BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Heidi Sprow, Charging Party, vs. **CEnTech Corporation**, Respondent.	**Human Rights Act Case No. 9901008758** *Final Agency Decision*

I. Procedure and Preliminary Matters

Heidi Sprow filed a complaint with the Department of Labor and Industry on December 11, 1998, alleging that CEnTech Corporation discriminated against her because of sex (female) when it paid her a lower wage as a part-time employee than it paid its male employees in October 1998. On June 15, 1999, the department gave notice Sprow's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

The contested case hearing convened on December 6, 1999, in Bozeman, Gallatin County, Montana. Sprow and her attorney, Geoffrey C. Angel, attended. The corporation attended through its designated representative, Gary Perry, and its attorney, James M. Kommers. Heidi Sprow and Gary Perry testified. The parties stipulated admission of exhibits 1 through 5 (identified in respondent's final exhibit list, accompanying the exhibits)[1]. The parties argued and submitted the case on December 6, 1999.

II. Issues

The legal issue in this case is whether the corporation discriminated against Sprow in employment because she was a woman. A full statement of the issues appears in the final prehearing order. The hearing examiner now amends the pleadings and issues to conform to the evidence and this decision.

III. Findings of Fact

1. Respondent CEnTech Corporation (the corporation) employed charging party Heidi Sprow starting August 17, 1998 as a full-time employee. The corporation paid her $7.50 an hour. The corporation made spa covers to fit particular spas. The corporation relocated to Bozeman in 1998, and hired

[1] Exhibit 6 was also admitted by stipulation, but the parties subsequently agreed to withdrawal of the exhibit. Exhibit 6 is not part of the record.

approximately 17 workers, including Sprow, to start in August 1998. Final Prehearing Order, IV. Facts and Other Matters Admitted, para. 1; testimony of Sprow and Perry.

2. Sprow had some experience as a lead worker. She expressed interest, at the time of hiring, in working up to a lead worker position. Testimony of Sprow.

3. Sprow was a leading candidate for one of the lead worker positions, based upon her experience and initial performance. The corporation intended to select lead workers after the first three months of operation. Exhibits 1, 4 and 5; testimony of Sprow and Perry.

4. In October 1998, before the corporation selected lead workers, Sprow requested that the corporation make her a part-time employee. She understood that converting to part-time would eliminate her from consideration for a lead position. Final Prehearing Order, IV. Facts and Other Matters Admitted, para. 2; testimony of Sprow and Perry.

5. The corporation did change Sprow's status to part-time, and reduced her wage to $6.00 per hour, effective October 26, 1998. Perry told her that as a part-time worker her wages would be $6.00 per hour, consistent with other part-time employees. Final Prehearing Order, IV. Facts and Other Matters Admitted, para. 3; exhibit 4; testimony of Sprow and Perry.

6. After she requested conversion to part-time status, Sprow discovered that another part-time employee, Kurt Gardner, was making $7.00 per hour, but another female part-time worker, Jenine Shay, was making $6.00 per hour. Sprow complained to her supervisor. Her supervisor told her that he had consulted with Perry, and that she would continue to make $6.00 an hour as a part-time worker. Testimony of Sprow.

7. Perry made individualized adjustments to the hourly wages of the corporation's workers in Bozeman. He increased the hourly wage for workers he wanted to keep and promote. For example, he wanted Gardner, a college graduate, to increase his hours and become a full-time employee. He therefore paid Gardner more as a part-time worker than he paid either Sprow or Shay. Perry increased Randy Heinrich's wage from $7.50 per hour to $8.00 per hour when Heinrich became a sprayer. Heinrich then also received $8.00 per hour for work on the same job as both Sprow and Anita Nelson worked. Anita Nelson continued to receive $7.50 per hour, even for hours spent working as a sprayer. Perry paid Jay Joyner, who had experience as a lead worker and later became a lead worker, $8.00 per hour for essentially the same full-time work

for which Sprow, Nelson and Carol Shores received $7.50 per hour as full-time workers. Shores, like Sprow and Joyner, had previous experience as a lead worker. Exhibits 2, 3,4 and 5; testimony of Perry.

8. Workers who received higher wages for essentially the same labor were all male—Gardner, Joyner and Heinrich—while their counterparts receiving lower wages were often (although not exclusively) female—Shay, Nelson and Shores. Exhibits 2, 3,4 and 5; testimony of Perry.

9. Due to a temporary decrease in work, the corporation laid off Sprow and Shay, both part-time workers, on December 18, 1998. The only other part-time worker was Gardner, who was not laid off but did leave the corporation. Final Prehearing Order, IV. Facts and Other Matters Admitted, para. 4; testimony of Sprow and Perry.

10. Sprow worked a total of 304.25 hours at $7.50 per hour, from her hiring through October 25, 1998. For each of those hours, she received $.50 less than comparable male employees, for a total of $152.13. Interest on the unpaid wages through March 2, 2000, amounts to $21.38.[2] Exhibit 4; testimony of Sprow and Perry.

