

1999, and taking adverse employment actions against him because of his marital status culminating in his discharge on February 28, 2000.

The contested case hearing proceeded on May 7 through May 9, May 18 and May 22 through 25, 2001, in Butte, Montana. Paula Sue Gummer and Jay Gummer attended with counsel, Gregory C. Black, Corette Pohlman & Kebe. The corporate respondents attended through their designated representatives, Ben Brown, Sr., Pat Evenson and Ben Brown, Jr., with counsel, Mark D. Parker and Casey Heitz, Parker Law Firm. Jay Gummer, Paula Sue Gummer, Judy Winscot, Dana Bowers, Ben Brown, Jr., Pat Evenson, Ben Brown, Sr., Bruce Hemphill, Bobby Moreno, Al Smith, Jill Talbot Brown, Mark Hamblin, Anthony Fields, Erik Nelson, Rob Birkle, Tim Birkle, Justin Amann, Seanna Brown, Darryl Smith, Renzel Crane, and LaVere Gookin testified at hearing. Mark Clark testified by deposition. The parties agreed by telephone on May 31, 2001, that the evidentiary record was complete. The hearing examiner so ordered, and dismissed FNP, Inc., for the consolidated cases. The hearing examiner's exhibit and file dockets accompany this decision.

II. Issues

The issue in this case is whether any of the respondents took adverse employment actions against the charging parties because of their marital status or sex. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. In 1982, Benjamin L. Brown, Sr. (Ben Brown) started a small pawnshop in Billings, Montana. In the following years, Ben Brown and members of his family together with his friends and business associates formed a number of related corporations which acquired or opened and then operated pawnshops in Montana and other states. The respondents in these consolidated cases are among those corporations. The corporations applied principles of uniform accounting practices, customer service and business policy to the pawnshops using the service mark "First National Pawn."

2. FNP, Inc. is a Montana corporation filed of record on December 16, 1993. It does business as First National Pawn. It owns and operates one pawnshop in Glendive and one pawnshop in Laurel. Its officers are Ben Brown and Benjamin L. Brown, Jr. (Benny Brown), one of Ben Brown's sons. Its sole director and shareholder is Ben Brown.

3. First Montana Pawn, Inc. is a Montana corporation filed of record on March 14, 1994. It does business as First National Pawn. It owns and operates two pawnshops in Billings. Its officers are Ben Brown and Benny Brown. Its sole director and shareholder is Ben Brown.

4. Golden Triangle, Inc. is a Montana corporation filed of record on September 7, 1994. It does business as First National Pawn, and owns one pawnshop in Billings and one in Great Falls. Its officers are Ben Brown and Pat Evenson. Its directors and shareholders are Ben Brown, Pat Evenson, Dan Evenson and Jennifer Evenson.

5. First National Pawn, Inc. is a Montana corporation filed of record on July 6, 1999. It does business as First National Pawn. Its officers, directors and shareholders are Pat Evenson, Benny Brown and Seth Brown.

6. All four respondent corporations are affiliated, interrelated entities. They share common corporate offices in Billings, Montana, use common corporate employees, and are commonly administered and operated. Ben Brown serves as a consultant to all of the corporations which do business as First National Pawn, including First National Pawn, Inc., for which he is a creditor instead of an owner.

7. At all times pertinent to these consolidated cases, both First Montana Pawn, Inc., and Golden Triangle, Inc., employed Benny Brown and Pat Evenson. In 1999 and 2000, Golden Triangle, Inc., and First Montana Pawn, Inc., employed Ben Brown.²

8. In late 1997, First Montana Pawn, Inc., bought the assets of Silver Bow Sales, a corporation which owned three pawnshops, two in Butte and one in Bozeman. At some point after the purchase, FNP, Inc., obtained ownership and began operating these three pawnshops. FNP, Inc., began implementing changes in order to conform these stores' operations to those of other First National Pawn stores. Although ownership of FNP, Inc. was entirely Ben Brown's, the Butte and Bozeman stores have always been primarily the concern of Benny Brown and Pat Evenson.

9. Corporate employees visited the three stores and told all existing employees that they would be retained for a 90-day probationary period, with

² Benny Brown testified that in 2000 Golden Triangle, Inc., became the entity that paid all employees of the various corporations. His testimony was not entirely clear regarding whether all employees of the various corporations became employees of Golden Triangle, and that question of fact (and perhaps law as well) is not relevant to the outcome of this contested case. Therefore, the hearing examiner has followed the uncontested facts for this finding.

raises and other benefits consistent with the salary and benefit structure of First National Pawn operations. The two Butte stores acquired from Silver Bow Sales were on Harrison Street (the downtown store) and Montana Street (the uptown store). Tim Birkle was the manager of the downtown store for First National Pawn. His brother, Rob Birkle, managed the uptown store for First National Pawn.

10. Jay Gummer was among the existing employees retained for a 90-day probationary period. He had been an employee of Silver Bow Sales for approximately 10 years prior to the sale of its three stores in 1997. He worked as a pawnbroker at the downtown store at the time of the change of ownership. Although he had worked for Silver Bow Sales as a manager, he was not a manager at the time of the sale of the stores to First National Pawn. After the sale, he was under the management of Tim Birkle.

11. Employees of First National Pawn who showed responsibility and earned the confidence of the manager could earn “key and code” responsibilities. With “key and code” an employee could open and close the store, and was on the list of employees to contact in an after-hours emergency (break-in or fire, for example). There was additional work involved for an employee with key and code responsibilities. Jay Gummer was initially a “key and code” employee at the downtown Butte pawnshop after First National Pawn began operating the pawnshop in 1998.

12. Tim Birkle prepared a written evaluation of Jay Gummer at the end of his probationary period (approximately April 1998). On all individual performance items, Birkle rated Gummer “fully successful” or better. However, throughout the multi-page evaluation, Birkle noted that Gummer did not want to have any increased responsibilities. He noted that Gummer turned problems over to the manager without attempting to address them himself, but that he complained about problems to other employees instead of discussing his complaints with the manager. Jay Gummer reviewed and signed this evaluation.

13. Tim Birkle allowed his employees more leeway in the discharge of their duties than Rob Birkle did. At the end of the 90-day probationary period, Rob Birkle recommended the discharge of two employees at the uptown store, Dale Gummer (Jay Gummer’s brother) and Brian Hemphill. Tim Birkle retained all his employees, including Jay Gummer and Brian Hemphill’s brother, Bruce.

14. Ben Brown and Jay Gummer had met before First National Pawn acquired the stores. They had disliked each other from their first meeting, and their mutual antipathy grew over time. Ben counseled against keeping Jay,

because he considered Jay difficult to manage. The corporation relied upon the recommendations of its store manager, Tim Birkle, and retained Gummer.

15. In 1998, First National Pawn made numerous changes from the manner in which Silver Bow Sales had run the pawn shops in Butte. The former Silver Bow Sales employees resisted many of the changes instituted by First National Pawn. First National Pawn sought input from the employees about the changes, and Jay Gummer was vocal and outspoken in opposition to the changes.

