BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Jody Peck, Charging Party, vs. **Dental Care of Great Falls**, Respondent.	**Human Rights Act Case No. 9901008869** *Final Agency Decision*

I. Procedure and Preliminary Matters

Charging party filed a complaint with the Department of Labor and Industry on April 6, 1999. She alleged the respondent, Dental Care of Great Falls, a Montana corporation, discriminated against her on the basis of sex, marital status and religion (unwed pregnant female) when it terminated her employment on October 8, 1998. On November 5, 1999, the department gave notice Peck's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

This contested case hearing convened on March 16, 2000, in Great Falls, Cascade County, Montana. Peck attended with her attorney, Elizabeth Best. The corporation was present through its designated representative, James Zander, D.D.S., with its attorney, Thomas Murphy. The hearing examiner excluded witnesses on Peck's motion. James Zander, Cherie Keller, Robert Kidd, Maryann Wilkerson, Patti Hopkins, Jody Peck and Cynthia Rapstad testified. The hearing examiner's docket of exhibits accompanies this final decision. The hearing closed on March 17, 2000. Counsel argued the case by telephone on March 22, 2000, and submitted it for decision.

II. Issues

The issue in this case is whether the corporation discriminated against Peck on the basis of sex, marital status and religion (unwed pregnant female) when it dismissed her from her position as receptionist on October 8, 1998. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Dental Care of Great Falls, P.C., the respondent in this case, is a Montana corporation. At all pertinent times, James Zander, D.D.S., owned and operated the corporation. Testimony of Dr. Zander and Cynthia Rapstad (accountant for the corporation).

2. The corporation employed Jody Peck as a receptionist beginning on or about April 19, 1996. Peck had worked as a volunteer in the office, and attended the same church as Dr. Zander. After the corporation hired Peck, she worked with patient scheduling, making appointments, confirming appointments, filing insurance, computer data entry, typing letters, controlling background music, cleaning the waiting area and restrooms, and collecting and accounting for the money she received from patients. As the receptionist, Peck was the first employee a patient would see when coming into the office. Both Patti Hopkins, the office manager, and Dr. Zander emphasized the need to make a positive first impression on patients each time they came to the office. Hopkins' concern for appearances of propriety extended to instructing the staff to dress up to greet wealthier patients. Testimony of Dr. Zander, Hopkins and Peck.

3. The atmosphere of the office was religious. Employees sometimes prayed together in the morning, discussed religion during the working day and usually played the Christian radio station. Talk about faith was also common in the office. Testimony of Dr. Zander, Cherie Keller (former employee), Hopkins and Peck.

4. The corporation housed a small one-dentist practice. During Peck's employment, the corporation did not have a formal job description for her position. The corporation also did not regularly complete performance evaluations on each employee. Testimony of Dr. Zander and Hopkins.

5. The corporation maintained billing records in a computer billing system into which Peck and Hopkins regularly made entries regarding the day's work. The corporation initially entered the full charge for each service into the system. However, for a number of reasons the corporation would provide "discounts" to some patients. Needy patients that Dr. Zander or Hopkins considered deserving[1] received discounts. The office term for such patients was "help patients." The office staff maintained an informal list of "help" patients, so that the office could call a "help" patient to come in and fill an empty spot in the schedule, due to cancellation or otherwise. Dr. Zander considered the discounted price both a charitable function appropriate to his profession and a practical way to use otherwise empty time in the office

[1] The criteria for "help" patients were unclear. From the testimony, "help" patients could be single parents with low income, or persons with health or other problems which limited their available income. Verification of the basis for considering a patient a "help" patient was also unclear. Personal knowledge of Dr. Zander or informal "vouching" for the person by someone Dr. Zander trusted, including Hopkins, appear to have been the usual methodology.

schedule to make a reduced profit and generate income against overhead. Testimony of Dr. Zander.

6. The corporation also gave discounts to patients in return for services rendered to office staff--usually Dr. Zander and his family, but sometimes for services to Hopkins or occasionally others. In these instances, a notation of a discount on a bill actually represented a reduced charge in exchange for goods or services to individuals within the office. The result of this practice was that the corporation reflected lower income than it actually generated and the individuals within the office staff who received the goods or services obtained unreported income. Testimony of Dr. Zander.

7. In 1997, Peck gave her two-week notice. Dr. Zander contacted her to see what it would take to keep Peck as an employee. The primary issue for Peck was her wage. Dr. Zander offered her a dollar per hour more to stay, and Peck agreed. The corporation raised her wage from $9.00 per hour to $10.00 per hour. Peck was working between 38 to 40 hours a week. Testimony of Dr. Zander and Peck.

8. At approximately the same time as her raise, Peck took $300.00 in cash from the daily receipts, replacing it with a personal check. This act became a problem because Dr. Zander happened to take the receipts to the bank for deposit and the discrepancy between cash and check totals for the deposit came to his attention. The bookkeeper, Cynthia Rapstad, wanted the corporation to fire Peck. Instead, Dr. Zander told Hopkins that this was not a proper practice and should not happen again. Hopkins told Peck that Dr. Zander was upset at her "cashing" a check out of the receipts, and asked Peck not to do it again. Testimony of Dr. Zander, Hopkins, Peck and Rapstad.

9. In April, 1998, Peck's continuing personal financial problems prompted Dr. Zander, at the behest of Hopkins, to give Peck a "bonus" that netted (after withholding) $700.00. Exhibit 10; testimony of Dr. Zander, Hopkins and Peck.

