

1 Anderson and Patel did not file the responses. Anderson and Patel did not file any
2 request for extension, motion for reconsideration, notice of bankruptcy, or any other
3 document. On July 17, 1997, Bosch served, by mail, her motion for additional sanctions for
4 failure to obey the previous order. She served her supporting brief by mail on July 23, 1997.
5 Anderson and Patel had until August 7, 1997, to respond. 24.9.320(3) A.R.M. Anderson and
6 Patel did not file any brief opposing the motion for further sanctions. They did not file any
7 kind of response at all.

8 The hearing officer then issued an order (1) to bar Anderson and Patel from asserting
9 defenses that depend upon the discovery responses sought; (2) to bar Anderson and Patel from
10 calling witnesses or offering evidence that the discovery responses should have revealed; (3) to
11 deem admitted the requests for admission to which Anderson and Patel have either not
12 responded or inadequately responded, and (4) to leave open for Bosch the opportunity to seek a
13 summary ruling on all or any part of the pending complaint. Anderson and Patel did not
14 challenge the order or take any action in response to it.

15 Bosch moved for partial summary judgment. The hearing examiner granted partial
16 summary judgment in favor of Bosch against Patel and Anderson, that both of them,
17 individually and as officers of Limelight, Inc. and Professional Hotel and Motel Management,
18 Inc. (formerly d/b/a EconoLodge/Limelight), discriminated against Bosch because of her sex
19 (female, pregnant female), violating §§49-2-303(1)(a) and 310(1) MCA. Patel and Anderson
20 did not challenge the order or take any action in response to it.

21 The contested case hearing on the complaint, with partial summary judgment and
22 sanctions already ordered, began on November 11, 1997, in Missoula, Montana, at the law
23 office of the attorney for Bosch. Bosch was present with Joan Jonkel, her attorney.
24 Respondents' attorney, Bruce L. Hussey appeared to represent all respondents: Limelight, Inc.
25 ("Limelight"); Professional Hotel and Motel Management, Inc. (formerly d/b/a
26 EconoLodge/Limelight) ("PHMM"); and the two individual respondents Martin Anderson and
27 Nainesh K. Patel.¹

¹ The hearing examiner dismissed former respondent Fisher Enterprises, Inc., on July 1, 1997.

1 Hearing concluded on November 11, 1997. Bosch filed her written closing argument
2 on December 18, 1997. Respondents did not file any closing argument, so the record closed.

3 During the hearing, the following exhibits were offered and either accepted or refused:

4	Exhibit--Description	Offered by	Objections	Admitted/Refused
5	1 Bosch's charges filed with HRC	Bosch	None	Admitted
6	2 Respondent's response to claim	Bosch	None	Admitted
7	3 Bosch responsive letters/rebuttals	Bosch	None	Admitted
8	8 Missoula bus. lic. for Limelight	Bosch	None	Admitted
9	9 Missoula bus. lic. for Econolodge	Bosch	None	Admitted
10	10 City bus. lic. appl. for both	Bosch	None	Admitted
11	11 State liq. lic. appl. for Limelight	Bosch	None	Admitted
12	13 Bankruptcy docket	Bosch	Foundation	Refused
13	14 Damage summary worksheet	Bosch	None	Admitted

14 The witnesses appearing and testifying were charging party Polly Bosch, her son, Justin
15 Lewis, and her friend, Margaret Olson. No witnesses appeared for any respondent. No
16 designated representative, other than counsel, appeared or attended for respondents. The
17 individual respondents, Anderson and Patel, did not attend, and appeared only through
18 counsel.

19 II. Issues

20 A full statement of issues appears in the final prehearing order (November 11, 1997).
21 Before signing the final prehearing order, Bosch renewed her motion for entry of default
22 against the respondents, for failure to file prehearing statements, failure to respond adequately
23 to discovery requests and failure to comply with orders compelling discovery and imposing
24 sanctions. Bosch also moved to exclude any evidence of any bankruptcy proceedings.
25 Respondents objected to the Commission's jurisdiction, on the grounds that the Bankruptcy
26 Court had exclusive and continuing jurisdiction. The parties, though counsel, agreed that the
27 bankruptcy petition was filed before Bosch filed her initial Human Rights Act complaint, and
28 that Bosch's claims were still pending before the Commission when the bankruptcy estate was
distributed, the trustee relieved, and the bankruptcy case closed. The parties also agreed,
through counsel, that Bosch's notice or lack of it regarding the bankruptcy was a question
solely of actual knowledge, and that she was never identified as a creditor or claimant in the
bankruptcy and was never on the bankruptcy mailing list.