11. Sprow did not suffer severe emotional distress because of her receipt of a lower full-time wage than comparable males. Testimony of Sprow.

IV. Opinion

Montana law prohibits discrimination in employment because of sex. §49-2-303(1)(a) MCA. Sprow must prove that the corporation took adverse employment action against her because she was a woman. Once she does, the corporation must show that it had a legitimate non-discriminatory reason for its action. If it does, Sprow may prove that the reason was pretextual.

Sprow Established a Prima Facie Case of Discrimination

Where there is no direct evidence of discrimination, Montana courts have adopted the three-tier standard of proof articulated in *McDonnell Douglas.*[3]

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[2] Interest on each paycheck, from issuance until the date of the last payday at $7.50 per hour, is $0.96. Interest on the entire award, from October 29, 1998 (Sprow's last payday at $7.50 per hour) through March 2, 1999, is $5.21. The interest on the entire award from March 3, 1999, through March 2, 2000, is $15.21. Adding these numbers generates the interest award.

[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

See, e.g., *Hearing Aid Institute v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813, 816 (1988); *Johnson v. Bozeman School Dist.*, 226 Mont. 134, 734 P.2d 209 (1987); *European Health Spa v. H.R.C.*, 212 Mont. 319, 687 P.2d 1029 (1984). Sprow presented no direct evidence of discriminatory motive.

The first tier of *McDonnell Douglas* required Sprow 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*, ***supra***, 411 U.S. at 802, 93 S.Ct. at 1924.

The Court noted in *McDonnell Douglas* that this standard of proof is flexible. The four elements may not necessarily apply to every disparate treatment claim. Thus, Sprow needed to prove that she was as qualified to earn wages as the men earning higher wages, and that despite her equal qualifications, the employer paid her a lower wage than those men.[4]

Sprow was a full-time worker with prospects to become a lead worker. She elected to become a part-time worker, and then she became a part-time worker receiving a lay-off. Her complaint alleged that reduction of her wages when she chose part-time work was discriminatory.[5]

Sprow proved that for a full-time employee and potential lead worker, her lack of a college degree did not render her less qualified than Gardner.[6] Thus, Sprow did establish that for the full-work she was doing, she was as qualified as the other workers were. The relevant difference between Sprow

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[4] ***Cf.***, *Martinez v. Yellowstone County Welfare Dept.*, 192 Mont. 42, 626 P.2d 242, 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).

[5] Sprow also argued that her departure from employment stemmed from illegal discrimination. She neither timely pled nor proved a retaliation case. Her lay-off was unrelated to any discrimination.

[6] No evidence from either side suggested that a college degree made a part-time worker more valuable to the employer.

and Gardner was gender. Sprow also proved other instances of similar conduct by the corporation. The relevant difference between Heinrich and Nelson, and between Joyner and Shores, was also gender. The corporation, during the brief time Sprow worked there, paid three males more for comparable work than it did several females. Sprow carried her burden of proving her prima facie case.[7]

The Corporation Presented A Legitimate Business Reason for Some of its Actions

Sprow's prima facie case under *McDonnell Douglas* raised an inference of discrimination at law. The burden then shifted to the corporation to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *Crockett*, ***supra***, 761 P.2d at 817. The corporation 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.

Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 255-56, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207, 217 (1981). The corporation had the burden to raise a genuine defense by clearly and specifically articulating its legitimate reason for taking the adverse action against Sprow. ***See***, *Johnson*, ***op. cit.***, 734 P.2d at 212.

The evidence established that Sprow's initial wage of $7.50 per hour changed to $6.00 per hour because she elected to become a part-time worker. Shay, another female part-time worker, likewise received $6.00 per hour. Gardner, a male, received $7.00 per hour. However, Gardner was a part-time employee that the corporation hoped to induce to become a full-time employee and a lead worker. Shay was solely a part-time worker. Sprow elected to abandon her chances to become a lead worker and instead became a part-time worker. The corporation, from that point forward, had a legitimate business reason to pay more to an employee it sought to retain and promote, as opposed to a part-time worker and a full-time promotion prospect who gave up that prospect to become a part-time worker.

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[7] Sprow's contentions included some references to the full-time wage rates that were pivotal to this decision. Her case focused more on the part-time wages she earned. By amending the pleadings and issues to conform to the evidence, the hearing examiner included the full-time wages within the jurisdiction of the department in this case.

The corporation satisfied its burden in the second tier of *McDonnell Douglas*, but only concerning Sprow's part-time work. Sprow also proved her *prima facie* case regarding her full-time wages, and the corporation's legitimate business reasons did not reach those wages. She proved disparate treatment of male versus female prospects for higher paying jobs (Heinrich, Joyner and Gardner versus Nelson, Shores and Sprow). The corporation's proffered reasons do not explain why Gary Perry rewarded males he considered good prospects with more money, while females with apparently equivalent prospects did not receive more money. The corporation made adverse employment decisions about Sprow's full-time pay because she was a woman.