10. When a patient whose account the corporation had already written off as a bad debt unexpectedly paid an old bill, Peck took the cash ($150.00) and left a check, which she asked Hopkins not to cash immediately. Hopkins agreed. The date of her check was May 7, 1998. After a period of perhaps two months in which Hopkins asked Peck if the check could be cashed and Peck said, "no," Hopkins finally arranged with Peck to take $50.00 deductions from three successive paychecks to cover the amount taken. Exhibit 107; testimony of Dr. Zander, Hopkins and Peck.

11. In May 1998, Peck became pregnant. She was not married to the baby's father. Peck believed that sexual intercourse was improper outside of marriage, and as a result considered pregnancy outside of marriage improper. Dr. Zander and Hopkins, as well as many of the corporation's patients shared this belief regarding pregnancy outside of marriage. This belief stemmed from the religious faith shared by Peck, Dr. Zander and Hopkins. Testimony of Dr. Zander, Hopkins, Robert Kidd (the baby's father), Maryann Wilkerson (Peck's mother) and Peck.

12. During her employment, Peck received at least 12 positive written comments about her work, both before and after the office staff learned of her pregnancy. Exhibits 2a through 2l; testimony of Dr. Zander, Hopkins and Peck.

13. In May 1998, Peck's pregnancy told Hopkins of her pregnancy. Hopkins told Dr. Zander. Hopkins began making comments about Peck's marital status. She suggested to Peck that the baby's father and Peck needed to work toward marriage. She asked Peck if she was counseling with her pastor about marriage. Hopkins even called Peck's mother at home, to engage her in a discussion about what to do about Peck's pregnancy. Testimony of Hopkins, Wilkerson and Peck.

14. Hopkins also called Robert Kidd, the father of Peck's unborn child. She called Kidd at his work to ask him if he was a Christian and if he was marrying Peck. Testimony of Kidd.

15. Dr. Zander did not participate in conversations between Hopkins and Peck about the pregnancy. On one occasion he did make a remark to Peck, to the effect that her pregnancy might be God's way of telling her that Robert Kidd, the baby's father, was the man she should marry. Dr. Zander knew that Hopkins had been telling Peck that she should get married. Testimony of Dr. Zander and Peck.

16. On July 10, 1998, a prior patient of the corporation came into the office for an examination regarding needed dental work. The patient (identified as "R.S." to protect patient confidentiality) discussed with Dr. Zander the apparent need for restorative work on one or two teeth, and the cost of that work. Exhibit 8; testimony of Dr. Zander.

17. On August 27, 1998, Dr. Zander and Hopkins met with Peck to discuss her performance. He told Peck that she needed to be more aggressive about asking for fees at the time of treatment and finding out if the patient needed financing for the fees. Peck was uncomfortable with this aspect of the

job. He and Hopkins also stressed anew the importance of the impressions the receptionist made with patients. Hopkins also mentioned a complaint by a patient that Peck had been rude. Dr. Zander then left, and Hopkins downplayed the significance of this complaint. Testimony of Dr. Zander and Peck.

18. R.S. returned to the office on August 28, 1998. Peck had discussed with Hopkins a discount for R.S. as a "help" patient, and Hopkins told Peck to give R.S. a discount. Hopkins provided no details regarding this discount, of what Dr. Zander now considered a likely single crown rather than restoration. Testimony of Cherie Keller and Peck.

19. When he began working on R.S. on August 28, 1998, Dr. Zander decided that R.S. needed two crowns. This would result in more work, at a greater expense. R.S. agreed, and Dr. Zander completed the preparatory work that day. Peck came into the room while Dr. Zander was working on R.S. and mentioned that R.S. was a "help" patient. Dr. Zander said nothing in response. The patient chart for R.S., in the room with Dr. Zander whenever he worked on the patient, contained the notation "help patient" on the first page, in Peck's handwriting. Peck made the computer billing entry for R.S. for that date. She entered charges for work on two crowns, at $545.00 per crown, and a "courtesy dentistry" discount of $700.00. The daily ledger, run each workday by Hopkins or Peck and put on Dr. Zander's desk, reflected the charges and the write-off. Exhibit 8; testimony of Dr. Zander[2] and Peck.

20. On October 5, 1998, R.S. returned for the seating of his two crowns. This was part of the work the corporation charged for on August 28, and against which Peck had applied the $700.00 discount. Dr. Zander had not paid any special attention to the write-off in August--he did not even remember seeing it in a daily ledger. Exhibit 8; testimony of Dr. Zander.

21. By October, Peck was five months pregnant. Her pregnancy was apparent. Patients commented on it. Testimony of Hopkins and Peck.

22. On October 6, 1998, Hopkins and Dr. Zander met to discuss Peck. Hopkins brought up the $700.00 discount to R.S. She also mentioned another $209.00 discount to another patient, giving Dr. Zander the impression that both discounts were unauthorized. Dr. Zander wanted to talk to Peck about the discount, but she had left early (with Hopkins' approval) because she had a sick child. Dr. Zander decided to fire Peck. He and Hopkins

[2] Dr. Zander testified that he did not recall this conversation. He did not affirmatively deny the conversation, but simply testified to no recollection of it.

planned to meet with Peck the next day, but Peck was absent again. Testimony of Dr. Zander and Hopkins.

23. On October 8, 1998, Hopkins called Peck at home and advised her that she was no longer needed. She said that Peck was not adequately performing her job duties. Peck's job performance had never previously been an issue. Testimony of Hopkins and Peck.

24. After Peck's discharge, Hopkins sent her a note stating that a former employee and her husband would make great parents "if that's what [she] decided to do." Testimony of Hopkins and Peck.

25. After Peck's discharge, Hopkins and Dr. Zander talked with R.S. about the discount, and R.S. agreed to pay in full. He obtained financing and did so. Testimony of Dr. Zander, Hopkins and Peck.

