

stipulated to the admission of exhibits 3, 4, 5 and 7-13. Exhibits 1, 2 and 14-16 were offered and admitted without objection. Exhibit 6 was not offered and is not part of the record.

On November 18, 1998, Fosses filed their initial closing argument. On November 25, 1998, Vortex filed its closing argument. On December 18, 1998, Fosses filed their reply brief.

II. Issues

The key issue in this case is whether Vortex unlawfully discriminated against either of the Fosses because they married. This single issue becomes two different factual issues for the two claimants:)1(Did Ray Scott force Ben Foss to quit by leading Foss to believe that Vortex would fire him unless either he or LaChelle Foss quit after they married; and)2(Did Vortex fire LaChelle Foss for absenteeism and insubordination or for marrying a coworker. A full statement of the issues appears in the final prehearing order)October 15, 1998(.

III. Findings of Fact

1. Vortex Fishing Systems hired LaChelle Atkinson)who later became LaChelle Foss(on June 17, 1996, and Ben Foss on August 11, 1996, to work at its facility in Flathead County, Montana. Both Atkinson and Foss were production employees during the entire time they worked for Vortex. Testimony of Fosses.

2. Ben Foss and LaChelle Atkinson became romantically involved. They planned to marry on May 10, 1997. They were not aware of any Vortex policy prohibiting employment of spouses. They knew of instances in which Vortex employed spouses, or other multiple members of the same families. They were also aware, by rumors they heard at work, that Ray Scott, president of Vortex, did not want multiple members of the same family working for Vortex. Testimony of Fosses.

3. In late April or early May 1997, Fosses made a request to their supervisor, Rick Burke, for time off during the week of May 5 to get married. Atkinson asked if there would be any problem with the two employees marrying. Burke indicated that he thought there would be no problem with either the marriage or the time off, but that he would need to check with Scott about the time off. Uncontested Fact No. 2, Final Prehearing Order; testimony of Fosses.

4. Scott became president of Vortex on August 5, 1994. Scott had a financial interest in Vortex before becoming president, but was not familiar with the day to day operations and personnel problems of Vortex. Shortly after he became president, Scott adopted a policy against employing two or more members of the same family. Based upon his previous business experience, Scott believed four problems resulted from hiring relatives. First, the company risked favoritism if one relative supervised another. Second, the company risked higher absenteeism, when one relative was off work, others from the same residence, or perhaps riding to work in the same car, would also call off. Third, Scott believed risks of pilferage increased with relatives working for Vortex, because if one member of a family stole from the company, so would others. Finally, Scott believed problems with discipline would also grow, because if the company fired one family member, the rest would quit. Scott announced his policy at a management meeting in August or September of 1994. Vortex never published the policy in the employee handbook or otherwise prior to May 1995. Testimony of Scott and Meighen.

5. On May 5 or 6, 1997)Monday or Tuesday that week(, Scott met with Fosses to discuss their request. At that meeting, Scott advised Fosses that because of the heavy production schedule and absenteeism he could not permit them to take time off that week. Scott left no doubt that Vortex could not spare Foss and Atkinson that week. Uncontested Facts No. 3 and No. 4, Final Prehearing Order; testimony of Scott and Fosses.

6. Scott further informed Fosses at the meeting that Vortex did not permit related persons)including married couples(to work for Vortex. Scott was angry because he believed his employees, including Fosses, knew or should have known of his 1994 policy against employing relatives. Uncontested Fact No. 5, Final Prehearing Order; testimony of Scott and Fosses.

7. Scott told Fosses that if they did marry, only one of them could continue to work for Vortex. He told them that unless one of them quit, Vortex would fire the one with the least seniority. Scott left no doubt that Foss and Atkinson could not both continue to work for Vortex if they married. Exhibit 1; testimony of Scott and Fosses.

8. After the day of the meeting, Ben Foss did not report to work. He knew that if neither he nor Atkinson quit before they married, Vortex would fire him the following week. He discussed it with her, and decided to quit. His only reason for quitting was that Vortex would fire him. Uncontested Facts No. 7 and No. 8, Final Prehearing Order; testimony of Fosses.

