BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

Levicy Breaux, Charging Party, versus **Yvonne Huntley d/b/a Evergreen Subway or Valley Gals Subway**, Respondent.	**HRC Case No. 9701007770** *Hearing Examiner's Decision*

I. Procedure and Preliminary Matters

Levicy Breaux (now known as Levicy Fox, hereinafter "Breaux") filed a verified complaint with the Montana Human Rights Commission on July 11, 1996. She alleged the respondent, Yvonne Huntley, discriminated against her on the basis of her sex (pregnant female) by cutting her hours in January 1996 and laying her off from her clerk position on or about March 26, 1996. On March 31, 1998, the Commission certified her complaint for a contested case hearing, and appointed Terry Spear as hearing examiner.

This contested case hearing occurred on October 14, 1998, in the Justice Courtroom of the Justice Center, Flathead County, Kalispell, Montana. Breaux was present with her attorney, Linda G. Hewitt (Warden, Christiansen, Johnson & Berg, PLLP). Yvonne Huntley was present representing herself. Breaux testified on her own behalf. Yvonne Huntley testified on her own behalf, on the single issue of her default. Exhibits 1, 2 and 3 were offered by Breaux and admitted without objection. The hearing examiner refused to set aside Huntley's default, urged the parties to explore possible settlement, and closed the record.

II. Issues

The issues here are whether Huntley justified setting aside her default, whether Breaux proved a prima facie case of unlawful discrimination, and what damages Breaux can recover.

III. Findings of Fact

1. Huntley hired Breaux in November 1995 to work in the Evergreen Subway, a sandwich shop in Kalispell that Huntley owned. Breaux previously worked for Huntley in

June and July 1995. Breaux left employment in July 1995 because of lack of available working hours. Testimony of Breaux.

2. Breaux worked for two weeks as temporary relief, providing vacation coverage. At the end of the two weeks, she asked to stay. Huntley made her a permanent employee. The number of hours Breaux worked depended entirely upon Huntley's scheduling of employee hours. Testimony of Breaux.

3. In early January 1996, Breaux found out she was pregnant. She freely told people, including Huntley, of her pregnancy. From that point on, Breaux found that Huntley reduced her hours. Breaux had worked 63.0 hours from December 13, 1995, through December 26, 1995. Breaux then worked only a total of 45.5 hours from December 27, 1995, through January 9, 1996. She worked 29 hours from January 10, 1996, through January 23, 1996. She worked 22.5 hours from January 24, 1996, through February 6, 1996. After that, she no longer appeared on the schedule at all. Testimony of Breaux, Exhibit 1 (pay sheet copies).

4. Breaux never asked for reduced hours. She was willing and able to work, and wanted full hours. Huntley never gave Breaux a formal review. Huntley complimented Breaux on her work, and never pointed out any flaws in Breaux' performance at work. Breaux could have worked 63 hours every two weeks, if Huntley had continued to schedule her. Her rate of pay was $4.50 an hour. Testimony of Breaux, Exhibit 1.

5. In March, Breaux called Huntley, to find out why she was no longer on the work schedule. Huntley said she felt that Breaux did not want to work. Huntley did not explain how she arrived at this feeling. Testimony of Breaux.

6. Breaux sought other work, but was unsuccessful. In April, as her pregnancy showed more, she stopped looking for work, feeling no employer would hire her. Her baby was born on August 26, 1996. She planned, even had she been working, to stay home for six weeks after the birth of her child. After the end of that six week period, she began, again, to seek work. She found employment March 28, 1997, with Flathead Janitorial, and no longer lost any money due to lack of employment with Huntley. Testimony of Breaux, Exhibit 2 (list of places Breaux sought work).

7. Breaux experienced low self-esteem and feelings of helplessness and dependency. She was fearful about her future, and had to rely upon her mother and friends for transportation and support. Testimony of Breaux. Breaux suffered emotional distress as the result of losing her job with Huntley. The sum necessary to compensate her for her emotional distress is $5,000.00.