1 At the close of the hearing, while scheduling briefs, respondents' counsel stated on the
2 record that he, for respondents, withdrew the bankruptcy issues. Counsel thus withdrew the
3 challenge to the jurisdiction of the Commission. The only issues for decision are the two
4 issues of fact stated in the prehearing order:

5 1. For what corporations were the individual respondents acting when discriminating
6 against charging party in employment based on her sex and retaliating against her?

7 2. What measures are required to correct any harm, pecuniary or otherwise, to the
8 charging party because of the illegal discrimination?

9 Final Prehearing Order, p.4, ls. 21-25.

10 The issue of law, "Are the claims of charging party barred as against one or more of
11 the respondents because of the bankruptcy of Professional Hotel & Motel Management, Inc.,"
12 Final Prehearing Order, p. 5, lines 1-3, has been eliminated.²

13 **III. Findings of Fact**

14 1. The facts determined by the sanctions order are repeated here as facts:

15 "A. As against Anderson, the following matters of fact are deemed admitted, and
16 require no additional proof:

17 1) Bosch was employed and satisfactorily performed her work at the Limelight
18 Nightclub and Lounge and Econolodge from 1-7-91 until 3-21-92;

19 2) On at least one occasion, in March of 1992, Anderson told Bosch, who was
20 five months pregnant, that she looked like she was ready to deliver;

21 3) Anderson knew in 1992 that Bosch had filed Montana Human Rights Act
22 charges against Limelight and Econolodge;

23 4) Anderson knew in 1994 that Bosch had filed amended Montana Human
24 Rights Act charges against Limelight, Econolodge and Professional Hotel and
25 Motel Management, Inc.;

26 5) Patel hired Bosch at Limelight/Econolodge on or about 1-7-91;

27 6) Limelight, Inc., and Professional Hotel & Motel Management, dba
28 Econolodge, operated with two different payrolls, paying employees working at
the 1609 West Broadway, Missoula, Montana, location on checks issued by both
Limelight, Inc. and Professional Hotel and Motel Management, Inc., between 1-
7-91 and 3-21-92;

7) Male Limelight bartender Doug Garrison wore clothing other than the
Limelight uniform of tuxedo shirt, black pants and bow tie;

² In addition to abandoning their bankruptcy defenses, respondents have exhausted them. See, Finding No. 4, including footnote 3.

1 8) When manager Lee Cox terminated Bosch, Anderson refused to discuss the
2 termination with Bosch, stating Cox was in charge;

3 9) Bosch worked only five shifts on the reservations desk at Econolodge and two
4 shifts behind the bar at Limelight from 3-11-92, to 3-21-92;

5 10) Bosch stated to Cox in March of 1992 that she wanted to work up until the
6 time she delivered her baby.

7 B. As against Patel, the following matters of fact are deemed admitted, and require no
8 additional proof:

9 1) Bosch was employed and satisfactorily performed her work at the Limelight
10 Nightclub and Lounge and Econolodge from 1-7-91 until 3-21-92;

11 2) Patel knew in 1992 that Bosch had filed Montana Human Rights Act charges
12 against Limelight and Econolodge;

13 3) Patel knew in 1994 that Bosch had filed amended Montana Human Rights Act
14 charges against Limelight, Econolodge and Professional Hotel and Motel
15 Management, Inc.;

16 4) Lee Cox was employed as a manager of Limelight Nightclub and Lounge and
17 Econolodge in March of 1992;

18 5) Patel hired Bosch as a bartender on or about 1-7-91;

19 6) Limelight, Inc., and Professional Hotel & Motel Management, dba
20 Econolodge, operated with two different payrolls, paying employees working at
21 the 1609 West Broadway, Missoula, Montana, location on checks issued by both
22 Limelight, Inc. and Professional Hotel and Motel Management, Inc., between 1-
23 7-91 and 3-21-92;

24 7) Anderson was directly involved in the management of Limelight, Inc. and
25 Econolodge in March of 1992;

26 8) Anderson supervised Cox;

27 9) Bosch worked only five shifts on the reservations desk at Econolodge and two
28 shifts behind the bar at Limelight from 3-11-92 to 3-21-92;

10) Bosch stated to Cox in March of 1992 that she wanted to work up until the
time she delivered her baby.

According to the partial summary judgment in favor of charging party, respondents
Anderson and Patel did discriminate against charging party in her employment by
reason of her sex, and did retaliate against her."