16. First National Pawn sought employees interested in advancing within the corporations. The corporations worked cooperatively to expand the total number of pawnshops open and operating under the First National Pawn service mark. Within an expanding operation, they considered ambitious employees willing to take on more responsibility and even move to other stores to be assets. While employees content to remain in their current jobs in their current locations were not necessarily liabilities, such employees typically were not interested in more responsibilities and often were not happy with the smaller raises that came with no advance in position except another year's seniority. Thus, ambitious employees willing to work harder and do more as part of their effort to advance were more valuable than employees who wanted only to put in their time and collect their checks without expending any extra effort or demonstrating any initiative.

17. Jay Gummer did not want to advance within the First National Pawn operation. He resisted and criticized the changes from the Silver Bow Sales methods of doing business. One of the changes he was most vociferous about was First National Pawn's unwritten policy that when an item is pawned, it must be redeemed or repawned within the 30-day pawn period or the 3-day grace period or become inventory when the business opens on the fourth day. As soon as an item became inventory, First National Pawn's policy was to place the item in the customer access portion of the store so it was available to buy. Silver Bow Sales had accorded more leniency to its regular customers than First National Pawn, leaving items in the back portion of the stores out of sight of prospective purchasers beyond the grace period at the customers' requests. First National Pawn's absolute rule (with an exception for tools in pawned toolboxes) made no sense to Jay Gummer, who considered the rule an example of how rigid and unreasonable First National Pawn's management approach was. He expected the new ownership's policies to drive away business and lead to failure in the Butte stores.

18. Jay Gummer resented the new operation's insistence that he and all the other employees do more work. He thought that he knew more about the

pawnshop business in Butte than the Browns and Pat Evenson. He voiced his belief regularly and pointedly. As one of the most senior members of the workforce in the Butte stores, he had some influence on the attitudes of his fellow employees. His influence was not positive. However, he was an experienced and competent pawnbroker, and got along well with the customers.

19. In November 1998, Tim Birkle prepared another evaluation of Jay Gummer. He rated Gummer “marginally successful” in one category, and overall gave slightly lower ratings on individual performance items. Nonetheless, Gummer’s average score was still in the “fully successful” range. There were no negative comments on the evaluation. Jay Gummer received a Christmas bonus for 1998 and a raise in pay for 1999.

20. Early in January 1999, Coral Harvey, a mutual friend of Ben Brown and Paula Sue Gummer,³ told Brown that Paula Sue Gummer needed assistance in finding employment. Paula Sue Gummer had gained notoriety in the Billings area when her husband had murdered her lover (a co-worker of Paula Sue’s) the previous year. After divorcing her husband, who was in prison, she was seeking new employment.

21. Ben Brown told Coral Harvey that he would consider hiring Paula Sue Gummer. She then called him and they met. Ben Brown decided to hire her, and arranged for her to interview at the corporate headquarters for all of the First National Pawn corporations.

22. The other officers of the various First National Pawn corporations did not want to hire Paula Sue Gummer, because of the adverse publicity she had received. Benny Brown and Pat Evenson, two other principal corporate officers and owners, warned Ben about potential trouble. Benny Brown suggested that his father pursue any romantic interests toward Paula Sue Gummer without hiring her. Ben Brown ultimately prevailed, and First National Pawn hired her as a pawnbroker and inventory supervisor. She began work on January 11, 1999.

23. As an inventory supervisor, Paula Sue Gummer traveled to the various First National Pawn locations throughout Montana to perform inventories in the stores. When not traveling she worked as a pawnbroker in the Billings Heights store in Billings. Her corporate employer was Golden Triangle, Inc.

³ Paula Sue Gummer was also known as Paula Sue Fields and Paula Sue Woods. For consistency the hearing examiner refers to her as Paula Sue Gummer throughout the decision.

24. First National Pawn corporations hire all new employees for a 90-day probationary period. Paula Sue Gummer began at \$1,250.00 per month, the normal beginning wage rate for a new employee of First National Pawn. Once she had completed her probationary period, First National Pawn paid most of the premiums for her health care insurance and all of the premium for her term life insurance, she received a raise to \$1,500.00 per month. After one year of employment, she would have become eligible to participate in First National Pawn's 401(k) plan.

25. Shortly after Paula Sue Gummer began working for Golden Triangle, Inc., she and Ben Brown began a social relationship that ultimately included consensual sexual relations. Each claims to have ended the relationship despite the other's desire for it to continue. After the relationship ended, Ben Brown stayed in friendly contact with Aaron Fields, one of Paula Sue Gummer's two teenage children, with whom he had developed a friendship. Paula Sue Gummer and Ben Brown struggled to maintain "friendly" communications because they were still in contact due to business.

26. The personal relationship between Ben Brown and Paula Sue Gummer had ended by the end of her probationary employment period in mid-March 1999. She continued working as an inventory supervisor and pawnbroker. While conducting inventories at the Butte stores on March 31 and April 1, 1999, she met Jay Gummer for the first time at the downtown store. She began a social relationship with him while in Butte completing the inventory.

27. Paula Sue Gummer told Ben Brown shortly after she began her social relationship with Jay Gummer that in Jay she "had met the most wonderful man in the world." Ben Brown told her that she could not have made a worse choice in men and that Jay was a hick, a red neck, a bully and no role model for her children. Paula Sue Gummer shared Ben Brown's comments with Jay Gummer.

28. In April 1999, after Paula Sue Gummer's initial conversation with Ben Brown about Jay Gummer, Ben Brown came into the back of the Billings Heights store when Paula Sue Gummer was working there and accused her and another employee, LaVere Gookin, of playing "grabass." The term had no sexual connotations, but meant goofing off on company time. An angry argument between Paula Sue and Ben ensued. After Gookin left the room, Ben Brown told Paula Sue Gummer that if she married Jay, she was marrying someone who would not be advancing within the company. The tone and the manner of the statement suggested that Paula Sue would not marry Jay

Gummer if she wanted to advance within the company. Paula Sue Gummer shared Ben Brown's comments with Jay Gummer.

29. In May 1999, after Tim Birkle's transfer to another locale, Rob Birkle became the district (or regional) manager of the three former Silver Bow Sales pawnshops in Butte and Bozeman. Bobby Moreno became the uptown store manager and Bruce Hemphill became the downtown store manager. Jay Gummer continued to work as a pawnbroker in the downtown store.

30. Jay Gummer and Paula Sue Gummer married on May 15, 1999.

31. On May 27, 1999, Paula Sue Gummer received an annual evaluation from First National Pawn. She received two individual performance ratings of "marginally successful," with the other twelve individual ratings at or above "fully successful."

32. Paula Sue Gummer requested a transfer to work as a pawnbroker in one of First National Pawn's stores in Butte, indicating she would seek other employment if she could not transfer. First National Pawn agreed to her transfer request. Paula Sue moved to Butte and transferred to the uptown store in Butte during the first week of June 1999. She worked part-time as a pawnbroker, and continued traveling and performing inventory work for the First National Pawn stores in Montana.