26. Peck filed her Human Rights Act discrimination complaint with the department on April 6, 1999. Complaint.

27. An investigator from the department's Human Rights Bureau contacted the corporation, and obtained statements from Dr. Zander. He told the investigator that the corporation had fired Peck because she secretly gave a patient (R.S.) an unauthorized discount, of which Dr. Zander was unaware until October 6, 1998. He told the investigator the office did not maintain a "help" patient list. Testimony of Dr. Zander.

28. Hopkins wrote a note regarding the $150.00 "check for cash" incident, identifying the patient who made the payment, and calling it a "past due" payment. Although Peck dated her check in May 1998, Hopkins dated her note "9-1-98" and wrote it as though the "check for cash" incident had just occurred. The note also addressed events that reportedly occurred after September 1, 1998. Hopkins wrote the note after the corporation decided to fire Peck. Exhibit 101; testimony of Hopkins.

29. At some point after the decision to discharge Peck, Dr. Zander wrote a note for inclusion in Peck's file, containing his recollection of the discussion with her on August 27, 1998. He dated the note "8/27/98" but he did not write the note on August 27, 1998. The note included references both to alleged patient complaints of Peck's "continuing rudeness" and to "continuing failure to resolve work issues as instructed by her supervisor" Hopkins. The corporation never documented either alleged performance deficiency except in the note allegedly written in August. Dr. Zander did not mention either alleged performance problem in his initial statements to the Human Rights

investigator. Dr. Zander could give no particulars of the "failure to resolve work issues" and deferred to Hopkins. The only particulars Dr. Zander could give regarding alleged patient rudeness were heresay. Exhibit 4; testimony of Dr. Zander.

30. Dr. Zander also asserted, based on what Hopkins told him, that Peck had given another patient an unauthorized discount of $209.00. In his testimony at hearing, Dr. Zander agreed that he had relied entirely on Hopkins' statements to him, and that he did not know whether that discount was authorized or unauthorized. Testimony of Dr. Zander.

31. Both Dr. Zander and Hopkins, based upon Hopkins' report and suspicions, told the Human Rights Bureau investigator that $50.00 was missing from office petty cash at the same time that one of the $50.00 deductions came out of Peck's paycheck. Hopkins wrote up the missing $50.00 in the note she dated "9-1-98." The clear implication of these statements was that Peck had stolen the money. Neither Dr. Zander nor Hopkins had any factual basis for such an accusation. Exhibit 101; testimony of Dr. Zander and Hopkins.

32. Hopkins also wrote two notes, on a single sheet of paper, dating the first note "Oct. 6, 1998," and the second "Oct. 8, 1998," regarding Peck and the business. On another sheet of paper, she wrote a lengthy account of events between Peck, Dr. Zander and herself on October 6, 1998. She originally dated the note "Oct. 8, 1998," but then wrote a "6" over the "8." Exhibits 102 and 103.

33. Peck rode an emotional roller coaster after losing her job. Her fear of being unable to support herself and her children was overwhelming. She had decided she did not want to marry Kidd, but now the issue of being pregnant and unmarried was more difficult, since she reasonably believed she had lost her job because she was a single pregnant woman. She felt hurt and frightened. Her emotional distress was genuine, and resulted from being fired. Testimony of Kidd, Wilkerson and Peck.

34. Peck was unable to find comparable employment until October 1999. During that time, she delivered her child. She lost approximately 10 months (43.3 weeks) of full-time income at $10.00 per hour ($17,320.00). Testimony of Peck.

35. In October 1999, Peck found a job for $9.00 per hour. She continues in that position. She continues to lose $40.00 a week in wages. Testimony of Peck.

36. It is reasonable to expect that Peck will continue to lose wages until at least October 2002. The present value of that future loss is equal to the amount of money that accrues judgment interest so that the amount plus the interest equals, in October 2002, the current total future earnings lost.[3]

IV. Opinion

A. Introduction

Montana law prohibits discrimination in employment based on marital status or sex. §49-2-303(1)(a) MCA.[4] Montana law also prohibits termination of a woman's employment because of her pregnancy. §49-2-310 MCA.[5]

Under Montana law, "marital status" includes the state of being unmarried. ***See***, *Thompson v. Board of Trustees*, 192 Mont. 266, 627 P.2d 1229 (1981):

> In reaching its decision, the District Court decided two subissues: (1) . . . , and (2) that the legislature intended the term "marital status" to be defined as the state of being married, unmarried, divorced or widowed. . . . .
>
> We find that the term marital status should be more broadly interpreted to accomplish the legislative objective of removing discriminatory practices in employment and therefore reverse the District Court.

Thompson at 269, 627 P.2d 1230-31.

If the term "marital status" means more than simply the state of being married, unmarried, divorced or widowed, then it must logically include those states. An employer must not discriminate against an employee for being unmarried.

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[3] Neither Peck nor the corporation offered any evidence on reduction of future losses to present value. Absent such evidence, use of the judgment interest rate to discount to present value is reasonable.

[4] There are statutory exceptions enumerated in §49-2-303(1)(a). Discrimination based on sex or marital status is legal when the reasonable demands of the position require the gender or marital status distinction. The corporation did not raise the defense of a bona fide occupational qualification, so the exceptions are irrelevant.

[5] Because the corporation did not raise the bona fide occupational qualification defense, the question of its application to §49-2-310 is irrelevant.