9. Atkinson had been sick with respiratory problems for approximately two weeks before the meeting with Scott. She did not go to work at Vortex for the three days following the meeting with Scott. She called in sick for these three days, talking to Burke. She did not call her physician, Dr. Pujol, until Friday, May 9, 1997. She obtained a return to work slip from Dr. Pujol, asking that she be excused for her three day absence. Uncontested Fact No. 6, Final Prehearing Order; Exhibit 2; testimony of LaChelle Foss.

10. Ben Foss and LaChelle Atkinson married on May 10, 1997. Testimony of Fosses.

11. Vortex fired LaChelle Foss on May 12, 1997. Scott made the decision to fire her. He did not believe illness prevented her from working the previous week. He believed she took the time off, despite his refusal to authorize that time off, to prepare for her wedding. He considered her absence unauthorized and insubordinate. Uncontested Fact No. 9, Final Prehearing Order; testimony of Scott and LaChelle Foss.

12. Ben Foss timely filed a verified complaint on October 29, 1997, 178 days after the earliest possible occurrence of discriminatory action by Vortex (May 5, 1997).

13. As of the day he quit, Ben Foss earned \$6.00 an hour. He worked 40 hours a week. He did not find other employment until after July 15, 1997. He lost gross

wages of \$240.00 a week for 10 weeks)May 6 through July 15, 70 days(. He lost \$2,400.00. Pre-judgment interest from July 15, 1997, on the entire amount, at \$.658 per day)10% times \$2,400.00 divided by 365 days(through March 9, 1999)603 days(is \$396.78. Uncontested Fact No. 10, Final Prehearing Order; testimony of Ben Foss.

14. Vortex laid off all its production employees on July 15, 1997, in preparation for moving its operations to another state. Testimony of Scott.

15. Ben Foss suffered serious emotional distress because of losing his job because he chose to marry LaChelle Atkinson. He is entitled to recover \$2,500.00 for that emotional distress.

IV. Opinion

Montana law prohibits discrimination in employment based upon marital status. §49-2-303)(MCA. Such discrimination is only permitted when the reasonable demands of the job require it. *Id.* The “reasonable demands” defense, equated with the federal “bona fide occupational qualification” defense, is an affirmative defense. The Commission and the department construe the defense strictly, against the employer raising it. 24.9.605 A.R.M.

Fosses established by direct evidence that Vortex forced Ben Foss to quit because he was marrying LaChelle Atkinson. Vortex has not offered any proof that it operated out of any motive other than his impending marriage. Vortex can only defeat Ben Reeves’ claim of discrimination by establishing a bona fide occupational qualification defense. *Reeves v. Dairy Queen*, 287 Mont. 196, 953 P.2d 703, 707)1998(.

Whether Vortex treats all relatives alike is not the issue. Vortex has failed to prove that a bona fide occupational qualification for producing fishing lures is not being married to another employee. Vortex failed to prove the validity of Ray Scott’s asserted justifications for his policy. As applied to two long-term employees, the “no relatives” policy is unduly harsh and unsupported by any facts.

It is a matter of degree, a fact question, whether an employer's discriminatory action makes working conditions so oppressive that quitting is the only reasonable option. *Snell v. Montana Dakota Utilities Co.*, 198 Mont. 56, 65, 643 P.2d 841 (1982). Vortex gave Ben Foss three choices. He could not marry LaChelle Atkinson, he could marry her and quit or he could marry her and be fired. Scott's testimony that he perhaps would not have fired Ben Foss after the marriage is singularly unconvincing. The argument that Foss should have waited to be fired flies directly in the face of what Scott told the Fosses. The argument that Foss could have not married and avoided being fired assumes within it that threatening discharge for marrying a fellow employee is legal. Since it is not legal under these facts, the adverse action Scott took, in his meeting with Foss and Atkinson on May 5 or 6, 1997, constituted illegal discrimination against Ben Foss based on marital status.