Sprow Did Not Prove Pretext, Regarding Either Part-time Work or Lay-off

Once the corporation produced legitimate reasons for its adverse employment action, Sprow had the burden to prove that the defendant's reasons were in fact a pretext. *McDonnell Douglas* at 802, 93 S.Ct. at 1824; *Martinez*, ***op. cit.***, 626 P.2d at 246. To meet this third tier burden, Sprow could present either direct or indirect proof of the pretextual nature of the corporation's proffered reasons:

> 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 at 256, 101 S.Ct. at 1095. Ultimately, Sprow had the burden to persuade the fact-finder that the corporation did illegally discriminate against her. *Crockett*, ***op. cit.***, 761 P.2d at 818; *Johnson*, ***op. cit.***, 734 P.2d at 213.

Concerning her lay-off and her part-time wages, Perry's explanations were credible and unrebutted. Perry, whether consciously or subconsciously, favored male employees with higher wages for the same work. However, in the case of Sprow, he had non-discriminatory reasons to pay less to part-time workers who had no lead worker prospects and to lay-off part-time workers. Sprow, unlike Gardner, was an employee in decline. She elected to convert from full-time to part-time. She made that choice before the end of the three-month initial employment period, after which the corporation was selecting lead workers. Paying Gardner more to keep him and induce him to become full-time was reasonable. Paying Sprow the lower "going rate" for part-time workers was also reasonable, for non-discriminatory reasons. She, like Shay, was purely a part-time worker. Her prospects as a potential lead worker evaporated when she decided to become a part time worker. Although the

corporation did favor males over females in making some employment decisions, it proved that it would have made the same decisions regarding Sprow (for part-time pay and lay-off) without regard to her gender.

Sprow Is Entitled to Recover Her Lost Wages

Upon a finding of illegal discrimination, the Montana Human Rights Act mandates an order requiring any reasonable measure to rectify any resulting harm to the complainant. §49-2-506(1)(b) MCA. Sprow lost fifty cents per hour while a full-time worker. She is entitled to recover that amount. Pre-judgment interest is properly part of that award to compensate for lost wages. *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).[8]

Affirmative Relief Is Proper

The finding of a discriminatory motive mandates affirmative relief, to prevent future discriminatory acts by the respondent. §49-2-506(1)(a) MCA. In the interest of the public, the corporation must not discriminate in the future.

V. Conclusions of Law

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

2. Respondent CEnTech Corporation, through its CEO, Gary Perry, unlawfully discriminated in employment against charging party Heidi Sprow because of her sex (woman) when it paid her lower wages than it paid comparable male employees until she became a part-time employee effective October 26, 1998. §49-2-303(1)(a) MCA.

3. Pursuant to §49-2-506(1)(b) MCA, the corporation must pay to Sprow the sum of $152.13 in unpaid wages and $21.38 in pre-judgment interest on those unpaid wages resulting from the illegal discrimination:

4. The circumstances of the illegal discrimination mandate imposition of particularized affirmative relief, to eliminate the risk of continued violations of the Human Rights Act. §49-2-506(1) MCA.

[8] Sprow failed to prove her emotional distress damages. The department's power to rectify harm to Sprow does not include the power to punish the offender, thus the department is without power to award punitive damages. §49-2-506(1)(a) and (b) MCA.

5. For purposes of §49-2-505(7), MCA, Sprow is the prevailing party.

VI. Order

1. Judgment is found in favor of Heidi Sprow and against CEnTech Corporation on the charge that the corporation illegally discriminated against Sprow in employment because of her sex (female).

2. Within 90 days of this order, Gary Perry must attend four hours of training, conducted by a professional trainer in the field of personnel relations and/or civil rights law, on the subject of sexual equality in pay and terms and conditions of employment. Upon completion of the training, Perry shall obtain the signed statement of the trainer indicating the content of the training, the date it occurred and that he attended for the entire period. Perry must submit the statements of the trainer to the Commission staff within two weeks after the training is completed.

3. CEnTech Corporation, or any successor company owned and operated by Gary and Lisa Perry, is enjoined from taking any adverse employment action against any employee because of sex (female). Said entity is also required, within 30 days of this order, to submit to the department (Human Rights Bureau, ATTN: Ken Coman, P.O. Box 1728, Helena MT 59624-1728) a complete list of its employees by name, address, SSN, date of hire, sex, job title and rate of pay. Said entity is also required to answer any subsequent inquiry of the department regarding employees, and to follow any direction of the department regarding the adjustment of employee pay found by the department to be based upon sex. The department's jurisdiction over said entity extends for one calendar year beyond the date of final decision (whether this order or subsequent order on appeal from this order) of this case.

4. CEnTech Corporation must pay Heidi Sprow $173.51 ($152.13 in unpaid wages and $21.38 in pre-judgment interest on those unpaid wages). Judgment interest accrues as a matter of law.

Dated: March 2, 2000.

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Terry Spear, Hearing Examiner
Montana Department of Labor and Industry