be proved by the defendant. The duty to mitigate requires the injured party to act reasonably and prudently to limit damages. **Harrington v. Holiday Rambler Corp.**, 176 Mont. 37, 575 P.2d 488 (1978). If Auchenbach failed to act reasonably to limit her damages, harm she suffered after that failure no longer proximately resulted from Village's acts.

Moving to another locality is more than can be required as reasonable and prudent to limit damages. **Martinell v. Montana Power Co.**, 268 Mont. 292, 886 P.2d 421 (1994). Village has failed to prove that it was possible, let alone reasonable and prudent, for Auchenbach to move back to Missoula after her baby was born.

Because Village imposed mandatory leave, Auchenbach was forced by financial hardship to go home to live with her parents. Had she not been forced to go home to live with her parents, she could have resumed work after her child was born.

Auchenbach had limited options after her son's birth, because Village stripped her of her income. Her losses continued, because Village had taken away her options. She lived in

Condon until August of 1995--she only lived in Condon at all--because Village forced her there by taking away her job. Auchenbach did what she could to mitigate her damages. All of her proven losses proximately result from Village's unlawful acts.

D. Emotional distress damages are recoverable.

Once a violation has been proven under state or federal civil rights statutes, then emotional harm is compensable if the claimant establishes that (1) distress, humiliation, embarrassment or other emotional harm actually occurred, and (2) the harm was proximately caused by the unlawful conduct of the respondent.[4] Compensable emotional harm resulting from a civil rights violation can be established by the testimony of the injured party alone, **Johnson v. Hale**, 942 F.2d 1192 (9th Cir. 1991), and, in some circumstances, can be inferred from the circumstances.[5] Auchenbach's testimony and the circumstances of her forced maternity leave entitle her to damages for emotional distress.

E. Village's "year in service" requirement must be amended.

Finally, affirmative relief is necessary. Village denies leave to all employees with less than a year in service. This policy constitutes illegal discrimination against pregnant employees. **Miller-Wohl Co., Inc. v. Commissioner**, *op. cit.* Keeping the policy on the books perpetuates the violation. The employer is not free to decide, on a case by case basis, whether it will waive an illegal policy.

V. CONCLUSIONS OF LAW

---

[4] *See*, *among others*: **Carey v. Piphus**, 435 U.S. 247, 264 at n. 20 (1978) (42 U.S.C. 1983 action, denial of voting rights); **Carter v. Duncan-Huggins Ltd.**, 727 F.2d 1225 (D.C. Cir. 1984) (42 U.S.C. 1981 employment discrimination); **Seaton v. Sky Realty Company**, 491 F.2d 634 (7th Cir. 1974) (42 U.S.C. 1982 housing discrimination based on race); **Brown v. Trustees of Boston University**, 674 F.Supp. 393 (D.C. Mass. 1987) (unlawful denial of tenure opportunity, based on sex); **Portland v. Bureau of Labor and Industry**, 61 Or.Ap. 182, 656 P.2d 353 (1982), *affirmed* 298 Or. 104, 690 P.2d 475 (1984) (sex-based employment discrimination); **Hy-Vee Food Stores v. Iowa Civil Rights Comm.**, 453 N.W.2d 512, 525 (Iowa, 1990) (sex and national origin discrimination).

[5] **Carter v. Duncan-Huggins, Ltd.**, *op. cit.*; **Seaton v. Sky Realty Co.**, *op. cit.*; **Buckley Nursing Home, Inc. v. MCAD**, 20 Mass.Ap.Ct. 172 (1985) (finding of discrimination alone permits inference of emotional distress as normal adjunct of employer's actions); **Fred Meyer v. Bureau of Labor & Industry**, 39 Or.Ap. 253, 261-262, rev. denied, 287 Ore. 129 (1979) (mental anguish is direct and natural result of illegal discrimination); **Gray v. Serruto Builders, Inc.**, 110 N.J.Sup. 314 (1970) (indignity is compensable as the "natural, proximate, reasonable and foreseeable result" of unlawful discrimination).

1. Village illegally discriminated against Auchenbach, by requiring her to take a mandatory maternity leave for an unreasonable length of time. §49-2-310(4) MCA.

2. Auchenbach lost $11,804.00 in net wages and moving expenses as a proximate result of this illegal discrimination. §49-2-506(1)(b), MCA.

3. Village owes Auchenbach $1,429.42 in prejudgment interest at 10% per annum to October 15, 1996, and continuing at $3.234 per day until final order, and thereafter until paid.

4. Village owes Auchenbach $2,500.00 to rectify the emotional distress she suffered as a result of the illegal discrimination.

5. The circumstances of the discrimination by respondent mandate affirmative relief. Village cannot maintain a policy of denying leave to all employees with less than a year in service, even if Village does waive application of the policy to pregnant employees. Recognition of the rights of the pregnant employee must be published to employees.

VI. PROPOSED ORDER

1. Judgment is awarded in favor of charging party and against respondent in the matter of April Auchenbach's complaint that respondent, Community Nursing, Inc., dba The Village Health Care Center, required her to take a mandatory maternity leave for an unreasonable length of time in violation of §49-2-310(4) MCA.

2. Respondent is ordered to pay $15,733.42 to charging party for lost wages, moving expenses and emotional harm caused by the described illegal discrimination. This sum includes prejudgment interest to October 15, 1996.

3. Respondent is ordered to pay prejudgment interest to charging party on the lost wages and moving expenses portion of the award in paragraph 2, at 10% per annum, $3.234 per day from September 23, 1996, until the final order issues, and thereafter until paid.

4. Respondent is ordered to change its policies to state that it will provide a reasonable leave of absence for pregnancy, without regard to the length of time or hours in service of the employee. Respondent shall, within 120 days of the final order, file written proof with the Commission staff that this policy manual change has been made and published to Village's employees.

5. Respondent is ordered not to violate any of the rights of its employees as protected under the Montana Human Rights Act.

Dated: October 15, 1996.

_____
Terry Spear, Hearing Examiner
Montana Human Rights Commission