

**BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY**

	(
Karen Perez,	(Human Rights Act Case No. 9801008270
	(
Charging Party,	(<i>Final Agency Decision</i>
	(
versus	(
	(
Lionshead Resort,	(
	(
Respondent.	(

I. Procedure and Preliminary Matters

Charging party filed a complaint with the Department of Labor and Industry on July 21, 1997. She alleged the respondent, Lionshead Resort, discriminated against her on the basis of her marital status (married) when it dismissed her from her waitress position on or about June 2, 1997. On March 16, 1998, the department gave notice Perez' complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

The contested case hearing began on June 12, 1998, in Gallatin County, Montana, in the conference room of the Lionshead Resort, 1545 Targhee Pass Highway. Perez was present with her attorney, Karl Seel. Lionshead Resort ("Lionshead") designated Terry Oksa as its corporate representative for hearing. He was present with Todd Hillier, Lionshead's attorney. Witnesses were excluded on Lionshead's motion.

The parties stipulated to the admission into evidence of Lionshead's exhibits A, C, D and E. The hearing examiner administered the oath/affirmation to the

witnesses as each appeared to testify. Perez called Karen Perez, who testified. Lionshead called Terry Oksa, Chris Harris, Margaret Hay and Bill Ward, who each testified. Lionshead requested written closing arguments. The hearing examiner set a schedule for submission of written arguments, and closed the evidentiary record on June 12, 1998.

Perez filed her written summation on December 18, 1998 by telefax. Lionshead filed its written summation on January 11, 1999 (mailed January 6, 1999). Perez had until January 13 to mail her written reply, and did not. The case closed January 13, 1999.

II. Issues

The key issues in this case are whether Lionshead took adverse employment action against Perez because it believed she was aiding her husband in a competing business, thereby unlawfully discriminating against Perez on the basis of her marital status, and if so what damages resulted to Perez. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Charging party is Karen Perez, a resident of Gallatin County, Montana at all pertinent times. Respondent, a Montana corporation, is T&J Enterprises of West Yellowstone, Inc., d/b/a Lionshead Resort ("Lionshead"). (Uncontested Fact Nos. 1 and 2.
2. Lionshead employed Perez for approximately three years as a waitress in a restaurant known as Alice's Restaurant at Lionshead Resort, outside West Yellowstone, Montana. Perez worked for the restaurant before the present shareholders, Terry Oksa and his brother Jerry Oksa, bought Lionshead in July, 1996. She continued to work for the restaurant after the purchase. (Uncontested Fact Nos. 3 and 5; testimony of Perez and Terry Oksa) ("Oksa").

3. Lionshead paid Perez an hourly wage, plus tips and housing. Lionshead reported that Perez made a net of \$1,947.04 in 1997 and a net of \$1,090.12 in 1996 working at Lionshead. Uncontested Fact Nos. 4 and 6.
4. Lionshead owns and operates a Super 8 Motel, the restaurant where Perez worked, recreational vehicle rental spaces, tent rental spaces, and sundry related services, including a general store, a laundry, shower facilities and outdoor cooking equipment. The entire facility is at 1545 Targhee Pass Highway, approximately 7 miles west of West Yellowstone, Gallatin County, Montana. Lionshead employs from 20 to 45 people. The facilities are open seasonally, in the winter and summer. The restaurant is open from early May until early October, and from the middle of December until the middle of March. Testimony of Perez and Oksa.
5. Lionshead provided employees with housing on the Lionshead property. The housing is available continuously. Providing employee housing is a common business practice in the area. Testimony of Perez, Oksa, Chris Harris, Margaret Hay and Bill Ward.
6. Perez and her husband, with their son, Bobby, lived in a 3 bedroom 14 by 72 foot trailer provided by Lionshead. During working months, Lionshead charged Perez \$100.00 per month)\$50.00 deducted from each bimonthly paycheck(for the housing. Lionshead did not charge for the housing when Perez was not working for the restaurant. Testimony of Perez and Oksa.
7. Perez' husband, Bob Perez, operated two services)snowmobile leasing and horse leasing(available to the customers of Lionshead. The snowmobile service was within the Lionshead property during the 1996-97 winter season. He kept the horses on other property away from Lionshead. Lionshead derived a benefit from the presence of Bob Perez' services. Availability of the services he offered enhanced the value of a visit to Lionshead by customers interested in either kind of recreation. Testimony of Perez, Oksa, Margaret Hay and Bill Ward.
8. Lionshead had telephone service that allowed the motel to transfer calls to the general store or to the snowmobile service)during the 1996-97 winter season(. The restaurant telephone service did not allow a transfer to the snowmobile service. The snowmobile service phone was in the Perez residence. At some point during or

after the 1996-97 winter season, the Perez family obtained separate phone service in their residence. Testimony of Perez, Oksa and Margaret Hay.

