

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

<b>Clairice M. Carr,</b>	)	
Charging Party,	)	HRC Case No. 0001009220
versus	)	<i>Final Agency Decision</i>
<b>IBEX Group, Inc.,</b>	)	
Respondent.	)	

**I. Procedure and Preliminary Matters**

Clairice M. Carr filed a complaint with the Department of Labor and Industry on April 12, 2000. She alleged that IBEX Group, Inc., a corporation, discriminated against her on the basis of age and marital status when it discharged her from her position as weather observer at the Miles City Airport on or about October 15, 1999. On September 15, 2000, the department gave notice of a contested case hearing on Carr’s complaint and appointed Terry Spear as hearing examiner.

The hearing examiner heard the contested case on March 8-10, 29 and 30, 2001, in Miles City, Montana. Clairice Carr attended with her attorneys, Daniel J. Sheran, Lindquist & Vennum, PLLP and Albert R. Batterman, Mackoff Kellog Law Firm. IBEX attended through its designated representative, Stephen Derrickson, with its attorneys, Michael P. Heringer and Bill D’Alton, Brown Law Firm. The transcript of hearing reflects the witnesses who testified and the exhibits offered. A copy of the hearing examiner’s docket accompanies this decision.

**II. Issues**

The issue in this case is whether IBEX Group, Inc., illegally discriminated against Clairice Carr on the basis of her age or marital status when it did not hire her in October and November 1999. A full statement of the issues appears in the final prehearing order.

**III. Findings of Fact**

1. Charging party Clairice M. Carr resides in Miles City, Montana, with her husband Lyle Carr. Their son, Joe Carr (Lyle Carr, Jr.), and their daughter, Penny Bartz, and her husband, Ken Bartz, also reside in Miles City.

2. Respondent IBEX Group, Inc., is a Florida corporation. One of its business activities is providing weather monitoring services under contracts with the Federal Aviation Administration, an agency of the United States Government. Steve Derrickson is the IBEX vice-president who runs the weather contracts.

3. Since the early 1990s, the FAA has invited bids and entered into contracts for weather observation services at seven airports in Montana, at Billings, Butte, Cut Bank, Helena, Lewistown, Livingston, and Miles City. Beginning on March 3, 1993, the FAA contracted with Weather Data, a company unrelated to IBEX, for weather observation services in Miles City for three years. The Miles City site had continuous operations, necessitating coverage 24 hours a day, 7 days a week.

4. Weather observers must have FAA certification. Ordinarily, successful completion of weather observation school is necessary to pass the FAA weather certification test. Certified weather observers are qualified to take weather observations, regardless of their length of experience. A new graduate with fresh certification is as capable as a certified observer with 30 years of experience. To maintain certification, an observer must take a verified weather observation once at least every 60 days. Verification ordinarily means that the supervising observer (OIC) at the observation site gives written approval of the observation in the documentation of it.

5. Lyle Carr managed the Miles City site for Weather Data from 1993 to 1996. He had been an FAA weather observer for approximately 30 years before Weather Data hired him. He had the authority to hire and fire, and could select his own staff. He hired Clairice Carr, Penny Bartz and Ken Bartz as some of his weather observers.

6. Clairice Carr worked as a part-time weather observer on weekends. She worked full-time during the week in a doctor's office in Miles City. She worked enough of her weekend weather observer shifts to maintain her certification. Lyle Carr worked for her on her other shifts. To avoid overtime expenses for his employer, Lyle Carr left her on the schedule, and Weather Data paid her, at her hourly rate, for the hours Lyle Carr worked but logged for his wife.

7. In 1996, the FAA awarded the next 3-year contract for Miles City weather observation services to Met-Tech, another company unrelated to IBEX. The FAA and Met-Tech formally entered into that contract effective August 5, 1996. Met-Tech employed Lyle Carr as Officer In Charge (OIC) and retained all of the Weather Data weather observers. Lyle Carr continued

his practice of working hours logged for his wife. Met-Tech paid her for those hours, at her hourly rate.

8. The FAA's long-term plan for the Montana stations was to replace the contract weather observation services with automated weather observation equipment, the Automated Surface Observation System (ASOS), as a stand-alone system. In its contracts, the FAA actually contracted for 1 year of service, with successive option years, reserving the right to terminate with notice at the end of any of the years. If the FAA believed the ASOS installation would be complete and operational at the contract site by the end of any of the years, it intended to exercise that right to terminate.

9. The FAA announced the next bidding schedule for the Miles City weather observation services contract and other such contracts throughout the region, in and out of Montana on June 29, 1999. The FAA requested bids to provide weather observation services at all seven Montana sites, including Miles City, as one unit. The seven station contract would be for 1 year, with 4 successive option years to follow. The contracts commenced October 1, 1999, after the expiration of the Met-Tech contract.

10. Bidding for the weather observation contracts was extremely competitive, with an increased number of bidders in 1999 compared to earlier years. Competitive bidding lowered profit margins. IBEX bidding strategy was to keep costs as low as possible, thereby reducing the bid amount while maintaining an acceptable profit margin. Part of Derrickson's effort to keep costs low was to determine the lowest possible projected labor costs.

11. The contracts with the FAA included compensation packages for the contractor's observers. The contractor had to honor the observers' years of employment with that contractor and the observers' continuous years of employment at their present sites. Observers without prior years of credited employment had no vacation entitlement. Observers with between one and five years of credited employment had a 2-week vacation entitlement. Observers with five or more years of credited employment had a 3-week vacation entitlement.

12. For the 1999 bid invitation, the FAA had eliminated contract clauses providing increased shift pay ("Sunday pay" and "night differential") and requirements for retention of weather observers from the prior contract ("non-displacement clause"). One of the aspects of the IBEX business strategy in bidding was to project labor costs based on hiring new employees who would have no vacation entitlement during the initial contract year, and the minimum vacation entitlement (2 weeks) during the option years. Derrickson's internal plan (which IBEX did not share with the FAA) was to

retain no employees of the prior contractor at new IBEX sites, except for employees so new that they would begin working for IBEX with no years of credited employment.

13. Derrickson anticipated transferring some existing IBEX employees to the new IBEX sites, but IBEX could then hire new observers to replace the transferred employees at the existing sites. If he transferred supervisors (OICs) from existing sites, that would permit promotion of existing employees to replace the transferred OICs. In this fashion, openings for new hires would still occur, so IBEX could maintain the minimum additional labor costs overall.

14. Derrickson also planned to keep the number of employees at each IBEX site at a minimum, to keep the costs of state unemployment tax as low as possible. In September 1999, IBEX provided the FAA with a staffing plan in which IBEX would staff the Miles City site with the minimum number of observers necessary to cover the operation. The minimum number of observers to cover a full-time (24 hours a day, 7 days a week) operation was three full-time observers and two part-time observers. Unless the two part-time observers could cover any absences for the full-time observers, a sixth observer was necessary.

15. FAA safety requirements did not prohibit the hiring and staffing strategies Derrickson developed on behalf of IBEX. Since the FAA was effectively eliminating the need for the contractors, it had little leverage to require that all bidders incorporate a higher labor cost to obtain and keep more experienced observers and OICs.

16. Eight companies bid on the 1999 solicitation for the Montana sites. IBEX submitted the lowest bid. In September, the FAA notified IBEX that it was the low bidder, obtained confirmation of the bid amount from IBEX, and began the paperwork to formalize the contracts for the seven sites. The FAA asked Met-Tech to extend its contracts to November 1, 1999, and told IBEX it would not commence its contracts until November.<sup>1</sup>

17. Met-Tech declined to extend its contracts. At 10:00 a.m. on September 30, 1999, IBEX received notice that it had been awarded the

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<sup>1</sup> Usually the FAA gave a contractor 15 days to a month to place its own employees on a site, with a 48 hour transition period during which both the prior and the new contractor are present at the site. In this instance, the FAA mistakenly failed to send the announcement to bid on the Montana sites to Met-Tech as the incumbent weather contractor. Because of this oversight, the FAA extended the solicitation for an extra week, which shortened the FAA's time for evaluation of the bids. The end result was a late announcement of the contract awards and a very limited time for a transition before the effective date of October 1, 1999.

contract for the Montana site and that it would be starting its contracts at 12:01 a.m. on October 1, 1999.