But Scott did not fire LaChelle Foss because she married a fellow employee. He fired her for taking three days of unexcused absence after Scott vehemently refused to authorize the absence. Whether Scott followed the company's policies in firing her is not the issue. His motivation in firing her is the issue. He did not fire her because she married Ben Foss. He fired her because she disobeyed his orders to show up for work during the week of May 5, 1997. Scott may have been autocratic and unfeeling when he told LaChelle Atkinson that Vortex could not spare her for the last three working days before her wedding. However, there is no credible evidence that he was being vindictive because she was marrying a fellow employee. Vortex did not illegally discriminate against LaChelle Foss when it fired her on May 12, 1997.

The Montana Human Rights Act empowers the department to issue an order to rectify any harm, pecuniary or otherwise, to Ben Foss. §49-2-506(1)(b) MCA.¹ Fosses presented no credible evidence that Vortex moved out of Montana for other than legitimate business reasons. Ben Foss lost wages until July 15, 1997, because of the illegal discrimination. Had he worked for Vortex on July 15, 1997, he would still thereafter have been without earnings. All of the Vortex production workers were

¹ Vortex is no longer doing business in Montana. No affirmative relief is appropriate.

without earnings from Vortex after July 15, 1997. Under these facts, Ben Foss' wage loss ends July 15, 1997.

An award of prejudgment interest is proper on lost past wages due to illegal discrimination. *P. W. Berry Co. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523)1989(; *Foss v. J.B. Junk*, Case No. SE84-2345)Montana Human Rights Commission, 1987(.

Ben Foss' emotional distress is compensable under the Montana Human Rights Act. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596)Mont. 1993(. A claimant's testimony can, by itself, establish entitlement to damages for compensable emotional harm, *Johnson v. Hale*, 942 F.2d 1192)9th Cir. 1991(. In some cases, the illegal discrimination itself establishes an entitlement to damages for emotional distress, because it is self-evident that emotional distress does arise from enduring the particular illegal treatment. *See, e.g., Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225)D.C.Cir.1984()42 U.S.C. §1981 employment discrimination(; *Seaton v. Sky Realty Co.*, 491 F.2d 634)7th Cir. 1974()42 U.S.C. §1982 housing discrimination based on race(; *Buckley Nursing Home, Inc. v. MCAD*, 20 Mass.App.Ct. 172)1985()finding of discrimination alone permits inference of emotional distress as normal adjunct of employer's actions(; *Fred Meyer v. Bur. of Labor & Industry*, 39 Or.App. 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.Super. 314)1970()indignity is compensable as the "natural, proximate, reasonable and foreseeable result" of unlawful discrimination(. This is such a case.

Ben Foss filed a verified complaint 178 days after the earliest possible occurrence of discriminatory action by Vortex)May 5, 1997(. Ben Foss' complaint was timely. §49-2-501)4(MCA.

V. Conclusions of Law

- 1 The Department has jurisdiction over this case. §49-2-509)7(MCA.
- 2 Respondent Vortex Fishing Systems unlawfully discriminated in employment against charging party Ben Foss on May 5 or 6, 1997, by threatening to fire him if he

married fellow employee LaChelle Atkinson and they both continued to work for Vortex. §49-2-303)a(MCA.

3 Pursuant to §49-2-506)1)b(MCA, Ben Foss is entitled to the sum of \$2,400.00 for lost wages. Prejudgment interest through March 9, 1999 is \$396.78. Ben Foss is also entitled to the sum of \$2,500.00 for emotional distress.

4 Respondent Vortex Fishing Systems did not unlawfully discriminate in employment against LaChelle Foss on May 12, 1997, when it fired her for three days of unexcused absence the previous week.

5 Affirmative relief is not necessary in this case. §49-2-506)1)a(MCA.

VI. Order

1 Judgment is found in favor of Ben Foss and against Vortex Fishing Systems on the charge of illegal discrimination in employment by reason of marital status.

2 Judgment is found in favor of Vortex Fishing Systems and against LaChelle Foss on the charge of illegal discrimination in employment by reason of marital status.

3 Ben Foss is awarded \$5,296.78 from Vortex Fishing Systems.

4 The claim of LaChelle Foss against Vortex Fishing Systems is dismissed.

Dated: March 9, 1999.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry