BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Heidi Crawford, Charging Party, vs. **Tamarack Management, Inc.**, Respondent.	HRA Case No. 0001009127 *Final Agency Decision*

I. Procedure and Preliminary Matters

Heidi Crawford filed a complaint with the Department of Labor and Industry on January 7, 2000. She alleged that Tamarack Management, Inc., discriminated against her because of gender (pregnant female) when it discharged her from her employment on or about December 23, 1999. On, August 25, 2000, the department gave notice Crawford's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

The contested case hearing proceeded on January 4, 2001, in Missoula, Montana. Crawford attended with counsel, Richard R. Buley, Tipp & Buley. The corporation attended through its designated representative, Claudia Kent, with counsel, Candace C. Fetscher, Garlington, Lohn & Robinson, PLLP. Heidi Crawford, Claudia Kent, Joyce Stevens, Dana Smolinski, Crystal Darling, Dr. Meg Carnegie (M.D.), Sandy Pauley, Jennifer Stiles, Julie Gosselin and Dr. Lynda Brown (Ph.D.) testified. The parties stipulated to the admission of Exhibits 1, 101, 102, 103, 104, 105 and 106. The corporation presented a chronology of events (Demonstrative Exhibit A), and the hearing examiner treated it as a filing, since counsel for Crawford received a copy. The corporation moved for a partial judgment (a directed verdict) that Crawford could not recover any damages for harm suffered after the birth of her child on February 27, 2000. Crawford agreed that she sought no such damages. The hearing examiner closed the evidentiary record at the end of the hearing on January 4, 2001. Crawford filed her closing argument on February 5, 2001. The corporation filed its closing argument on March 20, 2001. Crawford filed her reply on April 6, 2001.

II. Issues

The issue in this case is whether the corporation required Crawford to take an unreasonably long maternity leave. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Tamarack Management, Inc., is a corporation that provides para-professional and other staff support to health care providers at the Western Montana Clinic and others in Missoula, Montana. The corporation interviewed Heidi Lynn Crawford for a position on September 22, 1999. The corporation told Crawford that day that it would hire her for a job beginning October 4, 1999. At the time of her interview and hiring, Crawford told the corporation that she was pregnant. The corporation told Crawford that she would not be eligible for FMLA because she would not have been an employee for 12 months by her due date. The corporation also told Crawford that she would be eligible for maternity leave, with the right to return to an equivalent position after her leave.

2. The corporation employs a substantial number of female employees of childbearing age, and regularly extends maternity leave to them according to either physician-determined need or the employees' wishes.

3. On October 4, 1999, Crawford began work for the corporation as a front office assistant in the Family Practice Missoula office of the Western Montana Clinic. Her pay rate was $7.29 per hour and her regular workweek was 40 hours per week. Her supervisor was Claudia Kent.

4. Beginning November 4, 1999, Crawford was hospitalized and unable to work due to a medical condition involving kidney stones. She returned to work on November 22, 1999. She told Kent that her physician did not want her to work because she had a high risk pregnancy. Crawford told Kent that she needed to work because she had bills to pay, but that she would not be able to work after the end of December, or perhaps sooner. Kent told Crawford that she would attempt to accommodate her schedule and her physician's restrictions if possible. Kent told Crawford that the corporation would find a replacement for her position when she was no longer able to work, and that another position would be available to her when she returned from her maternity leave.

5. The corporation regularly published (by providing and posting within the office) a work schedule for employees. On or about November 29, the corporation published a December schedule that reflected that Crawford would be off work the last week of December. On November 30, Kent submitted a request to the corporation's Human Resources office for personnel to fill Crawford's position beginning after the end of December. The corporation posted the opening internally on December 3, 1999, to fill the position with an internal transfer effective January 4, 2000.

6. Crawford was unable to work on December 8, 1999 or the remainder of the work week. Because Kent was out of town, Crawford called the Human Resources office regarding her status. Crawford reported her inability to work that week, and reiterated her understanding that she would no longer be able to work after the end of December. Julie Gosselin, in the Human Resources office, told Crawford that there would be equivalent positions available in different departments and that Crawford could return to one of those positions when she was able to return to work after the birth of her child.

7. On December 13, 1999, Crawford returned to work. She told Kent that she could work only part time and that mornings were best for her. She also told Kent that she had medical limitations on lifting and other job functions. The corporation accommodated these reported limitations with some difficulty. From December 13 through December 17, 1999, Crawford worked approximately 5.2 hours per day.

8. On December 21, 1999, Crawford told Kent that her physician had given her permission to work full time. She did not produce documentation from her physician, although she could have obtained such documentation. Kent told Crawford that the corporation had scheduled her maternity leave to begin on December 23, 1999. Crawford wanted to work through the end of December. Kent told her, "Let's just leave it the way it is." Kent told her this even though the corporation had assigned a replacement for Crawford effective after the end of December. Kent unreasonably required Crawford to take leave sooner than the end of December. Crawford worked full time through December 23, 1999. She did not return to work for the corporation following the holiday weekend.

9. Pursuant to the corporation's personnel manual, Crawford was a probationary employee on her last day worked, December 23, 1999. Crawford received holiday pay for December 24 and 31, 1999. The corporation regularly had positions available that Crawford could have filled during January and February prior to the birth of her baby.

10. The Human Resources office left a message for Crawford on December 21, 1999, reminding her to return her enrollment form, as she was eligible to enroll in the health insurance plan furnished as a benefit by the corporation as of February 1, 2000.

11. Crawford understood that the corporation had placed her on maternity leave effective December 27, 1999. The corporation had repeatedly told her that once she commenced maternity leave, she could return to work after her baby was born. Since she had told the corporation she expected to commence maternity leave by the end of December, she unreasonably assumed

that the corporation would not have work for her after the end of December. Despite her desire to work, due to her financial need, she made no subsequent attempts to obtain further work from the corporation before the birth of her baby on February 27, 2000.

12. Crawford only communicated to Kent, on one occasion, her willingness and ability to work full time after December 21, 1999. She did not follow up with the corporation after that date. The corporation reasonably carried out its plan to replace her as of the end of December 1999.

13. Crawford lost four days of work time (December 27-30, 1999) because the corporation forced her to commence her maternity leave one week sooner than it reasonably believed she would begin that leave for medical reasons. Crawford received holiday pay for December 31, 1999. Any lost wages or other benefits resulting from dates after December 31, 1999, do not result from the corporation's acts. Crawford never clearly communicated to the corporation her ability and willingness to work after the end of December. The corporation did not discharge Crawford, since it expected her to return after her maternity leave and was ready and able to employ her at that time.

14. Crawford lost $233.28 in wages. Her benefits amounted to less than $4.00 per pay period, and no value to her of those benefits is of evidence. She received her last paycheck, which should have included the lost wages, on January 7, 2000.

15. Interest on the wages Crawford lost are $ .0639 per day, or $42.56 to the date of this final decision.

16. Crawford suffered emotional distress because her lost wages from December 27 until the birth of her child in late February resulted in serious financial problems. Crawford did not suffer severe emotional distress from the loss of four days of wages during the end of December.

17. The corporation's action of requiring Crawford to commence her leave one week prior to the time it reasonably expected her to go on that leave resulted from Kent's decision, not the corporation's practice and policy. Had Crawford pursued her desire to work beyond December, the corporation would have followed its practice and policy and given her work in January and February, correcting its misunderstanding about her ability and desire to work. The practice and policy of the corporation did not result in any discrimination. There is no reasonable risk that this type of discriminatory practice will occur again on other than an ad hoc basis. Only general injunctive relief is reasonably necessary to redress this occurrence.

IV. Opinion

Montana law prohibits an employer from discriminating because of sex by requiring that a pregnant employee take an unreasonably long maternity leave. §49-2-310 MCA. An employer may not treat an employee less favorably for "commencement and duration of leave" because she is pregnant. 24.9.1206 A.R.M.

The corporation, in accord with Crawford's communications about her maternity leave, assigned a replacement due to start after the end of December 1999. Kent, for no valid reason the corporation proved, elected to start Crawford's maternity leave a week earlier, even though no replacement was immediately available.

Crawford has the burden of proving that her pregnancy motivated her employer to require her to take an unreasonably long maternity leave. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-254 (1981)[1]. Kent gave no reason for commencing Crawford's maternity leave effective December 27 instead of replacing Crawford effective January 4, so her pregnancy was the reason. This is not an indirect evidence case. The corporation and Crawford agree upon the reason why the corporation placed Crawford on maternity leave. *Reeves v. Dairy Queen, Inc.*, 287 Mont. 196, 953 P.2d 703 (1998). Kent did not misunderstand Crawford and designate December 27 as the commencement of her leave based on a mistaken belief that Crawford required leave at that time for medical reasons. When Crawford specifically asked to continue working on December 21, Kent could not have misunderstood that statement, and it was at that time that Kent made her decision to place Crawford on leave effective December 27.

The corporation argued that it had too little notice from Crawford to change its plans to replace her effective January 4. It argued that it could reasonably rely upon Crawford's prior statements of her plans for maternity leave. However, the corporation proved that it could have placed Crawford in another position in January and February. Thus, the corporation cannot defend by arguing that it changed its position to its prejudice in reliance upon Crawford's prior statements, and should not be penalized for that reliance. Cases sustaining such a reliance defense, *Morrisey v. Symbol Technologies, Inc.*, 910 F.Supp. 117 (E.D.N.Y. 1996), are not applicable. The crux of the case involves the inexplicable decision to take Crawford off work during the last

[1] The Montana Supreme Court has approved the use of analogous federal cases in interpreting and applying 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).

week of December. The corporation's evidence that Crawford agreed or at least acquiesced in that decision was unconvincing. The corporation's argument that it reasonably relied upon Crawford's prior statements ignores Kent's knowledge that Crawford now could and would continue to work after the end of December.

The department may order any reasonable measure to rectify any harm Crawford 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); ***see also***, *Albermarle Paper Company v. Moody*, 422 U.S. 405 (1975).

By proving discrimination, Crawford established a presumptive entitlement to lost wages. *Albermarle Paper Company*, ***supra at*** 417-23 (1975). Crawford must prove the amount of the wages she lost with reasonable exactitude. ***E.g.***, *Horn v. Duke Homes*, 755 F.2d 599, 607 (7th Cir. 1985); ***see also*** *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 889 (3rd Cir. 1984); ***and*** *Rasimas v. Mich. Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983). Crawford has established the loss of four days of wages. She has not established with reasonable exactitude what benefits she also lost over those four days.

Prejudgement 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). Crawford is entitled to recover prejudgment interest on the wages, from pay day to judgment day.

Crawford had a duty to mitigate her damages. She had to make reasonable efforts to mitigate harm from the discrimination by seeking other comparable employment. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982). The corporation had the burden of proving by at least a preponderance of the evidence that Crawford was not reasonably diligent in mitigating her damages. *P. W. Berry, Inc.* ***supra***; *Hullett v. Bozeman School Dist. #7*, 228 Mont. 71, 740 P.2d 1132 (1987). Crawford did not have a duty exhaustively to seek out all possible employment opportunities. She could exercise reasonable discretion in pursuing offers of work. Whether the opportunity was in her chosen field of work, whether it was comparable to the job she lost, and whether the opportunity was economically feasible in light of her actual circumstances, are of the analysis. *Ford Motor Co.*, ***supra***, 458 U.S. at 231; ***accord***, *Hullett*, ***supra***.

In this case, all Crawford had to do was follow up with Kent and/or

Human Resources and document her availability for work in January and February. She would still have lost the wages for the last week in December before her documentation and the corporation's offer of another position occurred. But she need not have lost wages for January and February.

Montana has a single standard for recovery for severe emotional distress. *Sacco v. High Country Independent Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (1995). The intensity and the duration of the distress are factors to be considered in determining its severity. Crawford must prove that she suffered severe emotional distress. *Sacco* at 234, 896 P.2d at 426 (quoting *Restatement (Second) of Torts* §46, comment j). The facts of each case determine when and where a reasonable person endures emotional distress that falls short of being serious and severe. *Maloney v. Home Investment Center, Inc.*, 298 Mont. 213, 230, 994 P.2d 1124, 1135 (2000). Crawford established that she did suffer emotional distress because of her lost wages from the time she stopped working on through January and February 2000. However, Crawford did not establish that she suffered severe emotional distress because of her four day compensable wage loss.

The corporation followed a consistent practice of allowing maternity leave (without pay) to pregnant employees as needed or requested, and returning those employees to the same job or an equivalent position when they were ready to work after maternity leave. That practice, as presented in this case, complied with the law and did not involve an illegal termination of employment due to pregnancy. Thus, injunctive relief is sufficient to address the discriminatory actions in this case, which were not in accord with the practices and policies of the corporation. §49-2-506 MCA.

V. Conclusions of Law

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

2. The respondent, Tamarack Management, Inc., discriminated against Heidi Crawford because of gender (pregnant female) when it required her to commence her maternity leave effective December 27, 1999.

3. As a result of the illegal discriminatory action, Crawford lost wages of $233.28, with prejudgment interest of $42.56. §49-2-506(1)(b) MCA.

4. The law mandates affirmative relief. The department enjoins the corporation from requiring pregnant employees to take unreasonably long maternity leaves. §49-2-506(1) MCA.

VI. Order

1. The Department awards judgment in favor of Heidi Crawford and against Tamarack Management, Inc., on the charge that it discriminated against her because of gender (pregnant female) when it required her to commence her maternity leave effective December 27, 1999 even though she was ready and able to continue working.

2. The Department awards Crawford the sum of $275.84 and orders the corporation to pay her that amount immediately. Interest accrues on this final order as a matter of law until satisfaction of this order.

3. The Department enjoins and orders the corporation to comply with all of the provisions of Conclusion of Law No. 4.

Dated: November 13, 2001.

/s/ TERRY SPEAR
TERRY SPEAR, HEARING EXAMINER
Montana Department of Labor and Industry