18. In September 1999, Clairice Carr still worked part-time as a weather observer on weekends and full-time in the doctor's office during the week. She shared weekend shift assignments with Joe Carr, Ken Bartz, Rita Fisher and Lynne Brush. She still worked enough shifts to maintain her certification and received the wages for all of her scheduled shifts, the rest of which her husband worked and logged as hers.

19. On September 30 and October 1, 1999, Derrickson did not have time to replace the existing employees at the seven sites. IBEX had already placed position announcements on the Internet to recruit new observers, but Derrickson could not find, screen, hire and place enough new observers without more lead time. He called the sites and asked the current OICs to remain temporarily and to retain the existing Met-Tech observers on the same basis. He also asked for faxed resumes of the Met-Tech observers. Derrickson considered the temporarily employees to be applicants for jobs with IBEX, subject to the hiring decisions he would now make.

20. On October 4, 1999, Derrickson hired Evelyn Moyer as the OIC at the Miles City site, effective October 18, 1999. Before 6 months of unrelated employment from March to October 1999, Moyer taught weather observation at a Met-Tech weather school in Helena, Montana for 4 years. She was a certified weather observer.<sup>2</sup> She was qualified to be the OIC. She was in her early 50s at the time.

21. On October 5, 1999, IBEX received the faxed resumes of the Miles City site Met-Tech observers. Upon receipt of those resumes, Derrickson had sufficient information to infer that Clairice Carr's spouse was Lyle Carr.

22. Derrickson had little interest in retaining any existing employees and incurring additional labor costs. Because of the lack of adequate time on September 30 to recruit new employees, he presented the appearance of interest, to keep enough observers working to maintain services until he could replace the existing employees. Derrickson also discovered that he could not draw on a large pool of observers interested in working at the Montana sites. He had more difficulty than he had projected in finding new hires and internal transfers to staff the sites. Initially, he had no new hires or internal transfers available for the Miles City site, aside from Moyer.

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<sup>2</sup> Met-Tech allowed her to conduct periodic observations and keep her certificate current during her unrelated employment.

23. Upon receiving the faxed resumes of the Met-Tech observers at the Miles City site, Derrickson looked at each one to see if the observer was certified and how long he or she had been at the site. When he looked at Clairice Carr's information, Derrickson saw that she had more than five years' employment at the site. He decided not to hire her. Derrickson did not know Clairice Carr's age when he made the decision not to hire her. He decided not to offer her a position within minutes after receiving the faxed resumes on October 5, since he based his decision upon the number of years at the site and the certificate number verifying the applicant was certified. His decision was unrelated to her age and marital status.

24. Clairice Carr, because of her part-time status, did not have 5 full years of service in October 1999, and her vacation entitlement was a pro rata share of a full-time employee's entitlement. Because Derrickson was hurrying to staff sites IBEX was already responsible for operating, he did not take the time to verify her precise entitlement. He relied solely upon the length of time she had worked at the stations, according to the faxed resumes.

25. Derrickson addressed observer placement at the seven weather observation sites in Montana by addressing each site in turn, working from west to east, beginning with the Cut Bank site and ending with the Miles City site. On October 6, after calling to place observers for the other six Montana sites, Derrickson chose the Miles City site observers IBEX would hire, then called them and offered them positions. As soon as he filled the minimum number of positions necessary to staff the observation site, he ceased consideration of employing the existing Met-Tech observers.

26. Lyle Carr's October 1999 schedule assigned shifts to Clairice Carr after IBEX assumed operation of the Miles City site. Clairice Carr did not actually work at the observation site in October 1999. Other observers worked her assigned shifts in early October. Their substitutions appeared on the schedule and IBEX paid them for those shifts. IBEX did not employ Clairice Carr at the observation site, and did not pay her for observations taken in her name.

27. Derrickson terminated Lyle Carr's employment as OIC on October 12, 1999. He retained another former Met-Tech weather observer at the Miles City site, Hal Spry, as acting OIC. Spry had 4 months of observation experience and no prior experience as a manager or OIC, which was not sufficient to qualify him as an OIC. Derrickson knew that Moyer would be taking over from Spry within a few days, and acted on that basis.

28. Lyle Carr expected the termination of his employment. He had heard from observers, including OICs at the other Montana sites who already

had been relieved of their jobs. When Derrickson terminated his employment on October 12, 1999, Carr responded by threatening to take legal action against IBEX. Carr also told Derrickson that he would write Representative Hill, Senator Burns, Senator Baucus and Governor Racicot, reporting his perceptions of IBEX's improper operation of the Miles City site. Subsequently Carr wrote the letters and made various civil and administrative claims against IBEX.

29. On October 15, 1999, Derrickson gave Clairice Carr written notice that IBEX would not hire her. Derrickson had hired Brush and Fisher, two other part-time Met-Tech observers, to work 12-hour shifts on weekends. Neither Fisher nor Brush was related to Lyle Carr. Both Fisher, in her mid-30s, and Brush, at 38, were younger than Clairice Carr, who was 59.

30. By October 15, 1999, in addition to Moyer, IBEX had hired Spry, Brush, Fisher and Karen Hathaway, all Met-Tech employees as of September 30, with less than 5 years of employment at the Miles City site. Derrickson had also arranged for Randy Tillery to work temporarily at the Miles City site. Tillery had previously worked as an observer at the Miles City site but was working in Cut Bank at the time IBEX assumed the operations at the Montana sites. Tillery was unrelated to the Carr family and had no applicable years of employment at the Miles City site. All of the Met-Tech employees at Miles City that IBEX did not hire were members of the Carr family: Clairice and Lyle, Penny and Ken Bartz and Joe Carr.

31. Moyer arrived in Miles City on October 17, 1999, and began work as the OIC at the Miles City site the next morning.

32. On October 18, 1999, Lyle Carr came to the Miles City site, accompanied by Penny Bartz. Carr demanded to see Moyer's weather observation certificate. Her certificate had not arrived at the site. Carr, who behaved angrily during this visit, grabbed the October schedule he had prepared (which was still posted at the site) and left, taking the schedule with him.

33. After he visited the site on October 18, Lyle Carr contacted the National Weather Service and reported that he did not believe Moyer was a certified weather observer.<sup>3</sup> He also asked the National Weather Service

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<sup>3</sup> Carr knew that Moyer's certification had to be sent to the National Weather Service, for forwarding to Miles City, and had no reasonable basis for expecting that her certification would be available at the Miles City site or for concluding that the absence of the certificate indicated she was not properly certified.

whether Tillery had the proper certificate to work temporarily at the Miles City site.

34. Moyer created a new schedule for the Miles City site. She scheduled herself, Spry and Hathaway to work the three 8-hour shifts during the week, with Brush and Fisher working 12-hour weekend shifts. Tillery no longer worked at the site. This minimum staffing level was sufficient, but allowed no flexibility in scheduling.

35. Moyer wanted some additional flexibility in scheduling, and also wanted some assistance in carrying out her payroll and scheduling duties. Moyer knew that Penny Bartz had experience Moyer lacked with payroll and scheduling, in addition to being certified. Penny Bartz had also been friendly toward Moyer during the hostile visit to the observation site on October 18 by Lyle Carr. Penny Bartz had expressed sympathy to Moyer, because she knew that Moyer was in a difficult situation. Moyer believed Penny Bartz might be willing to work for IBEX despite her father's hostility toward the company. She requested permission from Derrickson to hire Penny Bartz as another observer. Derrickson authorized the hire at Moyer's urging.

36. Less than two weeks after Moyer assumed her duties as OIC at the Miles City site, National Weather Service representative Danny Graves arrived to conduct a station inspection. Although several of the observers working at the site knew the inspection was coming, no one had informed Moyer. Lyle Carr knew the inspection was coming, and likewise never informed Moyer.

37. Lyle Carr had hired and trained all of the observers under Moyer's supervision. He kept in contact with them, encouraging them to share with him questions and complaints they had about Moyer or IBEX. Moyer found the working environment difficult and often hostile. By the beginning of November, Graves returned a second time to the Miles City site, to confiscate training materials from Spry and to accuse Moyer of obtaining and providing observer test materials to Spry. The accusation was unfounded.

38. Moyer decided to take a job as an observer at a Nevada site. Moyer reasonably believed that Graves had a long-standing working relationship with the Carr family and that the selection of Penny Bartz as OIC would relieve the hostility Graves and the other observers at the site were directing toward IBEX. She recommended Penny Bartz to Derrickson, who authorized Moyer to promote Bartz to OIC. Moyer attempted on November 5 and 6, 1999, to persuade Penny Bartz to accept the OIC position, and ultimately succeeded. Bartz accepted the position and began on November 8, 1999. Derrickson agreed to Bartz' vacation entitlement based upon more than five years of employment at the Miles City site.



39. Her first day as OIC, Penny Bartz told Derrickson that she needed additional observers to cover the site operations, and suggested that Derrickson probably would not let her hire her father, mother and brother. Derrickson did not agree that any additional observers were necessary and did not agree to any new hires. His decision was not motivated by Clairice Carr's age and marital status. Bartz did not again request permission to hire Clairice Carr.

40. After IBEX hired Penny Bartz as OIC, Derrickson was not aware of any further problems at the Miles City site.

41. In November 1999, after Penny Bartz became OIC, Graves called Lyle Carr at his home and advised him that Graves would come to the Miles City site on November 23 for another inspection. Graves asked Carr to relay this to his daughter, the new manager (or OIC). Penny Bartz did receive warning that Graves was coming for an inspection before he arrived, and was able to prepare for the inspection, in which Graves found the station satisfactory.

42. From December 1999 through hearing, Bartz made recommendations to Derrickson about new hires. Derrickson followed all of Bartz's recommendations. Bartz never recommended Clairice Carr for any position at the Miles City site.

43. In December 1999, Penny Bartz hired her husband, Ken Bartz, age 42, to work part time on weekends as an observer at the Miles City site. Derrickson approved the hire, at the urging of Penny Bartz.

44. In March 2000, Penny Bartz hired Mary Lou Whittenberg as an observer at the Miles City site. Whittenberg was in her early 30s at the time. Derrickson authorized the hire.

45. In April 2000, the Human Rights Bureau forwarded copies of documents the Carrs had submitted regarding IBEX, including written complaints Lyle Carr had collected from other Montana observers in October and November 1999. IBEX had not previously known about this part of Carr's continuing campaign against it.

46. Derrickson allowed Penny Bartz to train four new people: Whittenberg and three other new hires (Dave Jones and two others whose names she could not recall) after she hired them. Bartz provided information regarding date of birth and ages of new hires, along with other pertinent information necessary for payroll, to the IBEX employee responsible for payroll and personnel, not to Derrickson.

47. Clairice Carr never reapplied for a position with IBEX. Penny Bartz never asked Clairice Carr whether she wanted to come back to work for IBEX.

48. In June 2000, Penny Bartz hired Sherry Tibeau as an observer at the Miles City site. Tibeau was in her early 30s at the time. Derrickson was not aware of the hire.

49. In August 2000, Derrickson discovered that Penny Bartz was permitting Clairice, Lyle and Joe Carr to conduct periodic weather observations at the Miles City Station, verifying those observations as OIC. Bartz was thereby helping her parents and her brother to maintain their certifications. Derrickson instructed her not to permit anyone but IBEX observers to perform observations at the site. He further instructed her to forward the weather observer certificates for any observers IBEX did not employ to the Salt Lake City National Weather Service office. He gave these directions based upon his understanding of the requirements for observations and retention of certificates. His instructions were not motivated by Clairice Carr's age and marital status.

50. In August 2000, Penny Bartz hired Chuck Arnoldy as an observer at the Miles City site. Derrickson was not aware of the hire.

51. In September 2000, Penny Bartz hired Kay Baxter as an observer at the Miles City site. Derrickson was not aware of the hire.

52. In March 2001, IBEX employed 7 weather observers at the Miles City site. Penny Bartz, OIC, and Hathaway were full-time observers, while Tibeau, Whittenberg, Fisher, Ken Bartz and Arnoldy were part-time observers.

53. The FAA proceeded with implementation of ASOS at the seven Montana sites. It anticipated discontinuing manual observations at the stations in the Fall of 2000. However, problems arose after installation of ASOS equipment. Since October of 2000, Midwest Weather assumed responsibility over weather observations in Helena and another contractor (with a business name of "SAW") assumed that responsibility in Billings.

54. Problems with the ASOS equipment at the Miles City site caused the FAA to extend the IBEX contract to March 31, 2001. As of hearing, the end of manual observation under the IBEX contract was scheduled to occur on April 1, 2001. IBEX gave notice that it would terminate the employment of all the Miles City site observers as of April 1, 2001. The FAA also intended to shut down the manual observation contracts at Butte, Cut Bank, Lewistown, and Livingston weather information sites effective April 1, 2001. IBEX gave

the weather observers at those sites notice that it would terminate their employment as of April 1, 2001.<sup>4</sup>

#### IV. Opinion

The Montana Human Rights Act prohibits refusal of employment to a person because of age or marital status. §49-2-303(1)(a) MCA. Clairice Carr alleged IBEX denied her employment on both bases.<sup>5</sup> She had no credible direct evidence of discriminatory animus due either to her age or her marriage to Lyle Carr,<sup>6</sup> so her claims are subject to the indirect evidence analysis.

The HRA prohibitions of discrimination mirror those of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Where there is no direct evidence of discrimination, Montana utilizes the three-tier standard of proof from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).<sup>7</sup>

The first tier of *McDonnell Douglas* required Carr 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.

*McDonnell Douglas*, *op. cit. in note 7*.

The *McDonnell Douglas* standard of proof is flexible rather than rigid.

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<sup>4</sup> Carr argued that Senator Baucus had presented a bill to Congress to keep open the manual stations in Montana. That bill was pending but not enacted when this hearing closed.

<sup>5</sup> Carr also argued that she was an IBEX employee who lost her job, but the evidence did not support her claim of employee status with IBEX, so only the claim of discriminatory refusal to hire is further addressed.

<sup>6</sup> Carr presented testimony that Derrickson expressed discriminatory motives in statements to various witnesses, but the testimony was not credible and did not support any findings of such discriminatory motive.

<sup>7</sup> *E.g.*, *Vortex Fishing Systems, Inc. v. Foss*, 308 Mont. 3, 2001 MT 312, \_\_\_ P.2d \_\_\_, 2001 WL 1667255 (12/31/01); *H.A.I. 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 S.D.*, 226 Mont. 134, 734 P.2d 209 (1987); *European Health Spa v. H.R.C.*, 212 Mont. 319, 687 P.2d 1029 (1984); *Martinez v. Yellowstone Co. Welf. Dept.*, 192 Mont. 42, 626 P.2d 242, 246 (1981).

The four elements will not woodenly apply to every claim, but instead adapt to the nature of the proof proffered.<sup>8</sup>

For her age discrimination claim Carr needed to prove that (1) she was older than persons IBEX hired instead of her and IBEX knew it; (2) she was qualified to work as a weather observer at the Miles City site; (3) despite her qualifications IBEX did not hire her and (4) the younger persons IBEX hired had substantially equal or inferior qualifications.

For her marital status discrimination claim Clairice Carr needed to prove that (1) her marital status (the identity of her spouse<sup>9</sup>) was known to IBEX; (2) she was qualified to work as a weather observer at the Miles City site; (3) despite her qualifications IBEX did not hire her and (4) the persons IBEX hired had substantially equal or inferior qualifications.<sup>10</sup>

Assuming *arguendo* that Derrickson could see from Carr's resume that she was available for weekend part-time work, Derrickson clearly could not have known at that time that Carr worked far less often than the Met-Tech schedules indicated. Lyle Carr's information sheet noted over 35 years of work experience before commencing his 6 ½ years at the Miles City site. Derrickson could have inferred that Carr was Lyle Carr's spouse and therefore might be of comparable age and thereby older than her co-workers. Therefore, Clairice Carr established a prima facie case with regard to the October 15, 1999, decision by IBEX not to hire her. Derrickson considered and rejected Carr for a weekend position, and hired two of her younger colleagues, who had no better qualifications than Carr and were not married to Lyle Carr. Derrickson could not at any time have considered Clairice Carr for the OIC position or other full-time observer openings, since Carr already had a full-time job.

Carr's proof of her prima facie case raised an inference of discrimination regarding the October 15 decision, shifting the burden to IBEX. IBEX met

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<sup>8</sup> *Cf.*, *Martinez, supra, citing Crawford v. Western Electric Company, Inc.*, 614 F.2d 1300 (5<sup>th</sup> Cir. 1980) (fitting the first tier elements of *McDonnell Douglas* to the allegations and proof of the particular case).

<sup>9</sup> Marital status discrimination under the Act includes disparate treatment by the employer because of the identity of the spouse. *Thompson v. Harlem School District No. 12*, 192 Mont. 266, 270, 627 P.2d 1229, 1231 (1981); *see also European Health Spa, supra* (affirming award for marital status discrimination for discharge of employee due to spouse's identity and conduct); *Matteson v. Prince, Inc.*, HRA No. 9901008658 (Sept. 27, 1999); *Perez v. Lionhead Resort*, HRA No. 9801008270 (May 5, 1999); *Van Haele v. Hysham School District No. 40*, HRC No. 9301005671 (April 1, 1996).

<sup>10</sup> The persons IBEX hired could not share her pertinent marital status, that of being married to Lyle Carr.

that burden of production of evidence by articulating “some legitimate, nondiscriminatory reason for [Carr’s] rejection.” *McDonnell Douglas*, *op. cit.* at 802. IBEX satisfied the requirements of this second tier of *McDonald Douglas*. It met Carr’s prima facie case by presenting a legitimate reason for its decision to hire fewer and less experienced observers. That legitimate reason entailed the extra costs of Carr’s vacation entitlement and the extra administrative expenses if IBEX hired more than the minimum employees needed to operate the site. Derrickson was able to staff the Miles City observation site without initially hiring any more experienced observers with full vacation entitlements. IBEX’s legitimate business reason evidence put Carr’s prima facie case at issue. *See, Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255-56, (1981); *e.g., Vortex Fishing Systems*, *op. cit.* [at note 6]; *Hafner v. Conoco, Inc.*, 268 Mont. 396, 404, 886 P.2d 947, 952 (1994); *Johnson*, *op. cit.* [at note 6], 734 P.2d at 212.

After IBEX produced a legitimate, nondiscriminatory reason for its actions, Carr had the opportunity to prove, by a preponderance of the evidence, that the legitimate reasons offered by IBEX were only a pretext for discrimination. *Vortex*, *supra*; *Hafner*, *supra* at 405, 886 P.2d at 953.

Carr argued that since she worked part-time, she had a lower vacation entitlement than other employees with five years of service at the site. Therefore, she contended, IBEX’s claim of increased vacation expense was pretextual. Carr did not prove she had equivalent or smaller vacation entitlements than the Met-Tech employees IBEX hired in October 1999 as part-time observers (Brush and Fisher). Additionally, Derrickson had good reason, in mid-October, to complete the hiring decisions as soon as possible. His reliance upon the time of service appearing on the face of the information sheets provided by Lyle Carr and his failure to make inquiry into Carr’s precise vacation entitlement was reasonable.

Carr also argued that Derrickson gave prior inconsistent statements during the investigation. The evidence established only that Derrickson was brusque and hostile during the investigation, not that he gave inconsistent statements. He told the Human Rights Bureau Investigator that he did not hire Clairice Carr because he did not have enough openings to include her. He subsequently told her, during a follow-up, that he had “no reasons” aside from those already provided. From the actual evidence, the hearing examiner could not conclude that Derrickson gave false reasons during investigation, or failed to disclose the reasons given at hearing (suggesting recent fabrication). Carr failed to establish pretext on the basis of alleged false justifications.

Carr argued that every subsequent hiring decision was another rejection

of her, but the facts do not support her argument that such an analysis establishes discriminatory motive. The only other time that Derrickson actively considered hiring Clairice Carr was when Penny Bartz, new OIC at the site, asked if he would consider allowing her to hire her mother, Clairice Carr, as well as her father and her brother. Derrickson refused to authorize any hiring at that time, because he wanted to keep staffing at a minimum level. Since IBEX engaged in no hiring at that time, Carr failed to establish a prima facie case regarding that November 1999 decision.

After November 1999, the only hiring decisions involving IBEX and Derrickson were made based on Penny Bartz' recommendations. She never recommended her mother. Derrickson relied upon her recommendations for hiring decisions known to him.<sup>11</sup> He even permitted her to hire her husband for a part-time position. There is no evidence, circumstantial or otherwise, that Penny Bartz discriminated against her mother due to age. If, as she contended during her testimony, Penny Bartz did not again seek to hire her mother because of Derrickson's prior refusal to authorize such a hire, the business reason (vacation entitlement) previously interposed properly applied. Further, after Derrickson relented and permitted hiring of her husband, Bartz could have recommended her mother for one or more of the subsequent spots that Derrickson authorized her to fill. She did not, and the record is devoid of credible evidence regarding why she did not.<sup>12</sup>

Carr offered the statement in Derrickson's letter of October 15, 1999, about keeping Carr's resume on file for future openings, as evidence that all future decisions were rejections of her. The decisions IBEX made regarding those future openings were justified, based upon Bartz' recommendations and the business reasons already advanced. Failure to consider Clairice Carr for those positions was not discriminatory. It was reasonable for Derrickson to rely upon his OIC for hiring recommendations. There is no evidence that Penny Bartz had a discriminatory motive in making those recommendations. There is no credible evidence that Derrickson displayed such a strong animus toward Clairice Carr that Bartz reasonably concluded she could not recommend hiring her mother at any time.

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<sup>11</sup> IBEX could not have discriminated against Carr when Bartz hired additional help without Derrickson's authorization. While Penny Bartz apparently decided to return to the staffing patterns her father had used, without telling her employer, she certainly did not have a discriminatory motive for not hiring her mother.

<sup>12</sup> A valid non-discriminatory reason for the failure of Bartz to hire her mother may have been that Clairice Carr preferred to continue her pattern of working at most one weekend 8-hour shift every two weeks, averaging only one such shift a month.

Although Carr argued vigorously and capably that choosing less experienced observers was unsafe and contrary to good practice, she failed to prove those arguments by the substantial and credible evidence of record. Although she proved that Lyle Carr embarked upon a campaign against IBEX after the October hiring decisions, she failed to prove that IBEX made any adverse employment decisions about her because of her husband's campaign.

The evidence of record did not support the argument that the practice of hiring less experienced qualified observers had a disparate impact upon older observers at the site. Carr did not argue or cite legal authority for the premise that such proof would establish illegal age discrimination. Such a claim failed on the facts and the law.

Loyalty to a competitor's long-time employees when acquiring an operation does not "trump" business necessity. IBEX presented a plausible explanation for selecting the less experienced observers. The choice the corporation made may have been repugnant to the community, but it was not illegal discrimination.

## V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. IBEX Group, Inc., did not illegally discriminate against Clairice Carr by reason of her age or marital status when it chose not to hire her as a weather observer at the Miles City site on October 15, 1999, and thereafter. §49-2-507 MCA.

## VI. Order

1. Judgment is found in favor of respondent IBEX Group, Inc., and against charging party Clairice M. Carr on the charge that respondent discriminated against charging party on the basis of age and marital status when it discharged her from her position as weather observer at the Miles City Airport on or about October 15, 1999 and thereafter.
2. The department dismisses the complaint.

Dated: January 25, 2002

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner  
Montana Department of Labor and Industry