8. Had Breaux continued to work for Huntley, she would have earned an average of $283.50 every two weeks (based on her hours before she told Huntley she was pregnant). Breaux lost $81.00 (18 hours at $4.50 per hour) from December 27, 1995, through January 9, 1996. She lost $153.00 (34 hours at $4.50 an hour) from January 10 through January 23. She lost $182.25 (40.5 hours at $4.50 an hour) from January 24 through February 6. After that, she lost $283.50 every two weeks until March 27, 1997, less the six weeks Breaux planned to be off work with her new baby. Her total lost wages are $81.00 plus $153.00 plus $182.50 plus $283.50 times 26.577 (414 days, 59.143 weeks, minus 6 weeks, divided by 2). Her total lost wages are $7,534.58.

9. Interest on the wages at 10% per annum through November 16, 1998, is $1924.37

10. Breaux estimated she made 50 trips from her home in Columbia Falls to Kalispell to seek work. She did not drive--her mother or a friend provided this transportation. Breaux believes she must repay them, at the rate of $6.20 per trip (31 cents a mile, 20 miles a trip), but she produced no evidence of any obligation to repay them. Breaux had no other expenses she could identify clearly. Testimony of Breaux, Exhibit 3.

11. The Sheriff of Flathead County served respondent Yvonne Huntley with the certification and notice of hearing on April 9, 1998. Testimony of Huntley, Sheriff's Return of Service (Hearing Examiner's Docket, 4-13-98). These documents required Huntley to file her appearance and preliminary prehearing statement by April 29, 1998. The "Certification for Hearing Notice of Hearing" says, in pertinent part (page 2, lines 13-21):

> EACH PARTY MUST FILE A WRITTEN APPEARANCE AND PRELIMINARY PREHEARING STATEMENT IN THIS MATTER WITHIN TWENTY (20) DAYS OF THE DATE OF SERVICE.
> Your appearance and preliminary prehearing statement must state the name, address, and telephone number of your attorney or indicate that you have no

> attorney. You must also identify your contentions of fact and law, witnesses, exhibits, relief sought, admitted facts, and prehearing motions. Failure to file an appearance and preliminary prehearing statement may result in dismissal of the charging party's complaint or default of the respondent. An appearance and preliminary prehearing statement form is attached for your convenience.

12. The hearing examiner issued the "Order Setting Contested Case Hearing and Prehearing Schedule" on April 14, 1998. Hearing Examiner's Docket. The certificate of service on that order shows service by first class mail on Yvonne Huntley on April 15, 1998. Huntley still receives mail, as of the date of hearing, at the address on that certificate, and all subsequent certificates of service in this case. Testimony of Huntley, Hearing Examiner's Docket. The scheduling order says, in pertinent parts (page 1, lines 20-22, page 2, lines 5-7):

> 5. The parties must comply with this prehearing schedule. This order does not alter or extend the deadline set in the Notice of Certification for filing an Appearance and Preliminary Pre-Hearing Statement.
>
> . . . .
>
> 7. Failure to comply with an order of the hearing examiner or to participate in a prehearing conference may result in sanctions pursuant to Rule 24.9.324, A.R.M. Sanctions include dismissal of the charge, *default of Respondent* or other appropriate action.
>
> [Emphasis added.]

13. On April 23, 1998, Breaux served written discovery requests upon Huntley, by first class mail. Hearing Examiner's Docket.

14. Huntley did not file an appearance, or any other document by April 29, 1998.

15. Breaux timely filed her appearance and preliminary prehearing statement. She also filed her amended proposed uncontested facts, her lists of contentions, witnesses, exhibits and requests for relief. Hearing Examiner's Docket.

16. Huntley's time for appearance, her time to complete discovery, her time to file motions, her time to file any amended lists of contentions, exhibits and witnesses and her time to exchange exhibits all elapsed. On June 26, 1998, the hearing examiner convened the final prehearing conference by telephone. Counsel for Breaux participated. Huntley participated personally, from her store in Kalispell where she was waiting on customers. Huntley said she had not been able to find an attorney. She said she was working long hours in her store to cut her labor costs, and could not do more than make a few phone calls to seek an attorney willing to represent her. She was not ready to proceed and had none of the past due documents ready.

17. During the June 26, 1998, telephone conference, the hearing examiner gave Huntley a month in which she was required, whether or not she obtained counsel, to file the documents she had failed to file, to exchange the documents she had failed to exchange, and to get ready for hearing. The hearing examiner warned Huntley that failure timely to act could and probably would expose her to liability for money damages on the merits of the claim against her, by default. The hearing examiner specifically told Huntley that if she failed to act within the month, an award of her money to Breaux was virtually certain. Huntley filed nothing in this case, from June 26, 1998, to July 20, 1998. Hearing Examiner's Docket.

18. By written order dated July 20, 1998, the hearing examiner extended Huntley's time to act until August 20, 1998, at 12:00 noon. The order gave notice that at noon on August 20th, the hearing examiner would convene a telephone conference and either schedule a contested case hearing on the merits of the claim or grant a default motion against Huntley and set a hearing date on damages to be awarded. The order also gave notice that once the hearing examiner convened the telephone conference, it would be too late for Huntley to obtain additional time to file anything. "Order Regarding Default," July 20, 1998. The hearing examiner served this order by first class mail on Huntley at the same address as the prior and subsequent mailings in this case, all of which Huntley received. Testimony of Huntley. Huntley filed nothing, from July 20, 1998 to August 20, 1998. Hearing Examiner's Docket.

19. On August 20, 1998, Carol A. Larkin, administrative assistant, made a conference call, connecting the hearing examiner (then in Sidney, Montana, for another case), the attorney for Breaux (in her office in Kalispell), and the business answering machine for Huntley, at her place of business. At the hearing examiner's direction, Larkin prepared a memo of her efforts at putting together the conference call. "Memo to Terry Spear regarding conference call for Breaux v. Huntley, August 20, 1998," Hearing Examiner's Docket. On August 21, 1998, Huntley telefaxed her "Contentions, Witnesses, Exhibits and Requests for Relief" to the hearing examiner. Hearing Examiner's Docket. This was the only document Huntley ever filed in this contested case. She did not explain her failure to follow the rules, the orders and the telephonic directions given to her in this case. She did not request an extension and she did

not explain her tardiness. She also did not certify service of a copy on Breaux.

20. On August 24, 1998, counsel for Breaux moved for default judgment. Huntley did not respond to the motion. On September 29, 1998, the hearing examiner set the hearing for October 14, 1998, in Kalispell, and entered Huntley's default. This order provided that hearing would be limited to two purposes--proof of damages by Breaux and a final chance for Huntley to justify her complete failure to follow the rules and the directions given to her. The order also provided that the parties must file, by October 7, 1998, lists of witnesses and exhibits and exchange exhibits. "Order Setting Contested Case Hearing and Entering Default," September 28, 1998, Hearing Examiner's Docket.

21. On October 7, 1998, Breaux filed her final lists of witnesses and exhibits and exchanged her exhibits. Breaux also moved for an order compelling discovery or imposing sanctions upon Huntley, who had never responded at all to discovery requests served on her by mail in April of 1998. Huntley filed nothing by the October 7, 1998, deadline. The hearing examiner granted the motion and ordered Huntley to bring the documents requested in discovery to the hearing. "Order Regarding Sanctions," October 12, 1998, Hearing Examiner's Docket.

22. Huntley appeared at hearing, and brought witnesses with her. She had received the orders of September 28, 1998, and October 12, 1998, but had not complied with either order. Testimony of Huntley.

23. At hearing Huntley testified that she had no time to find a lawyer, did not understand what she was to do, and could not do anything more than she had done (made half a dozen phone calls in six months, to seek counsel) because of the long hours she spent at work, doing the work herself to keep her labor costs down. She broke down and cried while she testified, over the difficulties she faced. She admitted receiving essentially every document sent to her except the July 20, 1998, order. She admitted she heard the comments the hearing examiner made to her in the June 26 telephone conversation. She admitted she owned and operated the business for several years prior to the hearing. Testimony of Huntley.

IV. Opinion

Montana law prohibits discrimination in employment based on sex, including pregnancy. §49-2-303(1)(a) MCA (1995). The Montana Maternity Leave Act makes it unlawful to require an unreasonably long maternity leave. §49-2-310 MCA. The law bars Huntley from taking an employee off the schedule, temporarily or permanently ("commencement and duration of leave") because of pregnancy. 24.9.1206 A.R.M. Breaux' testimony establishes that she was female and pregnant, that she satisfactorily performed her duties and that Huntley cut her hours after learning of her pregnancy. Breaux has established a prima facie case. ***E.g.***, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[1]

Huntley cannot defend against Breaux' charges, because Huntley delayed too long, for no good reason, in responding in this contested case. In addition, when Huntley belatedly responded, she still failed to follow the rules. Huntley had ample notice--multiple written and verbal warnings of the peril she faced if she failed to file timely documents--of impending default. Yet, she waited until Breaux had neither time nor notice of her particular defenses and witnesses, seeking leave to present defenses that would patently prejudice Breaux on the basis of a plea for sympathy because she had not found an attorney after very limited efforts in that direction. A person willing and able to be responsible for the operation of a business cannot credibly maintain she is, at the same time, incompetent and unable to understand directions and follow them. The only issue remaining in this case, after Huntley's default and failure to justify it, is the amount of recovery Breaux proved.

Breaux is entitled to lost wages.

When the Commission finds illegal discrimination, it can "require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person discriminated against." §49-2-506(1)(b) MCA. Courts or commissions award damages in employment discrimination cases to rectify the resulting harm and to make the victims whole. *P. W. Berry Co. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523 (1989); *Dolan v. School District No. 10*, 195 Mont. 340, 636 P.2d 825, 830 (1981); ***accord***,

---

[1] *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813 (1988) *Johnson v. Bozeman School Dist.*, 226 Mont. 134, 734 P.2d 209 (1987); *European Health Spa v. Human Rights Comm'n*, 212 Mont. 319, 687 P.2d 1029 (1984); *Martinez v. Yellowstone Co. Welfare Dept.*, 192 Mont. 42, 626 P.2d 242 (1981).

Albermarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 2372 (1975). Breaux is entitled to recover her lost wages due to the illegal discrimination, in the amount of $7,534.58.

Breaux Is Entitled to Prejudgment Interest on the Wages Lost.

Prejudgment interest is awarded on back pay. *P. W. Berry Co.*, ***op. cit.***; *Foss v. J.B. Junk*, Case No. SE84-2345 (Montana Human Rights Commission, 1987). The Commission awards prejudgment interest either from when the wages would have been paid, *P. W. Berry Co.*, ***op. cit.***, or from when the hearing was held, *Amstutz v. Mountain Bell*, Case No. HpE80-1235 (Montana Human Rights Commission, 1986). The differences in commencement dates for prejudgment interest result from differences in proof. When the amount lost and the accrual date for it are proved, interest from the due date is proper. *P. W. Berry Co.*, ***op. cit.***; *Foss*, ***supra***. This interest accrues at 10% simple annual interest. §25-9-205(1) MCA. Breaux is entitled to prejudgment interest in the amount of $1,924.37.

Breaux is entitled to recover for emotional distress.

Once a claimant proves a violation state or federal civil rights statutes, then emotional harm is compensable if the claimant proves (1) distress, humiliation, embarrassment or other emotional harm actually occurred, and (2) the harm was proximately caused by the unlawful conduct of the respondent. ***See, e.g.***: *Carey v. Piphus*, 435 U.S. 247, 264 at n. 20 (1978) (denial of voting rights); *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984) (employment discrimination); *Seaton v. Sky Realty Company*, 491 F.2d 634 (7th Cir. 1974) (housing discrimination); *Brown v. Trustees of Boston University*, 674 F.Supp. 393 (D.C.Mass. 1987) (unlawful denial of tenure); *Portland v. Bureau of Labor and Industry*, 61 Or.Ap. 182, 656 P.2d 353 (1982), ***aff'd*** 298 Or. 104, 690 P.2d 475 (1984) (employment discrimination); *Hy-Vee Food Stores v. Iowa Civil Rights Comm.*, 453 N.W.2d 512, 525 (Iowa, 1990) (employment discrimination). The injured party's testimony, standing alone can prove compensable emotional harm resulting from a civil rights violation, *Johnson v. Hale*, 942 F.2d 1192 (9th Cir. 1991). The trier of fact can also infer compensable emotional harm from the circumstances of the discrimination. *Carter v. Duncan-Huggins, Ltd.*, ***supra***; *Seaton v. Sky Realty Co.*, ***supra***; *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 compensable as "natural, proximate, reasonable and foreseeable result" of discrimination). The power and duty to award money for emotional distress is clear as a matter of law. Breaux' testimony proved she suffered emotional distress. She is entitled to recover $5,000.00 for this emotional distress.

The award for emotional distress in this case is one-third the Commission award in *Arrotta v. V. K. Putman, Inc.*, HRC Case Nos. 9101004544 and 9109004736 (9/29/93). It matches the amount awarded in *Stensvad v. Towe*, 232 Mont. 378, 759 P.2d 138 (1988) ($5,000 for mental anguish based on family testimony of embarrassment, sleeplessness, reluctance to go out). For other emotional distress awards, and there bases, ***see Brookshire v. Phillips***, ***op. cit.*** ($20,000 award for sexual harassment at work); *Webb v. City of Chester*, 813 F.2d 824 (7th Cir. 1987) ($20,250 awarded for embarrassment and humiliation although claimant only employed for two weeks); *Brown v. Trustees of Boston University*, ***op. cit.*** ($15,000 emotional distress award for discriminatory loss of tenure); *Paxton v. Beard*, Case No. GC89-327-S-0, 58 FEP 298 (N.D. Miss. 1992) ($15,000 award for mental distress from termination due to pregnancy); *Shelby v. Flipper's Billiards*, HRC Case No. RPa-800185 (January 1983) ($5,000 award for denial of public accommodation on account of claimant's race); *Capes v. City of Kalispell*, HRC Case No. SGs83-2121 (January 1985) ($750 award for sex based refusal to register child for city baseball).

Breaux is not entitled to recover for others' transportation costs.

Breaux did not prove she is legally obligated to repay her mother and her friends for assisting her with transportation to seek work. Since the sole evidence presented to establish this aspect of the claim was Breaux' testimony, she has not established this entitlement. Breaux may feel she should reimburse her mother and friends, but she is not bound to do so.

V. Conclusions of Law

1. The Commission has jurisdiction. §§49-2-501, 49-2-505, 49-2-509(7) MCA.

2. Respondent Yvonne Huntley engaged in an unlawful discriminatory practice in employment by reducing and then eliminating the working hours of Charging Party Levicy Breaux (now known as Levicy Fox) by reason of her sex (pregnant female), in violation of §49-2-301(a) MCA and §49-2-310 MCA.

3. Huntley has not established good cause to set aside her default.

4. Pursuant to §49-2-506(1)(b) MCA, Breaux is entitled to the sum of $7,534.58 for lost wages, $1,924.37 for prejudgment interest, and $5,000.00 for emotional distress.

5. Affirmative relief is necessary in this case. §49-2-506(1)(a) MCA. Huntley must refrain from engaging in any further unlawful discriminatory practices. Within 60 days of the entry of this order, Huntley must submit to the Human Rights Bureau a proposed policy regarding non-discriminatory maternity leave for employees. Within 60 days after receiving from the Bureau approval or suggested changes to that proposed policy, Huntley must file written proof with the Human Rights Bureau that she has formally adopted and posted the policy. Huntley must also comply with any additional conditions the Human Rights Bureau places upon her continued activity as an employer, or cease doing business in Montana.

6. For purposes of §49-2-505(4), MCA, the charging party is the prevailing party.

VI. Proposed Order

1. Judgment is found in favor of Levicy Breaux (now known as Levicy Fox) and against Yvonne Huntley on the complaint of sexual discrimination in employment.

2. Yvonne Huntley is ordered to pay Levicy Breaux the sum of $14,458.95.

3. Yvonne Huntley is enjoined from engaging in any further unlawful discriminatory practices, and is required to comply with the provisions of paragraph 3 of the Conclusions of Law herein.

Dated: November 16, 1998.

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