

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

BEN AND LACHELLE FOSS,)
CHARGING PARTY,)
vs.)
VORTEX FISHING SYSTEMS, AND JOHN)
DOES 1 AND 2,)
RESPONDENT.)

CASE NO. 9801008355 & 9801008370

**ORDER AFFIRMING FINAL
AGENCY DECISION**

The above-captioned matter came before the Montana Human Rights Commission (Commission) on July 12, 1999. The matter was before the Commission for consideration of the respondent’s appeal from the final agency decision. The respondent presents seven issues on appeal. The charging party lodged an objection to the seventh issue (constitutional issue) as being untimely.

As a preliminary matter, the Commission considered the charging party’s objection to the respondent’s constitutional issue. The charging party’s objection to that issue is overruled. The record reveals that the respondent did raise its constitutional issue in the pretrial order. The issue was preserved for further appeal particularly when considering that an administrative agency is without jurisdiction to resolve constitutional issues. *Jarussi v. Board of Trustees*, 204 Mont. 131, 136, 664 P.2d 316 (1983). As regards the merits of the constitutionality of not allowing a jury trial in human rights complaints, the Commission as an administratively attached entity to the Department of Labor and Industry would likewise be considered part of the administrative law process and is without jurisdiction to consider the issue. It does seem appropriate, however, to point out that the Montana Supreme Court has ruled on the issue and found no constitutional violation to exist. *Romero v. J & J Tire*, 238 Mont. 146, 149 777 P.2d 292, 294 (1989); *Vainio v. Brookshire*, 258 Mont. 273, 277, 852 P.2d 596 (1993).

The first issue presented by the respondent contends that emotional distress damages were improperly awarded. The record reveals that the Ben Foss experienced significant emotional distress as a result of having to quit his job in order to get married. Emotional distress is compensable under the Human Rights Act and the hearing examiner did not err in awarding \$2,500 in emotional distress damages. *Vainio v. Brookshire*, 258 Mont. 273, 281, 852 P.2d 596 (1993).

The second issue presented by the respondent asserts that the hearing examiner erred in concluding that its anti-nepotism policy constituted illegal discrimination against Ben Foss. It is unlawful for an employer, “to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition or privilege of employment because of... marital status...” *Section 49-2-303, MCA*. Marital status discrimination includes the “identity and occupation of one[s] spouse as well as whether one is married, single...” *Thompson v. Board of Trustees*, 192 Mont. 266, 271, 627 P.2d 1229 (1981). In the present matter, the hearing examiner found that the only reason Ben Foss left his employment was due to being informed by his employer that he or Lachelle Foss would have to leave their employment or be fired if they got married. The application of the respondent’s policy to Ben Foss created the illegal discriminatory conduct. The Commission concludes that the marital status protections of the Act would be thwarted if employees who announced their intent to marry were faced with termination from their employment. Such discrimination is just as repugnant to the Act as refusing to consider a person for hire due to the identity of the person’s spouse.

The third issue presented by the respondent is the question of whether Ben Foss is a member of a protected class. Ben Foss was certainly married at the time of the filing of his complaint. Prior to that

time, Ben Foss was unmarried. Marital status includes both classes, married and unmarried. *Id.* Ben Foss was a member of a protected class at the time of the discriminatory acts of the respondent. Further, the announcement of a change from one class to another resulted in the discriminatory act. As stated above, the Commission finds the acts of the respondent to force Ben Foss to choose between marriage and his job resulted in the finding of illegal discrimination. To allow an employer to fire or force employees to resign simply because of the announcement of an intent to marry would seriously undermine the protections of the Act.

The fourth issue presented by the respondent is whether Ben Foss was terminated because of his marital status. The hearing examiner found that Ben and Lachelle Foss were informed that if they married, one of them would have to leave the respondent's employ. The hearing examiner also found that the only reason Ben Foss quit was because of the prospect of being fired. The hearing examiner also found that Scott's testimony that Ben Foss might not have been fired was not convincing. Those facts are supported by substantial credible evidence in the record through the testimony of the witnesses. Under those facts, the Commission concludes that the hearing examiner did not err in concluding that Ben Foss had no reasonable alternative but to quit. A decision to continue on would have been futile in that he would have been terminated and faced even greater issues regarding his future employment options.

The fifth issue presented by the respondent concerns whether the anti-nepotism policy was based on legitimate business reasons. The burden is on the party asserting an exception to identify the bona fide occupational qualification. *Mont. Admin. R. 24.9.605(5)*. The asserted legitimate business reasons for the policy should be considered on the basis of whether the reasonable demands of the position or program require the distinction. *Mont. Admin. R. 24.9.605(1)*. Any exception is to be construed strictly against allowing the exception. *Mont. Admin. R. 24.9.605(2)*.

The rationale advanced by the respondent is unconvincing. First, it is asserted that favoritism would result by placing relatives in a supervisory position. The anti-nepotism policy did not merely preclude relatives from supervising relatives, it went even further as applied in the present matter to preclude individuals from marrying even when one individual was not in a supervisory position in relation to the other. The first basis for the policy is rejected as being a legitimate reason for the policy as applied to the present matter. Second, it is asserted that the taking of time off by relatives is disruptive to the operations. That reason is likewise rejected as the employer retains the ability to approve or disapprove of leave time. Third, it is asserted that when one relative quit, the other became disgruntled and quit. There is no factual basis for that assertion and the Commission rejects the third basis for the policy. Finally, it is asserted that the employment of relatives makes it easier to pilfer from the company. That basis is likewise devoid of any factual basis and the insinuation that married people are more likely to steal from their employer is disturbing.

The sixth issue presented by the respondent concerns whether the hearing examiner erred in not reducing the award by the amount Ben Foss received in unemployment insurance benefits. Unemployment insurance benefits should not have been deducted. The respondent would be allowed a windfall by the reduction of those benefits. See generally, *Iannone v. Frederic Harris Inc.*, 941 F. Supp. 403 (S.D. N.Y. 1996). In addition, any award of backpay will be considered wages for unemployment insurance purposes resulting in a potential overpayment that would be recouped from the charging party. *Section 39-51-201(20)(a)(ii), MCA*.

For the foregoing reasons, the Commission affirms the final agency decision and overrules the charging party's objections to the constitutional issue.

It is hereby ordered, that the charging party's objection to the respondent's timeliness in raising its constitutional issue is overruled.

A party may appeal from this order by filing a petition for judicial review with the district court no later than thirty (30) days from the service of this order pursuant to Section 2-4-701, et seq., MCA.

It is further ordered that the final agency decision is affirmed.

Dated this __ day of September, 1999.

Gloria "Patt" Etchart, Chair, Montana Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned employee of the Human Rights Bureau certifies that a true copy of the foregoing **ORDER AFFIRMING FINAL AGENCY DECISION** was served on the following persons by U. S. Mail, postage prepaid on the _____ day of September, 1999.

KENNETH E O'BRIEN
HASH & O'BRIEN
ATTORNEYS AT LAW
PO BOX 1178
KALISPELL MT 59903-1178

DEAN D CHISHOLM
KAPLAN LAW OFFICES
PO BOX 2071
COLUMBIA FALLS MT 59912