Only a woman can be pregnant. Discrimination against a pregnant employee is discrimination based on sex. In *Bankers Life & Cas. Co. v. Peterson*, 263 Mont. 156, 866 P.2d 241, 243-245 (1993), the Montana Supreme Court explained and reiterated this holding:

> In *Mountain States*[6], this Court determined that distinctions based on pregnancy are sex-linked classifications. Although we were primarily concerned with the question of federal preemption of the Montana Maternity Leave Act, §§49-2-310 and -311, MCA, we stated that:
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> > [p]regnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus, any classification which relies on pregnancy as the determinative criterion is a distinction based on sex . . . By definition, [placing pregnancy in a class by itself] discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male.
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> *Mountain States*, 608 P.2d at 1056 (citations omitted).
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> In 1984, we reaffirmed the principle that differential treatment of pregnancy is gender-based discrimination because only women can become pregnant. *Miller-Wohl Co., Inc. v. Comm'r of Labor* (1984), 214 Mont. 238, 254, 692 P.2d 1243, 1251. Again, the primary issue in that case was one of federal preemption. However, in *Miller-Wohl*, we determined that an employer's sick leave policy created a disparate effect on women who became pregnant compared to men who did not. Although the policy was facially neutral, it nonetheless subjected women to job termination on a basis not faced by men. We concluded, therefore, that the policy was gender-based discrimination. *Miller-Wohl*, 692 P.2d at 1052.
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> *Mountain States* and *Miller-Wohl* established that differential treatment of pregnancy constitutes sex discrimination in Montana.

The law is clear. If Dental Care of Great Falls, P.C., fired Jody Peck because she was unmarried and pregnant, it violated the Montana Human

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[6] *Mountain States Telephone v. Comm'r of Labor*, 187 Mont. 22, 608 P.2d 1047 (1980).

Rights Act, by discriminating against her in employment based upon her sex, marital status and pregnancy.[7]

B. Liability

1. Peck's Prima Facie Case

Peck has the burden of proving that her pregnancy motivated her employer to discharge her. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-254 (1981). She can establish a prima facie case by inference, in accord with the three-tier standard of proof articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Montana has adopted this standard of proof for disparate treatment cases. *Johnson v. Bozeman School Dist. #7*, 226 Mont. 134, 734 P.2d 209 (1987). *Martinez v. Yellowstone County Welfare Department*, 192 Mont. 410, 626 P.2d 242 (1981).[8] The Montana Supreme Court has approved the use of analogous federal cases to construe and apply Montana's Human Rights Act. *Harrison v. Chance*, 244 Mont. 215, 797 P.2d 200, 204 (1990); *Snell v. MDU Co.*, 198 Mont. 56, 643 P.2d 841 (1982).

The courts apply *McDonnell Douglas* because explicit proof of an employer's illegal motive for an adverse employment action is rarely available. "'Employers are rarely so cooperative as to include a notation in the personnel files' that their decisions were expressly forbidden by law."[9] Claimants often lack direct evidence of unlawful discrimination that speaks directly to the issue, requires no other evidentiary support and proves it without inference or presumption. BLACK'S LAW DICTIONARY 413 (5th Ed. 1979). With such direct evidence, *McDonnell Douglas* is unnecessary. *T.W.A., Inc., v. Thurston*, 469 U.S. 111, 121 (1985) (age discrimination). In that event, the burden of persuasion shifts to the employer who must respond to the evidence by proving

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[7] Peck held the same Christian beliefs as Dr. Zander and Hopkins. While those beliefs may have played a role in adverse employment action, analysis of the facts in terms of discrimination based upon either the employer's religious beliefs or Peck's adds nothing of significance.

[8] With respect to maternity leave cases, use of *McDonnell Douglas* standards is inappropriate. In evaluating whether a mandatory leave or a new job assignment upon return from maternity leave was discriminatory, the employer must prove that its acts were both reasonable and nondiscriminatory. Rule 24.9.1204, A.R.M.; ***cf.***, *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775, 1789 (1989). This is not a maternity leave case, so Peck has access to the inferences of *McDonnell Douglas.*

[9] *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, (2nd Cir. 1989), ***quoting*** *Thornbough v. Columbus and Greenville Ry.*, 760 F.2d 633, 638 (5th Cir. 1985).

either that the direct evidence was untrue or that a discriminatory motive played no role in the adverse action taken against the employee.[10]

Peck did not present direct evidence of discriminatory motive. There is no credible evidence that anyone said to Peck, on behalf of the corporation, "We are terminating your employment because you are pregnant and unmarried." The comments directly relating to her pregnancy suggest that Hopkins and Dr. Zander had concerns about her pregnancy, but those concerns might equally have been concerns for her spiritual and emotional well being. The comments do not directly evidence discriminatory motive. The hearing examiner must therefore weigh the evidence in accord with *McDonnell Douglas*.

The first tier of *McDonnell Douglas*, ***op. cit.***, required Peck to prove her prima facie case by establishing four elements:

> (i) that [s]he belongs to a [protected class] . . .; (ii) that [s]he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [her] qualifications, [s]he was rejected; and (iv) that, after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.
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> *McDonnell Douglas*, ***op. cit.***, 411 U.S. at 802.

The Court noted in *McDonnell Douglas* that this standard of proof is flexible. The four elements do not apply woodenly to every disparate treatment claim. Peck needed to prove (i) that she was unmarried and became pregnant while an employee of the corporation; (ii) that prior to her pregnancy she was qualified and acceptable to the corporation in her job; (iii) that after the corporation learned of her pregnancy it began to criticize her job performance and ultimately fired her; (iv) that her job performance during her pregnancy was the same as her job performance before her pregnancy.[11]

Peck proved her *prima facie* case. She proved that until the corporation learned of her pregnancy, she received praise, raises and bonuses. She proved

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[10] *Thurston*, ***supra*** at 121; *Carney v. Martin Luther King Homes, Inc.*, 824 F.2d 643, 648 (8th Cir. 1987) (pregnancy discrimination); *Fields v. Clark University*, 817 F.2d 931, 935 (1st Cir. 1987) (sex discrimination); *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 712 (6th Cir. 1985) (religious discrimination).