33. In June 1999, at one of the two Billings First National Pawn pawnshops, Paula Sue Gummer was doing inventory. While talking with Paula Sue Gummer, Ben Brown put on a cowboy hat, stuck out his stomach and stated, "My name is Jay Gummer and I have a trophy on my arm," referring to Paula Sue. Through the rest of the summer and into the fall of 1999, conversations between Ben Brown and Paula Sue Gummer continued to involve Paula Sue's comments about how wonderful Jay Gummer was, and Ben Brown's comments about how awful Jay Gummer was. Paula Sue Gummer shared Ben Brown's comments with Jay Gummer.

34. In July 1999, Paula Sue Gummer asked to be relieved of her travel and inventory duties. She talked to Pat Evenson, indicating that if she could not quit performing these travel duties, she would look elsewhere for work. Evenson consulted Ben Brown, and reported to Paula Sue Gummer that Ben did not want her to leave the company. First National Pawn relieved her of her travel and inventory duties, requiring that she continue traveling while she trained her replacement, Justin Amann, who was the manager of the Bozeman store.

35. On August 15, 1999, First National Pawn, Inc. acquired the assets of the two Butte pawnshops and one Bozeman pawnshop operated as First National Pawn pawnshops since their acquisition from Silver Bow Sales in 1997. It currently owns and operates those three pawnshops. From that date forward, Jay Gummer was exclusively an employee of First National Pawn, Inc.

36. Paula Sue Gummer's training of Justin Amann continued into September 1999. Thereafter, Paula Sue Gummer worked as a full-time pawnbroker in First National Pawn's uptown store in Butte, exclusively as an employee of First National Pawn, Inc. even though the corporations failed to correct their bookkeeping to reflect Paula Sue Gummer's exclusive employment by this corporation until 2000.

37. After Paula Sue Gummer moved to Butte, Ben Brown often called the Gummer home, asking to speak to Aaron Fields.⁴ In his conversations with Aaron, Ben Brown regularly asked how Jay and Paula Sue Gummer were doing and also specifically asked Aaron if Jay Gummer was beating his mother or him. During August, September and October 1999, Ben Brown called First National Pawn's uptown Butte store where Paula Sue Gummer worked and spoke to her on 8 to 12 occasions. Sometimes Paula Sue Gummer answered the phone and sometimes Ben Brown asked to speak to Paula Sue when someone else answered the phone. In some of his conversations with Paula Sue Gummer while she was at work, Ben Brown described Jay Gummer in denigrating terms (red neck, hick, bully). Ben Brown asked Paula Sue if Jay were beating her or her children. Paula Sue Gummer considered these phone calls to be unwanted and offensive. She asked Ben Brown to stop making the calls, and complained to Pat Evenson about the calls. The calls did not stop. Paula Sue Gummer shared Ben Brown's comments with Jay Gummer.

38. After she completed the training of Justin Amann, Paula Sue Gummer complained again to Pat Evenson and to Rob Birkle about Ben Brown's calls. When Pat Evenson spoke to Ben Brown about Paula Sue's complaints, he denied making the statements about Jay Gummer that Paula Sue Gummer accused him of making. In October 1999, after his conversation with Pat Evenson, Ben Brown stopped making calls to the Gummer residence and stopped speaking with Paula Sue Gummer about her husband when on the phone to the uptown Butte pawnshop.

⁴ The friendship between young Fields and Ben Brown also became embroiled in the conflict between his mother and Brown. The events of the erosion of that friendship is not relevant, since Aaron Fields is not a party to this action.

39. After Paula Sue started working full time in the uptown store in Butte, the store managers in Butte, Bob Moreno and Bruce Hemphill, cooperated in scheduling the Gummers so that they could have some days off together. They did not ask Rob Birkle or corporate management in Billings to approve this cooperation, but submitted their schedules for review as usual. They received no objections to the Gummers' work assignments within the schedules.

40. In the latter half of October 1999, a regular customer asked Jay Gummer to keep her pawned television out of inventory after the 3-day grace period, so that she could pay off the loan plus the fees and interest and retrieve the property without risk of it first being sold. Gummer put a "hold" note on the television so it would not be added to the inventory in the customer access portion of the store after the grace period. After the extra day the customer had requested, no one pulled the television from pawn to put it into inventory in the customer access portion of the store. Since the customer did not return and redeem it, the television remained in the back for several more days, until Rob Birkle discovered it still in the back with Jay Gummer's "hold" note on it.

41. Despite the stated company policy, employees at the First National Pawn stores in Butte, including managers Rob Birkle, Tim Birkle, Bruce Hemphill, and Bob Moreno sometimes provided regular customers with extra days past the due date to redeem a pawned item before it was moved to inventory. This continuation of the practice of Silver Bow Sales did not occur often, but it did happen. Corporate management did not approve of these exceptions, and continued to try to implement complete compliance with the "no extra grace periods" policy.

42. Rob Birkle decided, after talking to Benny Brown and Pat Evenson, that he would give Jay Gummer a written warning for not following the "no extra grace periods" policy, since Gummer had received prior instruction and direction about the policy. On October 26, 1999, Birkle approached Gummer and told him that he was going to write him up. The discussion was in a corner of the store where no one else could hear, but was not in the back of the store or out of sight of other employees. Gummer went from that discussion to a fellow employee, Judy Winscott, and complained to her about the write-up, loudly enough for Birkle to hear. Birkle believed Gummer was deliberately undermining his authority and sent him home for one day without pay. Jay Gummer called his wife at the uptown store and told her of the suspension.

43. Rob Birkle was in the uptown Butte pawnshop later that day. Paula Sue Gummer challenged Rob Birkle, contending that she also should be written up for holding a pawn item past its due date. The item in question was

a toolbox, an exception to the general rule. Paula Sue Gummer had argued with Birkle about his treatment of her husband before, but this was an escalation of the previous incidents. Although Paula Sue Gummer did not technically violate the policy, Birkle noted in her employment file that he had given her an oral warning because she requested one. He took no other action at that time regarding her arguably insubordinate conduct.

44. Paula Sue Gummer's accounts of Ben Brown's statements to her over the summer and fall of 1999 had intensified Jay Gummer's dislike for Ben Brown. His continued conflict with Birkle also fueled his dislike for First National Pawn generally. Jay Gummer, by the time of his suspension, loathed Ben Brown, and extended that feeling toward the entire First National Pawn business structure.

45. After his suspension Jay Gummer brought a little red notebook to work with him. Although he had made it known that he had no interest in any management responsibilities, he made a visible production out of writing notes in the notebook about how other employees broke rules. Other employees noticed his use of the notebook at work. Jay Gummer's last entry in the notebook was in mid-November, 1999.

46. In early November 1999, Jay Gummer and Rob Birkle met again. Rob Birkle told Jay Gummer that he had managerial duties because of his experience and because other employees looked to him as an example. Jay Gummer disagreed, pointing out that he had never been a manager under First National Pawn and that he did not want any managerial responsibilities. Jay reiterated that he did not want to be a manager, did not like the way managers were compensated and just wanted to be a pawnbroker. Rob Birkle and Jay Gummer ended their meeting with Jay surrendering his "key and code." Jay Gummer related these events to Paula Sue Gummer.

47. The next day, Birkle told Gummer that since he was no longer a "key and code employee" and his responsibilities were thereby reduced, his wages were being cut by \$200.00 per month. First National Pawn reduced Gummer's wages by \$200.00 per month thereafter.

48. At least one other employee of First National Pawn in Butte, Jamie Stephenson, had his key and code responsibilities taken away without a reduction in pay. Stephenson did not want to surrender his key and code responsibilities, which he later regained. There were also instances in which First National Pawn demoted managers and did not reduce their pay. Those instances occurred when corporate management brought in new managers, not when existing managers resigned from their management responsibilities. The

demoted managers were still seeking management positions, and subsequently obtained other management positions.

49. First National Pawn had previously had a problem with disappearance of jewelry in one or more stores. To address this situation, Seth Brown wrote a memo and faxed it to all stores, stressing the need to return jewelry to its proper case and to lock the jewelry cases at all times. The memo indicated that the next employee who failed to properly lock up jewelry would be disciplined or discharged. On November 5, 1999, Jay Gummer noted in his notebook that Rob Birkle had left jewelry out and failed to lock the jewelry case when he moved to another part of the store. Jay Gummer was present and working. Rather than put the jewelry away and lock the case himself, he elected to write about the incident in his notebook.

50. On November 5, 1999, Pat Evenson and Benny Brown paid a visit to Butte to discuss Jay Gummer's attitude problems. Jay Gummer reiterated his unhappiness and started talking about misconduct of other employees whom the company had not disciplined. Benny Brown and Evenson refused to discuss other employees or Jay Gummer's complaints about First National Pawn's policies. They tried to focus on his attitude and his work. They suggested to Gummer that if he thought he knew better how to run a pawnshop perhaps he should open his own store. They told him that as long as he worked for them, he needed to follow company policies and practices. Jay Gummer resisted their efforts to focus upon his conduct and attitude. He also denied receiving an actual written warning regarding the October 26 incident.

51. On November 6, 1999, Birkle presented a written warning to Jay Gummer concerning the October 26 incident, which Gummer refused to sign. The warning stated at the bottom: "Disciplinary action taken: none at this time, if problem arises again, employee will be sent home for three days; with no pay given."

52. Also on November 6, 1999, Jay Gummer recorded another employee's failure to return jewelry to the display case and lock the case before moving to another part of the store, while Birkle and Gummer were both present. Again, Gummer chose to record the violation rather than put the jewelry away and lock the case himself.

53. Jay Gummer took two weeks of vacation during the remainder of November to go hunting. Paula Sue Gummer continued to work and did not go hunting with her husband.

54. After the events of October and early November, Rob Birkle noticed that after he approved a work schedule for the downtown Butte store, Bruce Hemphill switched one of Jay Gummer's shifts with a shift of another employee. Birkle assumed Hemphill had modified the schedule to meet a demand of Jay Gummer to have the same days off as Paula Sue Gummer. Birkle was in no mood to let Jay Gummer dictate scheduling. He changed the schedule back and directed the two store managers for the Butte stores not to adjust the schedule to accommodate Jay and Paula Sue Gummer having days off together. The Butte managers remained willing to schedule employees to accommodate the Gummers having days off together, but followed the management directive not to do so. Other married couples in the First National Pawn companies received such scheduling accommodations, including Bennie Brown and his wife, Jill Brown. Paula Sue Gummer complained about the scheduling to Rob Birkle, and shared her resentment of the scheduling with her husband.

55. On or about December 10, 1999, First National Pawn demoted Bruce Hemphill from the downtown Butte store manager position and replaced him with Rob Birkle as acting manager.⁵ On December 14, 1999, Birkle performed Gummer's annual evaluation, giving him substantially reduced marks from his two previous evaluations in 1998. Gummer refused to sign to acknowledge he had read and discussed the evaluation, writing on it, "This is all bullshit not fair or equal evaluation. I do not agree with it at all."

56. On December 15, 1999, Bob Moreno, the uptown store manager, prepared Paula Sue Gummer's annual evaluation, with the participation and input of Rob Birkle.⁶ For every individual item on her evaluation, she received a "fully successful" rating or better. There were no negative comments in the evaluation.

57. In December 1999, First National Pawn announced bonuses for the employees of the various corporations. Paula Sue Gummer and Jay Gummer received no bonuses. Almost all other store employees throughout the state (except Hemphill) received from \$50.00 to \$200.00 in bonuses.

58. Pat Evenson and Benny Brown decided not to give Paula Sue Gummer a bonus because of her conflict with Rob Birkle. They believed she

⁵ Hemphill had clashed with Birkle since assuming the manager position in the downtown Butte store. The findings do not include his saga of conflict with First National Pawn management, which is not relevant to this case.

⁶ Bob Moreno also had his conflicts with First National Pawn management. Hemphill, Moreno and Jay Gummer are now working together in a Butte store competing with First National Pawn.

should not be acting out her loyalty to her husband by confronting her supervisor, and that in doing so she was being disloyal to the company. Ben Brown agreed, but was also influenced by his dislike of Jay Gummer and his disapproval of Paula Sue Gummer's marriage. Benny Brown and Pat Evenson would not have denied Paula Sue Gummer a bonus, since her actual job performance was not subject to any legitimate criticism, but for her combative conduct with Rob Birkle. Even without Ben Brown's views and recommendation, Benny Brown and Pat Evenson could have and would have reached and implemented their decision that First National Pawn would not give Paula Sue Gummer a bonus in December 1999.

59. Pat Evenson and Benny Brown decided to deny Jay Gummer a bonus because of his declining job performance and his hostile attitude toward management (including the disciplinary action taken against him in October 1999). Ben Brown's personal animosity toward Gummer did not cause or contribute to their decision. They could have and would have reached and implemented their decision that First National Pawn would not give Jay Gummer a bonus in December 1999 even if Ben Brown had not participated.

60. Paula Sue Gummer and Jay Gummer attended the company Christmas party in December 1999, after learning they would not receive any bonuses. The party occurred in Billings, and First National Pawn provided transportation and lodging for employees attending from the stores outside of Billings. There were a large number of people at the party.

61. Paula Sue Gummer came to the party angry. She confronted Benny Brown, Pat Evenson and Seanna Brown, Ben Brown's daughter, about her husband and her not receiving bonuses, and about Jay's treatment by First National Pawn. She mentioned their "zero" bonuses to other employees during the party. During the Christmas party, Ben Brown approached Paula Sue Gummer from behind and ran his hand up the back of her leg, over her buttocks and onto her back. When she turned and saw who had made this contact with her, her anger grew. She did not confront Brown about his unwelcome touching, nor did she complain of it to any other members of First National Pawn management.

62. Ben Brown, Benny Brown and Pat Evenson decided early in January 2000 that Paula Sue Gummer would not receive a raise in 2000. Although they considered input of store managers in most instances, they did not consult with Paula Sue Gummer's store manager, Bob Moreno, relying instead upon their communications with Rob Birkle, Moreno's immediate supervisor. Ben Brown justified denial of a raise to Paula Sue Gummer on her declining attitude and lack of loyalty, but was also motivated by her marriage to Jay

Gummer.⁷ Benny Brown and Pat Evenson decided to deny Paula Sue Gummer a raise because of her conduct at the Christmas party in confronting them about the lack of bonuses for the Gummers and again arguing about the company's treatment of Jay. Her reaction to the denial of her bonus convinced them that she was not getting the message about sticking to her business at work. They would have reached the same decision to deny her a raise even if Ben Brown had not supported denial of her raise.

63. Ben Brown, Benny Brown and Pat Evenson decided early in January 2000 that Jay Gummer would not receive any raise in 2000. Jay Gummer's store manager, Rob Birkle, concurred with this decision. Benny Brown and Pat Evenson based denial of a raise to Jay Gummer on his performance (including the disciplinary action taken in 1999) and his attitude (including his response to the visit with Benny Brown and Pat Evenson after the disciplinary action, and his written response to his 1999 evaluation). Ben Brown's personal animosity toward Jay Gummer contributed to his advocacy of no raise for Jay Gummer, but did not cause or contribute to the decision of Benny Brown and Pat Evenson. They would have reached the same decision even if Ben Brown had not supported denial of Jay Gummer's raise.

64. Paula Sue Gummer resigned her employment on January 15, 2000. Although Ben Brown's treatment of her in the past and at the Christmas party contributed to her decision, as did her perception of the treatment her husband was receiving, she would not have quit when she did but for the denials of a 1999 bonus and a 2000 raise in pay. Her resignation was not a reasonable response to the terms and conditions of her employment. She submitted an angry resignation note, in which she both denounced First National Pawn and again thanked Ben Brown for introducing her to Jay Gummer, "the most wonderful man" she had ever known.

65. At no time within 180 days before June 1, 2000, did any First National Pawn corporation treat Paula Sue Gummer less favorably than other employees for the terms and conditions of her employment because she was female.

⁷ Ben Brown testified that his decision to deny her a raise in 2000 was partially because she got a raise during 1999. Evidence that Paula Sue received a raise during 1999 when she finished her probationary period did not present a justification for denial of raise in 2000. Multiple other 1999 hires who received their raises at the end of their probationary periods later in 1999 than Paula Sue Gummer received hers also received raises for the year 2000, including three other Butte employees. His presentation of this irrational explanation demonstrated his partially discriminatory motive.

66. At no time within 180 days before June 1, 2000, did any First National Pawn corporation treat Paula Sue Gummer less favorably than other employees for the terms and conditions of her employment because she was married to Jay Gummer.

67. In late December 1999, First National Pawn transferred Justin Amann from managing a store in Bozeman to managing the downtown Butte store. Amann promised Jay Gummer a clean slate in order to work on his increasing negative attitude. However, with the denial of a bonus and a raise, and the resignation of Paula Sue Gummer in January, Jay Gummer's attitude grew worse rather than improving. He continued to challenge the new rules. He told customers who complained about policies (such as the "no extra grace periods" policy) that "they" set the policy, rather than aligning himself with First National Pawn with regard to policies. Amann talked with Gummer about either changing his attitude and behavior or losing his job, but he did not document those conversations nor did he give any written warnings.

68. During January and February 2000, Jay Gummer took his entire vacation for the calendar year by taking two weeks off and cashing in the other two weeks. He was an avid hunter, and regularly used two weeks of his vacation for hunting season. Justin Amann decided that Jay Gummer would not accept First National Pawn's direction and supervision no matter who was the manager, and that Gummer had little interest in maintaining his employment. Birkle and Amann agreed that Gummer expected to leave employment one way or another before hunting season. By the end of February 2000, with no improvement in his conduct, they decided it was time to fire Jay Gummer. They told Ben Brown and Pat Evenson of their decision, and received approval to proceed.

69. On February 28, 2000, First National Pawn fired Jay Gummer, documenting its reasons for the firing in a file memo that day. Although the reasons in the memo are unartfully drafted, the decision to fire Gummer was based upon legitimate business reasons arising out of his conduct at work and his attitude toward the employer.

70. First National Pawn subsequently opposed Jay Gummer's receipt of Unemployment Insurance (UI) benefits with an excessive zeal, twisting and exaggerating its legitimate business reasons for firing him. Its conduct in opposing his receipt of UI benefits was not motivated by his marital status, but by the difficulties in dealing with him as an employee prior to his discharge.

71. At no time within 180 days before June 1, 2000, did any First National Pawn corporation treat Jay Gummer less favorably than other

employees for the terms and conditions of his employment because he was married to Paula Sue Gummer.

72. In the last 4-5 months of 1999, First National Pawn, Inc., paid Jay Gummer's wages and Golden Triangle, Inc., paid Paula Sue Gummer's wages, even though she worked for First National Pawn, Inc. In 2000, First National Pawn, Inc., paid the wages of both Jay Gummer and Paula Sue Gummer.

IV. Opinion

Montana law prohibits employment discrimination based upon sex or marital status. §49-2-303(1)(a) MCA. An employer directing unwelcome sexual conduct toward an employee violates that employee's right to be free from discrimination based upon sex when the conduct is sufficiently abusive to alter the terms and conditions of employment and create a hostile work environment. *Brookshire v. Phillips*, HRC Case #8901003707 (April 1, 1991), **affirmed sub nom.** *Vanio v. Brookshire*, 852 P.2d 596 (Mont. 1993); **see also** *Houghton v. Medtrans*, HR Case No. 9901008749, "Final Agency Decision," pp. 7-8 (May 3, 2000). Paula Sue Gummer alleged that her employer subjected her to less favorable treatment and a hostile work environment because of her sex.

Marital status discrimination under the Montana Human Rights 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, op. cit.* (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. Lionshead Resort*, HRA No. 9801008270 (May 5, 1999); *Van Haele v. Hysham School District No. 40*, HRC No. 9301005671 (April 1, 1996). Paula Sue Gummer and Jay Gummer each alleged that their employer subjected them to less favorable treatment because they were married to each other.

The anti-discrimination provisions of the Montana Human Rights Act closely follow a number of federal anti-discrimination laws, including Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Montana courts have examined and followed federal case law that appropriately illuminates application of the Montana Act. *Crockett v. City of Billings*, 234 Mont. 87, 761 P.2d 813, 816 (1988). Thus, in considering the claims of the Gummers, citation to and use of federal as well as state case law is appropriate.

I. Employment Discrimination Because of Sex

Paula Sue Gummer's claims of sex discrimination are limited to allegations of a hostile work environment due to Ben Brown's unwelcome sexual attentions toward her. Her other claims all arise in the context of alleged marital status discrimination (addressed *infra*).

Gummer's substantial and credible evidence established that within 180 days of her complaint filing, Ben Brown subjected her to unwelcome touching at the 1999 business Christmas party. The only other evidence of any alleged sexual harassment within the limitation period was innuendo that "the more you say yes the more we say yes" had sexual content and testimony that Brown accused Gummer and a male employee of playing "grabass" at work. The decision contains no findings regarding "the more you say yes," because the substantial and credible evidence of record established that the phrase simply meant that employees who worked hard and tried to succeed in the business were viewed (and treated) with more favor than employees who did only enough work to maintain their job and had no desire to succeed. The phrase had no sexual connotations, and no relevance to claims of sexual harassment. Likewise, the decision includes the finding that the term "grabass" had no sexual content, but referred generically to goofing off on company time. This evidence could not add further gravity to the Christmas party incident, and was not indicative of other potential harassment within the 180 day period.

Gummer presented testimony of three other alleged events arguably related to a hostile environment due to her sex, all outside of the 180-day statute of limitations. These other three incidents were so poorly substantiated by credible evidence or of such limited import if they did occur, that the hearing examiner did not include them in the findings.⁸ Other irrelevant alleged events not appearing in the findings, such as further incidents involving Aaron Fields or the two Butte store managers, Bruce Hemphill and Bob Moreno, were insufficiently probative of any relevant motive or adverse act toward charging parties to merit inclusion. Thus, the only incident relevant to

⁸ Those three incidents were as follows: (1) an alleged prior incident of unwelcome touching by Brown, this time at work, which was the only evidence offered that Brown attempted any sexual contact in the work place (the alleged incident was out of character for Brown and unsubstantiated by any evidence except Gummer's testimony, which was not credible); (2) a reference by Brown at work to an earring Gummer was wearing as a match for one Brown had at home (far too innocuous and isolated an incident to cause or contribute to a hostile sexual environment if it did occur); and (3) a second incident of accusations by Brown that Gummer was playing "grabass" at work (poorly substantiated and irrelevant to claims of sexual harassment, since the term was without sexual content).

the claim of hostile environment is the unwelcome touching at the Christmas party.

Isolated incidents normally did not constitute discriminatory changes in the terms and conditions of employment unless the incidents are extremely severe. *Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998). A sufficiently intrusive unwelcome single incident of sexual harassment can create a hostile work environment. *Richardson v. N.Y.S. Dept. of Corr. Serv.*, 180 F.3d 426, 437 (2d Cir.1999); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1071 (10th Cir. 1998); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir.1996); *Becker v. Ulster County*, 167 F.Supp.2d 549, 555 (N.D. N.Y. 2001); *Fall v. Ind. U. Bd. Of Trustees*, 12 F.Supp.2d 870, 879-80 (N.D. Ind. 1998).

A charging party establishes a *prima facie* case of sexual harassment with proof that she was subject to “conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.” *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). “Harassment need not be severe and pervasive to impose liability; one or the other will do.” *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000) (emphasis added, citations omitted). A totality of the circumstances test is used to determine whether a claim for a hostile work environment has been established. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, (1993). The relevant factors include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Harris*, 510 U.S. at 23; *see also Faragher, op. cit. at 787-88.*

The standard for finding a hostile environment must be “sufficiently demanding to ensure that [anti-discrimination law] does not become a ‘general civility code.’” *Faragher, op. cit., citing Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998). The correct standard when properly applied will filter out complaints attacking “the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.” *Oncale, supra, quoting* Lindemann & Kadue, *Sexual Harassment in Employment Law* 175 (1992). In other words, only extreme conduct can discriminatorily alter the terms and conditions of employment. The objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances. *Oncale, supra, quoting Harris*, 510 U.S. at 23. It is appropriate, when assessing the objective portion of a charging party’s claim, to assume the perspective of the reasonable victim. *See Ellison, op. cit. at 879.*

Unwelcome, intentional touching of a charging party's intimate body areas can be sufficiently offensive to alter the conditions of her working environment, according to the EEOC's Policy Guidance on Sexual Harassment, (*see* 8 BNA FEP Manual 405:6681, 405:6691, Mar. 19, 1990); *accord*, *Barrett v. Omaha Nat. Bank*, 584 F. Supp. 22, 23-24, 30 (D. Neb. 1983) *aff'd*, 726 F.2d 424 (8th Cir. 1984). The gravamen of the question in this case is whether the single incident of unwelcome touching so altered the terms and conditions of Paula Sue Gummer's employment as to render the work environment hostile.

The conduct of Brown at the Christmas party was offensive, but fell far short of the degree of offensiveness found in *Lockhard, op. cit. at* 1067⁹ or in *Fall, op. cit. at* 873 and 878-80¹⁰, where single incidents were sufficient to establish a hostile work environment.¹¹ Here, the contact was unwelcome and offensive, but there is no evidence of premeditation, no evidence of stalking or trapping the victim and no evidence of force. The incident occurred in a public environment, in the presence of a multitude of other people. Paula Sue Gummer was free to walk away, to denounce Brown for the contact, or even to slap his face. Brown's demeanor and behavior during hearing established that he does not respect the personal space of his family and his employees. Although his conduct with Gummer at the Christmas party was inappropriate and insulting, that single incident did not establish a hostile environment.¹² Therefore, that claim fails.

2. Marital Status Discrimination: Paula Sue Gummer

⁹ Male customers at the restaurant had previously told the waitress they "would like to get into" her pants. Required to wait on them again, the waitress was told that she smelled good and was asked what kind of cologne she was wearing. When she responded that it was none of the customer's business, he grabbed her by the hair to sniff her. Required still to continue to wait upon the customers, she was again grabbed by hair by one of the two men, who then put his mouth on her breast.

¹⁰ The University chancellor used a pretext to lure the plaintiff into his office, where he closed the door and grabbed her, kissed her, forced his tongue in her mouth, and forced his hand down her blouse far enough to grope her breasts. The Plaintiff escaped the office and immediately had to vomit in a nearby restroom.

¹¹ As distasteful as such line-drawing may be, the courts have even weighed whether the touching was through or inside the complainant's clothing. *See, e.g., Fall*, for a lengthy comparison of such circumstances.

¹² Some of the federal circuits have also distinguished between conduct motivated by the claimant's gender as opposed to conduct arising out of animosity toward the claimant because of a prior sexual relationship. The validity of such a distinction is beyond the scope of this decision.

Both Paula Sue Gummer and Jay Gummer allege marital discrimination. Paula Sue Gummer alleges that the employer took a number of adverse acts against her because she was Jay Gummer's wife. While respondents deny any such acts, they also interpose a statute of limitations defense, arguing that any such acts occurred more than 180 days before complaint filing, and that in determining whether there were adverse acts within the 180 days, conduct outside of that time period is irrelevant.

Failure to file the discrimination complaint within 180 days of the unlawful acts by the employer bars the claim. §49-2-501(4) MCA; *e.g.*, *Skites v. Blue Cross/Blue Shield of Montana*, 297 Mont. 156, 161, 991 P.2d 955, 958 (1999) (when the administrative complaint on its face indicated that the last act of alleged discrimination occurred more than 180 days before complaint filing, summary judgment in favor of the employer was proper). The statute of limitations issues arising in this case are (1) whether timely allegations of such unlawful acts also confer jurisdiction upon the department to decide whether the employer engaged in a violation of the Act that began before the pertinent statute of limitation and continued into the 180 days and (2) if acts outside of the 180 days can serve to illuminate the respondents' motives even if they cannot be a basis for relief. The first issue involves so-called "continuing violations" or "serial violations." The second issue involves proof of motive.

Neither *Skites* nor the earlier Montana Supreme Court decision regarding the statute of limitations for Human Rights Act claims¹³ directly addresses the issue of continuing violations. In both instances, discovery or occurrence of the last act of alleged discrimination took place more than 180 days before complaint filing. Although the Montana Supreme Court has not addressed the issue, the Montana Human Rights Commission has. *E.g.*, *Kundert v. City of Helena*, HRC No. 9301005512 (Mar. 31, 1995) (adopting findings regarding conduct of employer for 17 months prior to the complaint filing date); *followed*, *Dernovich v. City of Great Falls*, HRC No. 9401006004 (Nov. 28, 1995) (citing *Kundert* for adoption of continuing violation theory and overruling objection to consideration of discriminatory acts occurring more than 180 days before complaint filing); *see also*, *Ashmore v. Hilands Golf Club*, HRC No. 9103004707 (Jun. 10, 1994) (respondent's historic treatment of women directly relevant and probative to issue of intent and acts of discrimination against women as a class).

¹³ *Hash v. U.S. W. Communications Serv.*, 268 M 326, 886 P2d 442 (1994)

The corporations argued that the *Ashmore* Commission decision is not precedent because (a) a district court reversed it and (b) administrative tribunals have no authority to establish and follow administrative precedent, but can only adopt rules. With due respect to the district court that reportedly reversed *Ashmore* (a decision reportedly on appeal to the Montana Supreme Court), the rationale of the Ninth Circuit decisions is consistent with all three of the pertinent Commission decisions. *E.g.*, *Morgan v. N.R.P.C.*, 232 F.3d 1008 (9th Cir. 2000); *Fielder v. UAL Corp.*, 218 F.3d 973 (9th Cir. 2000); *Anderson v. Reno*, 190 F.3d 930, 936 (9th Cir.1999); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1107 (9th Cir.1998); *Sosa v. Hiraoka*, 920 F.2d 1451 (9th Cir. 1990). California takes the same approach to continuing violations as the Circuit. *Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798, 29 P.3d 175 (2001).

To establish a series of related acts, several of which were within the limitations period (a “serial violation”), Gummer must prove that First National Pawn engaged in a continuing course of conduct motivated by her status as the wife of Jay Gummer. Any acts of discrimination occurring outside of the limitations period must be sufficiently related to those occurring within the limitations period, *see, Fielder, supra at* 988, rather than isolated, sporadic, or discrete acts, *see, Draper, supra at* 1107-10; *Sosa, supra at* 1456.

Ben Brown stopped making derogatory remarks to Paula Sue Gummer about her husband more than 180 days before Paula Sue Gummer filed her complaint. All events involving Aaron Fields (arguably irrelevant as not constituting adverse employment actions against either charging party) occurred more than 180 days before Paula Sue Gummer filed her complaint. Within the 180 days before she filed her complaint, First National Pawn denied Paula Sue Gummer a bonus and then denied her a raise. These acts, if motivated by her marriage to Jay Gummer, are too different in nature from the acts prior to the 180-day period to establish a continuing violation. While Gummer argues that all of the acts were motivated by her marital status and all were hostile, the difference is too great between jibes about her husband, delivered by her ex-lover and arguable boss, either at work or by phone to her home, and employment decisions that cost her money. Likewise a change in Ben Brown’s treatment of her son, who is not a charging party here, is too far removed from bonus and salary decisions about her.¹⁴ There was no serial violation here. Potential recovery can only be based upon adverse acts within

¹⁴ The actual change in scheduling (refusing accommodation for Jay Gummer to have the same days off as Paula Sue Gummer) was irrelevant to her claims since it did not involve changes in her schedule. Also, the other married couples in the company who did receive accommodation never had both marital partners simultaneously and individually involved in confrontations with management.

the 180 days before complaint filing.

The conduct of Ben Brown toward Paula Sue Gummer prior to the 180 days before her complaint filing is relevant to the question of motive for decisions about bonus and salary. *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (evidence of prior discriminatory acts relevant to motive), a case the Montana Court has expressly applied to Human Rights Act litigation regarding burdens of proof. *H.A.I. v. Rasmussen*, 258 Mont. 367, 852 P.2d 628, 632 (1993); *Crockett, supra*.

Ben Brown disapproved of his ex-lover's marriage to Jay Gummer. Whatever the emotional mix that triggered that disapproval, Brown expressed it with a barrage of negative comments about Jay Gummer to Paula Sue Gummer. However, in October 1999, after Pat Evenson talked to Ben Brown about Paula Sue's complaints, Ben Brown stopped making the comments. If he had created a "hostile work environment" with his comments, that hostile environment ended with the end of the comments, more than 180 days before Paula Sue Gummer filed her complaint.

Ben Brown's disapproval of her marriage did not end. When he voted in favor of denying her a bonus for 1999 and then in favor of denying her a raise for 2000, his disapproval of her marriage to Jay Gummer factored into his votes. His votes were not, however, determinative. His original desire to hire Paula Sue Gummer carried the day in 1999, over the objections of Pat Evenson and Benny Brown, but he was hiring her into the Billings operation and the corporate office (for inventory). After she became an employee, his continuing interest in her employment contributed to First National Pawn's agreement to transfer her to Butte and agreement to accept her resignation from inventory work, but his interest in her was not the decisive factor in those decisions. Paula Sue Gummer had performed well as an employee and had received good evaluations. She had established herself as a contributing member of the organization. Pat Evenson and Benny Brown would not have agreed to her transfer to Butte, into an operation for which they were primarily responsible, had they not considered her an acceptable employee.¹⁵

Pat Evenson and Benny Brown were less malleable to Ben Brown's wishes when those wishes involved negative action against an employee. For example, when Ben Brown recommended ending Jay Gummer's employment

¹⁵ Indeed, had she still been romantically involved with Ben Brown, Pat Evenson and Benny Brown would not have agreed to her transfer to Butte. They accepted her on her own merits as an employee when they agreed to the transfer.

after the 90-day probation period, Evenson and Benny Brown disregarded his recommendation and retained Jay Gummer.

By late 1999, Paula Sue Gummer was an employee of a corporation in which Evenson and Benny Brown (and not Ben Brown) had ownership interests, and she was working in an operation for which they and not Ben Brown had primary responsibility. Given Paula Sue Gummer's history of positive evaluations, Evenson and Benny Brown would not have agreed to deny her a bonus, but for her challenges of her manager in her campaign against the company's treatment of her husband.