Final Prehearing Order, pp. 2, line 16 through p. 4, line 16.

2. Nainesh Patel was the president of PHMM according to the license application filed
with the City of Missoula on May 18, 1993 (Exhibit 10). According to that same document,
PHMM owned Econolodge (the motel), and Limelight owned the nightclub ("Limelight

1 Nightclub" on the application). The other business license records (Exhibits 8 and 9) show a
2 series of owners and operators, with no clear indication of who owned and operated the
3 nightclub or the motel at any given time, either before or after 1993.

4 3. The liquor license application (Exhibit 11) identifies Limelight as the owner of the
5 nightclub, with Martin Anderson as the president and sole shareholder and Patel as the vice-
6 president of the corporation. This information applies from August 1992 through August
7 1993.

8 4. PHMM filed a Chapter 11 petition pursuant to the United States Bankruptcy Code
9 on or about January 29, 1992. Case No. 92-30129-11, U.S. Bankruptcy Court, District of
10 Montana. That proceeding commenced before Bosch's Human Rights Act claim was filed.
11 That proceeding also concluded before the hearing here. "Motion to Reopen," filed by Debtor
12 Professional Hotel & Motel Management, Nov. 7, 1997.³ Bosch was never named as a
13 creditor nor given notice of the pendency of that petition. Testimony of Bosch. She had no
14 actual knowledge of that proceeding until her attorney told her of the bankruptcy, at some time
15 after she hired her attorney here. Bosch did not understand a reference, in Limelight's March
16 10, 1994, letter to the Human Rights Commission staff (CP's exhibit 2, fourth page, letter to
17 Teresa Graham), to "a Chapter 11 Trustee" as showing the pendency of a bankruptcy.
18 Testimony of Bosch. Bosch therefore never had, during the pendency of the bankruptcy, any
19 knowledge sufficient to require her to take action to preserve her claim in the bankruptcy.

20 5. Bosch was a full-time employee of Limelight and PHMM, working 40 hours or
21 more per week, until she was discharged on March 21, 1992. Testimony of Bosch. Her
22 discharge followed adverse treatment regarding work scheduling, clothing worn to work and
23 conduct at work, all adverse treatment being inconsistent with the treatment of male employees
24 on the same issues. She identified the person directly responsible for this treatment as the
25 manager, Lee Cox, who made hostile comments regarding bodily functions, body size and
26 shape, "craziness" of pregnant women, the certainty that as a pregnant woman Bosch would be

27
28 ³ Although no formal filing of the outcome of that motion is in this record, the hearing examiner has
been advised that the motion to reopen was denied by the bankruptcy court. There being no evidence or notice of
any action by the bankruptcy court reopening the bankruptcy, the bankruptcy court is presumed to have denied it.

1 taking too many breaks, would not look appropriate in the uniform, and could not properly
2 tuck in her shirt with her stomach hanging out. The hostile treatment and adverse employer
3 action followed her notification of her pregnancy to the employer. Testimony of Bosch.

4 6. Bosch made approximately \$200.00 per week prior to the adverse actions of Cox,
5 would have continued to earn the same amount, plus tips of approximately \$20.00 per shift,
6 from her discharge until September 15, 1992, when (had she still been employed) she would
7 have then commenced earning \$240.00 per week (after a raise from \$5.00 per hour to \$6.00
8 per hour). Testimony of Bosch.

9 7. Bosch planned to take no more than a six week maternity leave, because she could
10 not afford to take more time off. Her child was born on July 20, 1992. She could have
11 returned to work six weeks later, on September 15, 1992. Testimony of Bosch.

12 8. Bosch was not expecting to be fired. She suffered and displayed emotional distress
13 in mood swings, increased stress due to the financial strain upon the household, loss of sleep,
14 and anger and resentment because she felt she had been wrongly fired--punished for being
15 pregnant. Her relationship with her husband deteriorated (he ultimately committed suicide).
16 Bosch experienced financial hardship and genuine privation from the loss of income. Although
17 some of the debt problems and relationship problems existed before Bosch's discharge, the
18 evidence is clear and convincing that loss of her job for no good cause magnified her problems
19 and inflicted substantial emotional distress upon her. At the time of hearing Bosch had not yet
20 gotten out of the emotional "hole" into which she fell when she was fired. Testimony of
21 Bosch, Justin Lewis and Margaret Olson.

22 9. Bosch expended \$300.00 in job-hunting costs--paying for car gas and maintenance,
23 extra make-up and "nice" maternity outfits to seek employment. Testimony of Bosch.