[11] ***Cf.***, *Martinez*, ***op. cit.*** 626 P.2d at 246 (1981) ***citing*** *Crawford v. West. Elec. Co., Inc.*, 614 F.2d 1300 (5th Cir. 1980) (fitting the four elements of the first tier of *McDonnell Douglas* to the allegations and proof of the particular case).

that after the corporation learned of her pregnancy, it subjected her, and both her mother and the father of her child, to suggestions that she marry. She proved that even after the office learned of her pregnancy, she still received praise, a raise and a bonus. She testified that both before and during her pregnancy, she performed her job to the best of her ability, even taking work home to call patients and confirm appointments. She proved that after the corporation knew of her pregnancy and apparent intention to remain single, despite her apparent continued good performance, questions about her job performance appeared and resulted in her discharge.

2. The Corporation's Legitimate, Non-Discriminatory Reason for Its Adverse Employment Action Against Peck

Peck's prima facie case under *McDonnell Douglas* raised an inference of discrimination at law. The burden then shifted to the company to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, ***op. cit.***, 411 U.S. at 802. The company only had the burden to show, through competent evidence, that it had a legitimate nondiscriminatory reason. *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813, 817 (1988). The company had to satisfy this second tier of proof under *McDonnell Douglas* for two reasons:

> [It] meet[s] the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Burdine, ***op. cit.***, 450 U.S. at 255-56. The corporation only needed to put at issue Peck's proof by clearly and specifically articulating a legitimate reason for firing her. *Johnson*, ***op. cit.***, 734 P.2d at 212.

The corporation presented a legitimate reason. It proved that Peck, on two occasions, exchanged a personal check for the corporation's cash, once out of petty cash and the other time out of a patient's payment of an old bill. It also proved that Peck wrote off $700.00 of dental work for a friend. On its face, this evidence did present legitimate reasons for the decision to fire Peck.

3. Pretext

Once the corporation produced a legitimate reason for firing her, Peck had the burden to prove that reason was pretextual. *McDonnell Douglas*, ***op. cit.***, 411 U.S. at 802; *Martinez*, ***op. cit.***, 626 P.2d at 246. To meet this

third tier burden, Peck could present either direct or indirect proof of the pretextual nature of the proffered reason:

> She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, ***op. cit.***, 450 U.S. at 256. Ultimately, Peck had the burden to persuade the fact-finder that the company did illegally discriminate against her. *Crockett*, ***op. cit.***, 761 P.2d at 818; *Johnson*, ***op. cit.***, 734 P.2d at 213.

Peck established that the reason proffered by the corporation was pretextual. She proved that the corporation, during the course of proceedings on her complaint of discrimination, offered numerous reasons for firing her. She showed that several of those reasons were either untrue or unproved. Proffer of false reasons for allegedly discriminatory action is evidence of a hidden and presumably discriminatory motive. ***See*** *McInnis V. Alamo Community College District*, 207 F.3d 276, 283 (5th Cir. 2000).

Addressing the reasons the corporation finally advanced at hearing, she demonstrated that both of the "checks for cash" events occurred before she was pregnant, with no consequences. She presented testimony of another former employee that "checks for cash" with Hopkins' approval did occur in the office.[12] She proved that even though the bookkeeper wanted the corporation to fire Peck for the first "check for cash" incident, the corporation did not fire her, and in fact raised her wages and kept her at the higher wage. Only her delay in repaying the second "check for cash" occurred close to the time of her firing. She provided evidence that the corporation's explanation for her allegedly unauthorized write-off of R.S.'s bill was subject to question and doubt.

The corporation contends that Peck decided, without any authorization, to write off $700.00 in dental bills for a friend. She allegedly made this decision, a decision patently dangerous to her continued employment, just one day after the corporation claimed it had warned her that her handling of patients and financial matters in the office had triggered a "final warning" of impending discharge if she did not improve. Three months pregnant at the time, Peck had no alternative source of support for herself and her children.

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[12] The former employee Cherie Keller, also had a claim of religious discrimination pending before the Hearing Bureau against the respondent. Although there is the possibility of bias slanting Keller's testimony, the mere fact of the pending claim does not alone undercut her credibility. After hearing and before this decision, Keller dropped her claim.

The corporation asked the fact-finder to believe that Peck decided to risk discharge by making a write-off she must have known would be discovered, within 24 hours of receiving the most serious warning an employee could receive, short of discharge. Such an account of events makes no sense. There is no explanation in the record of why or how Peck would embark upon such a reckless course of action. This explanation of the events was inherently incredible.

Peck also proved that personal appearance was a critical component of the receptionist's job, since patients formed their first impression of the office from the receptionist. Since Dr. Zander and Hopkins shared Peck's belief that unwed pregnancy was improper, her showing pregnancy was an embarrassment for the corporation as well as for Peck.

Finally, she proved that the "business records" the corporation presented were subject to serious question. Her proof of the questionable status of those documents called in question the credibility of the corporation's key witnesses, whose explanations of those documents were, at best, dubious.