Then at the Christmas party, Paula Sue Gummer went to Benny Brown and Pat Evenson and attacked their decision not to give either her husband or her a bonus. Thereafter, they reasonably decided it was appropriate to deny her a raise for 2000, without regard to Ben Brown's views. Although Ben Brown's votes on these issues were not purely based on corporate well-being, Benny Brown and Pat Evenson's votes were. The corporate decisions were not motivated by Paula Sue Gummer's marital status. While one of the three decision-makers had an illicit motive, the two decisive votes were cast for legitimate business reasons, and the result would have been the same even without Ben Brown's disapproval of her marriage.

This is a mixed motive case with regard to Paula Sue Gummer. A mixed motive case is one in which the charging party presents direct evidence of discriminatory motive, but the parties disagree on the reason for the employment action; a respondent in such a case can escape liability with proof that it would have made the same decision even without the discriminatory motive. *E.g.*, *Laudert v. Richland County Sheriff's Office*, 301 Mont. 114, 122, 7 P.3d 386, 392 (2000). The respondents proved that had Paula Sue Gummer never had a relationship with Ben Brown, her conduct as an employee would still have resulted in the same decisions about her 1999 bonus and 2000 raise. Therefore, they proved the affirmative defense necessary to defeat her direct evidence of discriminatory motive.

Because the respondents met their burden of proving that their adverse employment actions toward Paula Sue Gummer in late 1999 and early 2000 would have been the same even without Ben Brown's illicit hostility, Paula Sue Gummer's decision to quit her job was not reasonable. She had avenues to pursue regarding Ben Brown's conduct at the Christmas party. When she had complained about Ben Brown's comments to her about Jay Gummer, the comments stopped, within a period of less than 3 months. Given that the corporate acts were reasonable, the Christmas party incident by itself cannot render her resignation a constructive discharge. Therefore, the marital status

discrimination claim fails.

3. Marital Status Discrimination: Jay Gummer

Jay Gummer's marital discrimination case fails for a different reason. Ben Brown never took any hostile action toward Jay Gummer due to any illicit motive. In fact, but for Paula Sue Gummer's decision to share with her husband every negative comment and insinuation Ben Brown made to her, Jay Gummer would not have been particularly aware of Ben Brown's antipathy toward his marriage. Jay Gummer's problems with First National Pawn did not result from marital status hostility by the corporations, or even from his personal antipathy toward Ben Brown. Instead, Jay Gummer's problems with First National Pawn resulted from Jay Gummer's attitude and behavior toward First National Pawn. The seeds from which First National Pawn's adverse employment actions against Jay Gummer grew were sown even before Jay Gummer met Paula Sue Gummer.

Confronted with an employee who did not like the changes First National Pawn brought to the Butte downtown store and who would not willingly make those changes, the corporate response to Jay Gummer during the time of his employment was measured and fair.¹⁶ Jay Gummer's initial manager worked around his recalcitrance, because Gummer was an experienced pawnbroker who knew the store, the customers and the market. Even though his early evaluations by First National Pawn demonstrated that Jay Gummer was not becoming a model employee who sought to advance in the company, First National Pawn attempted to "bring him around."

As time went by, Gummer continued to resist change. Perhaps due to the continued reports of Ben Brown's treatment of Paula Sue Gummer, but perhaps without regard to those reports, Jay Gummer became more than recalcitrant, he became a hostile employee. He may have survived unscathed for as long as he did because his second manager, Bruce Hemphill, was also a malcontent who did not mind having Gummer in his store.

When his district manager finally confronted him about his failure to conform to policies, he immediately complained to another employee in the

¹⁶ The overreaction to his UI claim was not motivated by his marital status, but by animus toward him inspired by how difficult an employee he had been. Corporate representatives in the UI proceedings were outraged that a troublesome employee would seek benefits after being fired. Their efforts to establish good cause for his discharge under UI standards were not the result of his marital status, and did not demonstrate anyone's illicit hostility due to marital status except that of Ben Brown individually.

hearing of the district manager, and then complained about the discipline that resulted from that conduct. When the two primary operator-owners for the Butte operation, Pat Evenson and Benny Brown, came to Butte to talk with him, he argued with them, then became more outspoken and visible in his discontent. When he received a poor evaluation, he responded with vulgar insubordination. When his efforts to adjust his work schedule (despite all his conflicts with management) to match that of his wife were rebuffed, he used his entire year's vacation entitlement in January. Management reasonably concluded that either they could decide when this unhappy and unwilling employee would cease drawing his pay or they could wait until he decided the time was ripe for him to leave. They had ample legitimate business reasons to fire him. Although his counsel made an excellent argument about progressive discipline, Jay Gummer had plenty of notice that he needed to adjust his attitude and behavior, and chose to do neither. Whether or not First National Pawn followed with exactitude a model of progressive discipline not within any of its written policies, Jay Gummer failed to prove discriminatory treatment or discriminatory discharge.

Ben Brown, Benny Brown and Pat Evenson had ample legitimate business reasons for firing Jay Gummer. While Ben Brown had personal hostility toward Gummer, there is no evidence that Ben Brown's animus prompted any adverse acts toward Jay Gummer by the respondents that they would not have undertaken anyway, for valid business reasons. Since the respondent corporations proved that their actions resulted from legitimate business reasons, it would be an overstatement to classify Jay Gummer's case as a mixed motive case. It was simply a case in which the claimant could not prove a causal connection between his marital status and the respondents' adverse employment actions.

4. Injunctive Relief

The Human Rights Act mandates injunctive relief upon a finding that an employer engaged in discriminatory conduct. §49-2-506(1) MCA. However, under the facts of this case, the ultimate finding is that there was no adverse employment action taken because of discriminatory animus within 180 days of complaint filings. Under these peculiar circumstances, it would not be proper to impose injunctive relief. Although Ben Brown had discriminatory animus toward Paula Sue Gummer because of her marriage to Jay Gummer, the respondent corporations did not engage in the discriminatory practice alleged. Therefore, the department imposes no injunctive relief.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. Respondent FNP, Inc., took no action of any kind regarding charging parties within 180 days of their complaint filings, and the department dismissed that respondent at the close of contested case hearing.
3. Even though Benjamin L. Brown, Sr., disapproved of Paula Sue Gummer's marriage to Jay Gummer and participated in the decisions of the respondents to deny her a 1999 bonus and a 2000 raise in pay, the respondents established that they would have taken the same actions absent Ben Brown's unlawful motivation.
4. Charging parties failed to prove that the respondents, other than FNP, Inc., took adverse employment action toward them during the 180 days before their complaint filing because of their marital status or sex. §§49-2-506 and 49-2-507 MCA.

VI. Order

1. The department dismisses FNP, Inc., as a respondent, without objection.
2. The department awards judgment in favor of respondents Golden Triangle, Inc., d/b/a First National Pawn, First National Pawn, Inc., d/b/a First National Pawn, and First Montana Pawn, Inc., and against charging parties Paula Sue Gummer and Jay Gummer on the charges that the respondents discriminated against charging parties in employment because of marital status and sex.
3. The department dismisses the consolidated complaints.

Dated: January 3, 2002.

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner
Montana Department of Labor and Industry