24 10. Bosch made reasonable and proper attempts to find work. On April 1, 1993, she
25 obtained a full-time job with comparable wages and comparable tips. Testimony of Bosch.

26 11. Bosch lost, by reason of the respondents' wrongful acts of discrimination that
27 culminated in her discharge, \$300.00 for miscellaneous job-hunting expenses. She lost wages
28 from March 21, 1992, through July 20, 1992 and from September 15, 1992, to April 1, 1993,

1 for a total wage loss of \$10,172.00. She lost tips for the same periods, for a tip earning loss of
2 \$4,530.00. Her wage losses total \$14,702.00.

3 12. Lacking clear evidence of pay dates, the interest calculation on lost earnings will
4 be set from July 20, 1992, for the earlier period of loss, and from April 1, 1993, for the
5 remainder. Interest accrued at \$1.44 per day from July 20, 1992 through March 31, 1993 (.10
6 times \$5,250.00 divided by 365). Interest accrued at \$2.59 per day from April 1, 1993, to the
7 present (.10 times \$14,702.00 divided by 365).

8 13. Bosch suffered emotional distress that was severe. Her lost job precipitated
9 extreme consequences in her home life, for her child, in her sense of self-esteem, and certainly
10 increased the strain in her marriage (although her husband's suicide was not proved to result
11 from her job loss). Her demeanor and testimony credibly support a finding of extreme
12 emotional distress directly resulting from her loss of her livelihood, in the sum of \$15,000.00.

13 **IV. Opinion**

14 Sanctions

15 This contested case involved sanctions from fairly early in its progression.
16 Respondents moved for a dismissal in March of 1997, within four months of service of the
17 corporations and Martin Anderson, and within a month of service of Nainesh Patel. The
18 dismissal motion relied upon a completed bankruptcy proceeding by Professional Hotel &
19 Motel Management. Case No. 92-30129-11, U.S. Bankruptcy Court, District of Montana.

20 From that early motion through hearing, although respondents continued to insist until
21 the closing remarks of the hearing that the bankruptcy foreclosed this case, respondents
22 steadfastly refused to provide full and complete discovery responses. Without the facts of the
23 relationships between Anderson and Patel and the corporate entities, Bosch could not
24 adequately respond to the bankruptcy defense, and was virtually without facts to verify or
25 discard her "alter ego" claims against Anderson and Patel. Sanctions imposed upon the
26 respondents for their prolonged failure to address their deficient discovery responses, coupled
27 with the withdrawal of the bankruptcy defense, left Anderson and Patel exposed to joint and
28 several liability with the corporate defendants.

1 It remains unclear to what degree Anderson and Patel were actually involved in the
2 discriminatory acts. But they alone have the evidence to clear up that uncertainty. Refusal to
3 provide the evidence justifies both sanctions and a presumption that the evidence they have
4 declined to provide would weigh against them. §26-1-602(5) and (6) MCA.

5 Pregnancy Discrimination is a Violation of the Montana Human Rights Act

6 The Montana Maternity Leave Act makes it unlawful to terminate a woman's
7 employment because of her pregnancy. §49-2-310 MCA. Respondents clearly fired Bosch
8 because she was pregnant. Pregnancy discrimination is necessarily discrimination against
9 females, and is therefore sex discrimination. *Miller-Wohl Co., Inc. v. Commissioner*, 214
10 Mont. 238, 692 P.2d 1243 (1984); *vac'd and remanded*, 479 U.S. 1050, 107 S.Ct. 919, 93
11 L.Ed.2d 972 (1987); *jdgmnt reinst'd*, 228 Mont. 505, 744 P.2d 871. Discrimination in
12 employment based on sex is a violation of the Montana Human Rights Act. §49-2-303 MCA.

13 Damages

14 In terms of damages, Bosch established her lost wages by clear and credible testimony
15 that was not effectively rebutted.⁴ Interest at the statutory rate of 10% per annum, is proper.
16 *P. W. Berry Co. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Foss v. J.B. Junk*, Case
17 No. SE84-2345 (Montana Human Rights Commission, 1987). The Commission awards
18 prejudgment interest either from the date the wages would have been paid, *P. W. Berry Co.*,
19 *op. cit.*, or from the hearing date, *Amstutz v. Mountain Bell*, Case No. HpE80-1235 (Montana
20 Human Rights Commission, 1986). When the amount lost and the accrual date for it are
21 proved, interest from the due date is proper. *P. W. Berry Co.*, *supra*, *Foss*, *supra*.