Dr. Zander's testimony that he created Exhibit 4 on August 27, 1998 was not credible. He testified that he wrote the document before the meeting with Peck on August 27, and that he showed the document to her. When confronted with the fact that he wrote the document in the past tense, he changed his testimony to explain that he prepared the list of three numbered performance complaint before the meeting, then wrote the last paragraph of the document after the meeting. However, the introductory paragraph to the numbered list was also written in the past tense. The list is in the middle of the document. Not only was the initial account of the origin of the document not credible, the shifting explanation was even less credible. Dr. Zander did not write the document until after the meeting with Peck. His testimony that he did write it before the meeting, and his subsequent testimony that he wrote part of it before the meeting, casts in question his credibility on other matters.[13]

At hearing, Dr. Zander testified that he no longer felt he could trust Peck, and therefore decided to terminate her employment. During the HRB investigation, Dr. Zander did not mention the "checks for cash" incidents, offered at hearing as part of the basis of his lost trust in Peck. At hearing Dr. Zander had no personal knowledge of the discounting, but relied upon Hopkins. In short, Dr. Zander appeared certain at all times, during

[13] As a matter of law, a fact-finder can consider that a witness false in one part of his testimony is suspect in other parts as well. §26-1-303(3) MCA.

investigation and hearing, that he had good reasons for ending Peck's employment, but the nature of those reasons varied over time.

The testimony of Cynthia Rapstad, the corporation's bookkeeper, provided no support of the corporation's defense. The bookkeeper had no personal knowledge of Peck's conduct at work. The bookkeeper's information came from Dr. Zander and Hopkins. Once the bookkeeper learned about the first "check for cash" incident, she wanted the corporation to fire Peck. The corporation, the actual employer, did not fire Peck, and did not even discipline her. Thus, the bookkeeper had no direct knowledge of Peck's performance. What Rapstad did have was knowledge that Peck's conduct at work, until she became obviously pregnant and still unmarried, never led the corporation to take any action against her.

The corporation only proved two events within its various business explanations that actually happened after her pregnancy showed. Those two events were the discount to R.S. and the reduction in wages to recapture the $150.00 "check for cash." These two events did not convince the hearing examiner that the corporation discharged Peck for legitimate business reasons, and without an illicit discriminatory motive.

The main impetus for firing Peck, based upon the evidence, came from Hopkins, rather than Dr. Zander. The main animus toward Peck's status as a single pregnant female also came from Hopkins, rather than Dr. Zander. Nevertheless, in relying upon Hopkins, Dr. Zander and his corporation must then accept responsibility for her conduct. Since the corporation did not present credible evidence to support Hopkins' suspicions and suggestions about Peck's conduct, the fact-finder ultimately found that the corporation did act out of an illegal discriminatory motive.

4. Mixed Motive Analysis

Montana law follows the federal precedent in holding that the corporation also could prove that it would have taken the same adverse action irrespective of any unlawful discrimination. *Crockett*, ***op. cit.***, 761 P.2d at 819; ***See***, ***e.g.***, *Muntin v. State of California Parks & Recreation Dept.*, 738 F.2d 1054, 1056, (9th Cir. 1984). This affirmative defense bears the rubric of a "mixed motive" case.

The mixed motive defense arises when a claimant proves illegal discrimination but the discriminator proves a sufficient nondiscriminatory reason also existed for the adverse action. A successful mixed motive defense

would bar Peck's recovery.[14] To prove the defense, the corporation had to prove that even without the discriminatory motive, it would have made the same decisions. With such proof, no harm to Peck resulted from the discrimination--the same result would have occurred without it--and there would be nothing to rectify.

To rebut a *prima facie* case of discrimination, the corporation had to prove the illegal motive played no significant part in its hiring decisions by presenting legitimate non-discriminatory reasons for its acts not pretexts. For a mixed motive defense, on the other hand, the corporation only had to prove that the same result would have occurred without the illegal motive. If the corporation proved it would still have fired Peck without the illegal motive, it would establish a mixed motive defense. If it met this burden, the company then would not need to defeat the evidence of illegal motive.

Although Dr. Zander's testimony that he no longer trusted Peck was credible, it did not prove that without her visible pregnancy outside of wedlock the corporation would still have fired her. Hopkins' concern for Peck was genuine, but her concern for appearances of propriety, even extending to better dress to greet wealthier patients, was also genuine. The corporation failed to prove that without the discriminatory motive, it would have made the same decisions. The substantial credible evidence is that the primary cause of Peck's termination was her status as a single, visibly pregnant, female.

C. Remedy

Upon finding illegal discrimination, the department may award any reasonable measure to rectify any harm Peck suffered. §49-2-506(1)(b) MCA. The purpose of an award of damages in an employment discrimination case is to ensure that the victim is made whole. *P. W. Berry 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***, *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362 (1975).

1. Back Pay

By proving discrimination, Peck established a presumptive entitlement to lost wages. *Albermarle Paper Company*, ***supra***, 422 U.S. at 417-23 (1975). Peck must prove the amount of wages she lost, but not with unrealistic exactitude. *Horn v. Duke Homes, Division of Windsor Mobile Homes, Inc.*, 755 F.2d 599, 607

[14] *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2d 628 (1993); *Johnson v. Bozeman School Dist.*, ***op. cit.***

(7th Cir. 1985); *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 889 (3rd Cir. 1984); *Rasimas v. Mich. Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983) (fact that back pay is difficult to calculate does not justify denying award). Peck is entitled to $17,320.00 in back pay prior to her finding her present job, and she is entitled to $40.00 per week in back pay from October 1999 through June 19, 2000.

2. Front Pay

Front pay is an amount granted for probable future losses in earnings, salary and benefits to make the victim of discrimination whole when reinstatement is not feasible; front pay is only temporary until the charging party can reestablish a "rightful place" in the job market. *Sellers v. Delgado Comm. College*, 839 F.2d 1132 (5th Cir. 1988), *Shore v. Federal Expr. Co.*, 777 F.2d 1155, 1158 (6th Cir. 1985); *Rasmussen v. Hearing Aid Inst.*, HRC Case #8801003988, ***affirmed as*** *Hearing Aid Institute v. Rasmussen*, ***op. cit. at note 9***. In the absence of any concrete evidence of the time necessary to reestablish the claimant's place in the market, a four year time frame is a "reasonable measure . . . to rectify" pecuniary harm to Peck for continuing lost wages, to October 15, 2002. §49-2-506(1)(b) MCA; ***see also*** §39-2-905(1) MCA (4 years of lost wages the limitation upon recovery for such losses under the Montana Wrongful Discharge from Employment Act).

Front pay is appropriate only if it is impossible or inappropriate to reinstate Peck because of the hostility or antagonism between the parties. *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1347 (9th Cir.1987) (upholding front pay award based on "some hostility" in spite of testimony that plaintiff and defendant were still friends); ***see also***, *Thorne v. City of El Segundo*, 802 F.2d 1131, 1137 (9th Cir. 1986); *E.E.O.C. v. Pacific Press Publ. Assoc.*, 482 F.Supp. 1291, 1320 (N.D. Cal.) (when effective employment relationship cannot be reestablished, front pay is appropriate), *affirmed*, 676 F.2d 1272 (9th Cir. 1982).

Peck need not request reinstatement as a prerequisite to obtaining front pay where the evidence reveals such hostility. *EEOC v. Prudential Fed. S&L Ass'n*, 763 F.2d 1166, 1173 (10th Cir.), ***cert. denied*** 474 U.S. 946 (1985); *Thorne*, ***supra***, 802 F.2d at 1137 ("failure to seek reinstatement would not preclude front pay if excessive hostility exists"). Here, the hostility is clear, in the statements made on behalf of the corporation in investigation and through the hearing. It is not reasonable to expect Peck to return to work with the corporation. Front pay is therefore appropriate.

3. Pre-Judgment Interest

Pre-judgment interest on lost income is a proper part of the department's award of damages. *P. W. Berry, Inc.*, ***op. cit.***, 779 P.2d at 523; *Foss v. J.B. Junk*, HRC Case No. SE84-2345 (1987).

4. Emotional Distress

Since the law requires "any reasonable measure . . . to rectify any harm, pecuniary or otherwise, to the person discriminated against,"[15] the power and duty of the department to award money for proven emotional distress is clear as a matter of law. *Vainio v. Brookshire*, 258 Mont. 273, 852 P.2d 596, 601 (1993). As already noted, damages in discrimination cases are broadly available precisely so that the awards rectify any and all harm suffered. *P. W. Berry, Inc.,* ***op. cit.***; *Dolan,* ***op. cit.***; *Albermarle Paper Co.*, ***op. cit.*** Emotional distress recovery is appropriate upon proof that Peck suffered emotional distress because of the proven illegal discrimination. *Campbell v. Choteau Bar and Steak House*, HRC#8901003828 (3/9/93)[16].

Under federal civil rights law, "compensatory damages may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances, *whether or not plaintiffs submit evidence of economic loss or mental or physical symptoms*." *Johnson v. Hale*, 13 F.3d 1351 (9th Cir. 1994) (emphasis added) (increasing award of $125.00 to $3,500.00 for overt racial discrimination). This make-whole remedy is different from the standard used for assessing whether emotional distress is compensable in common law tort cases, but it is consistent with the principles announced in the Montana cases. ***See***, *Choteau Bar and Steak House*, ***supra***, pp. 3-7 and 39-50.

The standard in tort claims for compensation for emotional distress is whether there has been both a substantial invasion of a legally protected interest and a significant impact upon the wronged party. *First Bank of Billings v. Clark*, 236 Mont. 195, 771 P.2d 84 (1989) and *Johnson v. Supersave Markets, Inc.*, 211 Mont. 465, 686 P.2d 209 (1984). But infliction of illegal discrimination can *per se* result in compensable emotional distress, based upon the testimony of the victim. *Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991) (reversing refusal to award emotional distress damages). The trier of fact can

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[15] §49-2-506(1)(b) MCA

[16] ***See*** *Carey v. Piphus*, 435 U.S. 247, 264, n. 20 (1978); *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225 (D.C.Cir. 1984); *Seaton v. Sky Realty Company*, 491 F.2d 634 (7thCir.1974); *Brown v. Trustees*, 674 F.Supp. 393 (D.C.Mass. 1987); *Portland v. Bureau of Labor and Industry*, 61 Or.Ap. 182, 656 P.2d 353, 298 Or. 104, 690 P.2d 475 (1984); *Hy-Vee Food Stores v. Iowa Civil Rights Commission*, 453 N.W.2d 512, 525 (Iowa, 1990).

infer that emotional harm did result from the illegal discrimination. *Carter*, ***op. cit. at note 12***; *Seaton*, ***op. cit. at note 12***; *Buckley Nursing Home, Inc. v. M.C.A.D.*, 20 Mass. App. Ct. 172 (1985); *Fred Meyer v. Bureau of Labor & Industry*, 39 Or.Ap. 253, 261-262, ***rev. denied***, 287 Ore. 129 (1979); *Gray v. Serruto Builders, Inc.*, 110 N.J.Sup. 314 (1970).