9. When her husband was not home, Perez took phone messages for the snowmobile service and for the horse service. Testimony of Perez, Oksa, Margaret Hay and Bill Ward.

10. At the beginning of the 1997 summer season, Bob Perez decided to move his horses to property across the highway from Lionshead. He also decided to move the snowmobile service off the Lionshead property. He told Oksa about these decisions. Oksa knew that Bob Perez was now operating his horse service, and would now be operating his snowmobile service, with Carl Cook. Cook operated a bed and breakfast across the highway from Lionshead, competing for some of the same potential customers. Testimony of Perez and Oksa.

11. In late May 1997, Oksa visited with Perez about her husband's business involvement with Cook. Oksa did not want Perez working for her husband, because he believed that was aiding the competition. Perez believed her husband's business dealings with Cook were none of Oksa's business, and that Cook's competition with Lionshead was none of her business, either. She did not understand the conversation as a warning about her job security. Oksa considered her responses confirmation that she was actively involved in promoting the business interests of a rival of Lionshead. Testimony of Perez and Oksa.

12. As part of the division of Lionshead operations between Oksa and his brother, Oksa managed the restaurant. Before June 2, 1997, he received one or more phone calls at the restaurant for "the waitress whose husband works next door."¹ Oksa remembered that some of these calls were about getting cheaper accommodations through group rates at the bed and breakfast than Lionshead offered.

¹ Because Oksa testified that some of these phone calls came after Perez no longer worked for Lionshead, the exact number of calls before June 2, 1997, is uncertain. Oksa remembered such calls occurring in the winter season of 1996-97 also, but Perez testified that her husband was still working "out of the store" at Lionshead during that winter season, earning approximately \$3,000.00. Bill Ward corroborated Perez. On this evidence, the number of such calls Oksa received before June 2, 1997, was not clear.

13. Before June 2, 1997, Oksa talked to at least 5 other Lionshead employees, including Chris Harris, Margaret Hay and Bill Ward. He recalled that all of them confirmed that Perez was aiding the competition. Testimony of Oksa.

14. Harris, Hay and Ward did not recall knowing that Perez was aiding the competition. At best, Ward recalled Perez complaining at some point that calls about snowmobile business)apparently at the time when the snowmobile service was still on the Lionshead premises(interrupted her sleep. Ward volunteered the opinion that if Perez was answering the phone, "she's got to be helping." Testimony of Harris, Hay and Ward.

15. Convinced that Perez was assisting the competition, Oksa drafted a letter and delivered it to her on June 2, 1997. In that letter, Lionshead gave Perez 24 hours to vacate the residence. Lionshead acknowledged in the letter that employee housing was a benefit. Perez understood the letter to terminate her employment. In addition, at the time he delivered the letter, Oksa told Perez, "You *were* an excellent waitress." Exhibit A; testimony of Perez and Oksa.

16. Perez believed her job was lost. On June 3, 1997, she asked Lionshead for her final paycheck. Lionshead gave her that check on June 3, 1997. Oksa considered the request for the check to be Perez' resignation. Testimony of Perez and Oksa.

17. But for the adverse action taken by Lionshead on June 2, 1997, Perez would have continued to work for Lionshead for at least another 2 years, through June 2, 1999.

18. In 1996, Perez worked 6 pay periods for Lionshead, earning an average wage of \$181.67 per pay period. In 1997, Perez worked 7 pay periods for Lionshead, earning an average wage of \$278.15 per pay period. Had Perez continued to work for Lionshead from June 2, 1997, through June 2, 1998, for the 8 months)16 pay periods(the restaurant was open during that period, she would have earned wages of approximately \$278.15, exclusive of tips. Exhibits C and D.

19. Perez testified that she cleared \$600.00 per month in tips. Her earning reports with Lionshead show \$1,653.57 in tips for the 7 pay periods in 1997. Although Perez testified that this is simply 8% of her tickets as a waitress, a standard method of reporting tips, she produced no documentary evidence)such as tax returns or

other reports(containing a larger amount. At this reported rate, Perez would have received \$236.22 per pay period for that additional 16 pay periods. Exhibit E, "Paystub Detail, Pay Period 6/1/97 - 6/15/97"; testimony of Perez.