22 Once a violation has been proven under state or federal civil rights statutes, then
23 emotional harm is compensable if the claimant establishes that (1) distress, humiliation,
24 embarrassment or other emotional harm actually occurred, and (2) the harm was proximately
25
26
27

28 ⁴ If Bosch received UI benefits that now must be refunded, the matter is between the Department and Bosch, and does not accord any offset or diminution in liability for respondents.

1 caused by the unlawful conduct of the respondent.⁵ The testimony of the injured party alone
2 can establish compensable emotional harm from a civil rights violation, *Johnson v. Hale*,
3 942 F.2d 1192 (9th Cir. 1991), and sometimes harm can be inferred from the circumstances.⁶

4 The award for emotional distress in this case is the same as that awarded in
5 *Arrotta v. V. K. Putman, Inc.*, HRC Case Nos. 9101004544 and 9109004736 (Spt. 29, 1993).
6 For other such awards, *see, Stensvad v. Towe*, 232 Mont. 378, 759 P.2d 138 (1988) (\$5,000
7 for mental anguish evidenced by family testimony of embarrassment, sleeplessness, reluctance
8 to go to Rotary Club meetings); *Brookshire v. Harley Phillips, et al.*, *op. cit.* (\$20,000 award
9 as a result of sexual harassment in the workplace); *Webb v. City of Chester*, 813 F.2d 824
10 (7th Cir. 1987) (§1983 employment discrimination claim, \$20,250 for embarrassment and
11 humiliation though claimant worked just two weeks); *Brown v. Trustees of Boston University*,
12 674 F.Supp. 393 (D.C. Mass. 1987) (\$15,000 award for emotional distress from loss of tenure
13 based on sex); *Paxton v. Beard*, Case No. GC89-327-S-0, 58 FEP 298 (N.D. Miss. 1992)
14 (\$15,000 award for mental distress in §1983 action in federal court, termination due to
15 pregnancy); *Shelby v. Flipper's Billiards*, HRC Case No. RPa-800185 (January 1983) (\$5,000
16 in denial of public accommodation on account of race); *Capes v. City of Kalispell*, HRC Case
17 No. SGs83-2121 (January 1985) (\$750 for sex based refusal to register child for city baseball).

18 V. Conclusions of Law

19 1. Respondent discharged the charging party on March 21, 1992 because of her gender
20 (pregnant female), violating §49-2-303 MCA.

21
22 ⁵ *See, among others: Carey v. Piphus*, 435 U.S. 247, 264 at n. 20 (1978) (42 U.S.C. 1983 action,
23 denial of voting rights); *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984) (42 U.S.C. 1981,
24 employment discrimination); *Seaton v. Sky Realty Company*, 491 F.2d 634 (7th Cir. 1974) (42 U.S.C. 1982,
25 housing discrimination based on race); *Brown v. Trustees of Boston University*, 674 F.Supp. 393 (D.C. Mass.
26 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).

27 ⁶ *Carter v. Duncan-Huggins, Ltd.*, *supra* [ftnt 5,]; *Seaton v. Sky Realty Co.*, *supra* [ftnt 5];
28 *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 & Ind.*,
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.Supp. 314 (1970) (indignity is compensable as the
"natural, proximate, reasonable and foreseeable result" of unlawful discrimination).

1 draft policies to the staff of the Human Rights Bureau for review and
2 comment;

3 b. Within 30 days after receipt of the comments of the Human Rights
4 Bureau staff and after revision of the draft policies in conformance with
5 those comments, each respondent shall adopt those nondiscrimination
6 policies and shall then distribute a copy to all current employees;

7 c. Within 30 days of adopting the described nondiscrimination policies,
8 each respondent shall post appropriate notices in conspicuous places
9 informing all employees and employment applicants that the respondent
10 does not discriminate in violation of state or federal law and that further
11 information concerning their rights to be free from unlawful
12 employment discrimination may be obtained from the offices of the
13 United States Equal Opportunity Commission, the Montana Department
14 of Labor and Industry or other appropriate government offices;

15 d. Within 120 days after the final order in this case, each respondent
16 shall produce to the Human Rights Bureau proof to establish that its
17 management (or the individual respondent) has obtained appropriate
18 training in human rights in employment, as required by Bureau staff.

19 Dated: September 10, 1998.

20
21
22
23
24
25
26
27
28

Terry Spear, Hearing Examiner for the
Montana Human Rights Commission
Hearings Bureau, Montana Department of Labor and Industry