The law expressly recognizes a person's right to be free from unlawful discrimination. §49-1-101, MCA. Unlawful discrimination is a per se invasion of a legally protected interest. The enforcement and remedial provisions of the Human Rights Act make clear that Montana does not expect a reasonable person to endure any harm, including emotional distress, resulting from a violation of the right to be free from unlawful discrimination. *Vainio*, ***op. cit.***; *Choteau Bar and Steak House*, ***op. cit.***; *Johnson v. Hale*, ***op. cit. and supra***. Thus, in Human Rights Act cases, emotional distress is an element of damages without the high burden of proof present for other kinds of torts.[17]

Like every emotional distress award, the department bases this award upon the impact Peck suffered, not upon the heinousness of the corporation's conduct. Emotional distress damages are compensatory, not punitive. With the exception of housing cases (§49-2-510 MCA), there are no damages under the Human Rights Act that rest upon the conduct of the respondent rather than the harm the charging party suffered. Peck's evidence of her emotional distress, as a single pregnant female with children, left without an income due to discriminatory discharge, justifies an award of $5,000.00.

5. Mitigation

A charging party is required to make reasonable efforts to mitigate damages from discrimination by seeking comparable, alternative employment. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982). The burden of proving a lack of reasonable diligence in mitigating damages from lost wages and benefits is on the respondent and must be proved by at least a preponderance of the evidence. *P. W. Berry, Inc. v. Freese*, 239 Mont. 183, 779 P.2d 521, 523

[17] Unlike most civil cases, in a Human Rights Act case the award of damages for emotional distress is purely a matter of whether the evidence adduced convinces the fact-finder that the claimant did suffer serious emotional distress. In other civil cases, the issue often involves whether the plaintiff proved the elements to establish liability for intentional or negligent infliction of emotional distress. ***See***, *Sacco v. High Country Independent Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (1995). Liability in discrimination cases does not arise from those free-standing torts. It flows directly from proof of the illegal discrimination, as an element of damages Thus, the pure fact question for emotional distress recovery involves the degree of actual harm suffered by the claimant, not the degree of egregious conduct on the part of the respondent.

(1989); *Hullett v. Bozeman School Dist. #7*, 228 Mont. 71, 740 P.2d 1132 (1987). A charging party is not required to seek all possible employment opportunities, but may exercise reasonable discretion in pursuing offers of work. Factors such as whether the opportunity is in her chosen field of work, whether it is comparable to the opportunity lost as a result of discrimination, and whether it is economically feasible in light of the charging party's actual circumstances, can be considered. *Ford Motor Co.*, ***supra***, 458 U.S. at 231 ("the unemployed or underemployed claimant need not go into another line of work, accept a demotion or take a demeaning position..."); ***accord***, *Hullett v. Bozeman School Dist. #7*, ***supra***.

In this case, the corporation did not prove that Peck failed to exercise due diligence in her employment search. The affirmative defense of mitigation does not bar or diminish Peck's damages.

6. Injunctive and Affirmative Relief

Pursuant to §49-2-506(1)(a) and (c) MCA, affirmative relief is necessary. The corporation, by the evidence, has begun the process of documenting its evaluations of employees, and its counseling of employees regarding performance deficiencies. It must do so in a fashion that will assure that the discrimination in this case will not recur with another employee.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.

2. Dental Care of Great Falls, Inc., unlawfully discriminated in employment against Jody Peck because of her sex and marital status when it terminated her employment on October 8, 1998. §§49-2-303(1)(a) and 49-2-310(1) MCA.

3. The corporation must pay Peck $18,706.56[18] for lost wages to date (June 19, 2000).

4. The corporation must pay Peck $4,048.00[19] for the present worth of future lost wages through October 2002.

[18] $17,320 for lost wages through September 19, 1999, $1,386.56 for lost wages from October 15, 1999 through June 19, 2000.

[19] $173.32 per month for 29 months equals $5,026.28. $4,048.00, at 10% simple for 29 months, equals $5,026.28.

5. The corporation must pay Peck $1,700.23[20] in prejudgment interest. Post judgment interest accrues by operation of law.

6. The corporation must pay Peck $5,000.00 for her emotional distress.

7. Pursuant to §49-2-506(1)(a) and (c) MCA, the corporation is enjoined against illegal discrimination in employment, and must adopt and rigorously follow a policy regarding non-discrimination in employment for pregnancy irrespective of marital status. Within 60 days of this decision, the corporation must submit a proposed policy to the department's Human Rights Bureau, and within 30 days of receipt of approval by the HRB of the policy with any suggested changes, the corporation must adopt the policy (with such suggested changes) and implement it.

8. Pursuant to §49-2-505(7), MCA, Peck is the prevailing party.

VI. Order

1. Judgment is found in favor of Jody Peck and against Dental Care of Great Falls, Inc., on the charge that the corporation unlawfully discriminated in employment against Peck because of her sex and marital status when it terminated her employment on October 8, 1998.

2. The corporation must pay Peck the sum of $38,454.79, for past lost wages, the present value of future wages, pre-judgment interest and emotional distress. Interest on this judgment accrues by law.

3. The corporation is enjoined from further discriminatory acts and ordered to comply with Conclusion of Law No. 7.

Dated: June 19, 2000.

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Terry Spear, Hearing Examiner
Montana Department of Labor and Industry

[20] $173.20 per year divided by 12 equals $14.433 monthly interest on each month of full lost wages, times 115 (16 plus 15 plus 14 plus 13 plus 12 plus 11 plus 10 plus 9 plus 8 plus 7 months of interest on the 10 months of full lost wages in 1999) equals $1,659.80. $40 times 4.333 weeks per month times 10% divided by 12 equals $1.444 monthly interest on each month of diminished wages, times 28 (times 7 plus 6 plus 5 plus 4 plus 3 plus 2 plus 1 months from November 1999 to the present) equals $40.43.