20. Perez immediately found employment at Gringo's Restaurant in West Yellowstone. She earned \$5.15 an hour for 5.5 hours, 5 days a week from June 1997 until the end of September 1997)25-30 hours a week, about the same hours as Lionshead, with about the same tips(. This would amount to approximately \$283.25 per pay period, \$110.00 more per month than she earned at Lionshead after the \$100.00 monthly housing deduction at Lionshead. She was unemployed in October and November of 1997, as she would have been at Lionshead. She worked at the Dude Restaurant from the end of December 1997 until the beginning of March 1998. She made \$5.25 an hour during that period. Thus, she again made as much as she earned at Lionshead, except during March 1998, when she would have made \$928.74)2 pay periods, wages and tips, less housing deduction(. Through her husband, she had housing without expense during this time. On June 1, 1998, she began work for Yellowstone Village, with a gross pay every two weeks of \$600.00, plus housing, exceeding her earnings at Lionshead, and ending any damages she suffered. Testimony of Perez.

21. Comparing actual earnings to projected earnings, Perez earned \$928.74 less in March 1998, but \$440.00 more in June through September 1997. Her net loss in earnings in \$528.74.

22. Perez' did not suffer emotional distress at a sufficient level to justify an award. Testimony of Perez.

23. Oksa still believes it is appropriate to hold an employee accountable for her husband's business, and withdraw a benefit of employment as a sanction if that employee assists in her spouse's business. Testimony of Oksa.

IV. Opinion

Montana law prohibits discrimination in employment based on marital status. §49-2-303)1)a(MCA. Discrimination based on marital status includes discrimination

based upon the identity of the spouse. *Van Haele v. Hysham School District No. 40*, HRC No. 9301005671)Apr. 1, 1996(. Lionshead had, at best, inferential evidence that Perez was providing assistance to her husband in his alleged role as a competitor. Lionshead had no credible evidence that Perez was abusing her position as a waitress to the detriment of her employer. What she did with her time in her residence with her residential phone was not within the purview of her employment.

Oksa was angry about someone living in employee housing having any relationship with a competing business. However, there is no basis for adverse employment action against Perez because she might be, outside of her employment responsibilities, assisting her husband. She was not an executive. She had no inside information. She could not be considered subject to any conflict of interest constraints.

This case does not turn on whether Lionshead terminated Perez' employment or not. Lionshead did take adverse employment action against her. Her perception that she no longer had a job was reasonable. Her ability to remain in employment, had she seen the chance to do so, was dubious, given the limited availability of housing. Had she moved across the street, providing further fuel to the fire of hostility generated by her husband's perceived alliance with a competitor, Lionshead would not have welcomed her to continue work. The end of her employment at Lionshead resulted from her husband's identity.

Perez argued that the \$70.00 per day liquidated damages Lionshead asserted in its June 2, 1997, letter)Exhibit A(is the appropriate measure of the lost housing. Actual cost to Perez from the lost housing is a much more reliable measure. Her housing cost \$100.00 per month when she was working, and cost nothing during months off work. Her housing since leaving Lionshead has cost her nothing. No better evidence of the value of the housing has been presented. Given the overreaching efforts of Perez to claim a value of \$70.00 a day for lost housing, her testimony about the far superior value of the Lionshead housing is not credible.

The department has the power to rectify any harm, pecuniary or otherwise, to Perez. §49-2-506 MCA. In this case, the harm involved is \$528.74. Given the tenuous evidence of loss, prejudgment interest is not appropriate.

Attorneys' fees are not recoverable in this forum. §49-2-505)7(MCA.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509)7(MCA.
2. Lionshead Resort unlawfully discriminated against Karen Perez in employment by taking adverse action against her on June 2, 1997, by reason of her marital status. §49-2-303)1)0a(MCA.
3. Pursuant to §49-2-506)1)0b(MCA, Perez is entitled to recover from Lionshead the sum of \$528.74 for lost wages.
4. Affirmative relief is necessary in this case. §49-2-506)1)0a(MCA. Lionshead must refrain from engaging in any further unlawful discriminatory practices. Within 60 days of the entry of this order, Decker must submit to the Human Rights Bureau a proposed policy barring any further adverse employment action against its employees by reason of their marital status, including a means of giving notice to employees of the existence of the policy. Within 60 days after the Human Rights Bureau approves)with or without suggested modifications(the proposed policy, Lionshead must file written proof with the Human Rights Bureau that it has adopted and published the policy)with any suggested modifications(. Lionshead must also comply with any additional conditions the Human Rights Bureau places upon its continued activity as an employer, or at once cease doing business in Montana as an employer.
5. For purposes of §49-2-505)4(, MCA, Perez is the prevailing party.

VI. Order

1 Judgment is found in favor of Karen Perez and against Lionshead Resort on the charge of illegal discrimination in employment because of marital status.

2 Lionshead Resort must pay Karen Perez \$528.74.

3 Lionshead Resort is enjoined from further discriminatory acts and ordered to comply with the provisions of Conclusion of Law No. 4.

Dated: May 5, 1999.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry