

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0051011431:

DENNIS A. MCGEE,)	Case No. 662-2006
)	
Charging Party,)	
)	
vs.)	FINAL AGENCY DECISION
)	
THOMAS C. MERCER,)	
D/B/A UNION SQUARE APARTMENTS,)	
2400 OLD FORT ROAD)	
MISSOULA MT 59804)	
)	
Respondent.)	

* * * * *

I. Procedure and Preliminary Matters

Dennis McGee filed a human rights complaint alleging Thomas Mercer discriminated against him on the basis of his marital status (married) when Mercer discharged him from his position as maintenance supervisor with Mercer’s property management enterprise. The contested case hearing in this matter was held on February 13, 14, and 15 in Missoula, Montana. Karl Englund and Matt Thiel, attorneys at law, represented Dennis. Elizabeth O’Halloran attorney at law, represented Mercer. Dennis, his wife Lynda McGee, Thomas Mercer, Tessa Knudsen, Dan Petersen, Jim Stensrud, and Rich Kain all testified under oath. McGee’s Exhibits 2 through 4, 6, 8 through 13, 16 through 46, 51 and 52 were admitted into evidence. Mercer’s Exhibits 101 through 105, 108, 109, 111, 131-133, 135, 138, 141, 143, 145, 147, 148, 150, 153, 155, 156 and 159 were also admitted into evidence. McGee’s Exhibit 53 was not admitted into evidence.

Counsel for each party requested time to submit post-hearing briefs. These requests were granted and each party’s responsive brief was received on April 17, 2006, at which time the record closed. Based on the arguments and evidence adduced at hearing as well as the parties’ post-hearing briefing, the hearing examiner makes the following findings of fact, conclusions of law, and recommended order.

II. Issues

1. Did Mercer violate Montana Code Annotated §49-2-303 when he discharged Dennis McGee from his maintenance supervisor position with Mercer's property management enterprise on the sole basis of Dennis' marriage to Lynda McGee?
2. If Mercer discriminated against Dennis, what are Dennis' damages?

III. Findings of Fact

1. At all times relevant to this proceeding , Lynda and Dennis McGee have been married to each other.
2. Thomas Mercer, who lives in California, is part owner of several properties in the Missoula area, including the Union Square Apartments (USA). He is also an attorney and, as demonstrated by Mercer's voluminous and detailed correspondence pertinent to this case, is very detail oriented. USA is a large apartment complex consisting of 108 residential apartments.
3. Prior to February, 2002, USA was managed by Shelter West, a property management company located in Missoula. In June, 1999, Lynda and Dennis were hired by Shelter West to serve as an onsite property management team at USA. Although Shelter West had hired and trained the McGees, Mercer officially employed them (Shelter West was Mercer's agent).
4. Lynda worked full-time as the onsite property manager at USA. Her duties included collecting rents, filling apartment vacancies, handling calls from tenants and arranging for repairs. Shelter West had two additional maintenance employees who did some of the maintenance and repairs at the USA property. Shelter West also hired outside contractors for maintenance services that its employees could not do.
5. As part of his resident property management team responsibilities, Dennis did approximately 10 hours of light maintenance around the USA property each week. While doing this, Dennis was also employed full-time by Smurfit-Stone. Lynda received a paycheck and Dennis did not. In addition, Lynda and Dennis received a rent free apartment plus free cable and free utilities as part of the compensation.

6. Lynda and Dennis had limited contact with Mercer during their tenure as Shelter West property managers at USA. Most of their contact was with Shelter West employees. They did, however, meet with Mercer on his occasional visits to Missoula.

7. During 2001, Mercer became disenchanted with Shelter West services (but not with the work of Lynda and Dennis), believing that he was being double billed for work which was not being performed to his specifications on the property. He contacted Shelter West about his concerns and also made them known to Lynda. (Mercer Exhibits 103 and 104).

8. At about the same time, Lynda began to explore with Mercer the possibility of Mercer terminating his arrangement with Shelter West and permitting Lynda to take over the management of Mercer's Missoula properties. To this end, Lynda and Tessa Knudsen provided a preliminary proposal which floated two ways to structure a new management enterprise that would manage both USA and other properties owned by Mercer and others in the Missoula area. The proposal listed a proposed staff and summaries of previous years expenses on the various properties, but did not have a budget or a projection of expected revenues and expenses. The proposal included Lynda and Dennis staying on as resident managers of USA. The proposal further suggested hiring Knudsen and maintenance employees Rich Kain and Jim Stensrud. Mercer did not agree to the proposal. Lynda, Knudsen and Mercer did , however, continue their discussions throughout the remainder of 2001 about the possibility of such an arrangement.

9. In September 2001, Dennis received an offer of early retirement from Smurfit-Stone. The McGees considered the possibility of Dennis receiving additional income working for Mercer in the event Dennis decided to take early retirement. In November, 2001, in part based upon the prospect of separate employment with Mercer's management enterprise, Dennis decided to retire from Smurfit-Stone effective January 1, 2003. Mercer Exhibit 156.

10. Also in September 2001, Lynda proposed that Dennis' work be increased from 10 hours to 25 hours per week. Mercer declined this offer. Instead, he asked Lynda and Dennis about Dennis' skills and abilities, the work Dennis was qualified to do, who Dennis would be replacing, and the work he would perform in addition to the ten hours of light maintenance that he was already performing.

11. Lynda responded to Mercer's inquiry in an October 1, 2001 letter to Mercer. McGee Exhibit 36. The letter explained that Dennis had been performing

routine maintenance on apartments that had been vacated. The letter stated that Dennis would be willing to assist both where needed and on projects normally done by outside contractors. Lynda then proposed that Dennis be paid \$20.00 dollars per hour for each hour he worked over his ten hours of work per week as a resident manager. On October 3, 2001, Mercer responded to the proposal showing interest. McGee Exhibit 35. He wanted to know more about how Dennis' time would be utilized and about Dennis' specific skills.

12. Lynda replied to Mercer's inquiries on October 16, 2001. McGee Exhibit 34. Lynda reminded Mercer that Dennis was already required to work ten hours a week in his capacity as resident manager and that he did so performing apartment renovation and improvement related to taking care of any emergencies and after hours and weekends." Lynda then proposed that in the future Dennis be compensated for "[a]ny additional hours Denny works on your property related to mechanical rooms, heat pumps, and other maintenance now scheduled by other outside contractors." *Id.* Mercer did not oppose or object to Lynda's proposal.

13. Mercer decided that he would take over management of USA on January 1, 2002. He also decided to take over management of other properties he and others owned in the Missoula area on February 1, 2002. He further resolved to hire Knudsen, Kain and Stensrud away from Shelter West to work for Mercer's new management enterprise.

14. In November, 2001, Mercer wrote to Lynda about the need to discuss staffing after the first of the year. McGee Exhibit 32. In December, 2001, Mercer himself recognized that Dennis would be taking on an employment role apart from his role as resident manager when he included discussion of Dennis in the staffing after January 1, 2002 and specifically stated that Dennis' "expanded role at Union Square [USA] should be determined by that time." McGee Exhibit 31.

15. On January 1, 2002, Mercer took over the management of USA. Dennis started in his new position, taking over the additional maintenance duties at USA. On January 9, 2002, Dennis signed a W-4 and became one of Mercer's employees. In almost three years of being a resident manager, he had never previously signed nor been asked to sign a W-4. Mercer acknowledged Dennis' status as an employee in his January 26, 2002 letter to Lynda in which he included Dennis on the list of "present employees on payroll." McGee Exhibit 29.

16. In the January 26, 2002 letter, Mercer granted Lynda and Knudsen broad authority over employees, including the authority to set their hours and to assign

them tasks. His only conditions upon that authority were (1) that the employees keep a record of the work performed (so that employee costs could be properly allocated between the various properties that would be under Mercer's management umbrella) and (2) that work would be assigned to the employees before hiring more expensive outside contractors to do work on the properties.

17. On February 1, 2002, Mercer took over the management of the other properties owned by him and others. Those additional properties under Mercer's management were:

- Union Square Apartments, a 108 unit apartment complex;
- Tamarack Apartments, an 8 unit apartment complex;
- Alamont Apartments, a 12 unit apartment complex;
- Catlin Plaza, a 10 suite commercial building;
- Washington Park, a 12 suite, two building commercial complex; and
- Two storage rental complexes, one in East Missoula and one on the west side of Missoula.

18. As of February 15, 2002, the staff of Mercer's management entity included Lynda and Dennis, Tesa Knudsen, Rich Kain and Jim Stensrud. Lynda and Dennis still acted as resident managers of USA. Lynda acted as general manager of Mercer's new enterprise. Dennis, in addition to his resident manager duties, performed maintenance that Kain and Stensrud did not have either the time or the skills to do.

19. By February 15, 2002, all of the properties and all of the staff, including Dennis as an employee, had been brought into the enterprise. In her capacity and with her authority as general manager, Lynda would meet with Dennis and Kain and would assign maintenance tasks for each day. If there was more work than Kain and Stensrud could complete, that additional work would be assigned to Dennis. Dennis never replaced Kain or Stensrud and was never given hours of work that could have been completed by either Kain or Stensrud.

20. On March 22, 2002, Mercer wrote to Lynda asking among other things, whether Dennis should be listed separate from Lynda on the employee roster. McGee Exhibit 27. He then specifically asked for a "complete and integrated employee roster." *Id.* Lynda responded by providing Mercer that employee roster on March 27, 2002. McGee Exhibit 26. Dennis was listed on the roster as having two positions. One was his position as "team resident manager, where he worked 10 hours each week to "compensate for housing." *Id.* The roster also listed him in a

separate position as “maintenance supervisor mechanical” and showed him working “15 - 20 [hours per week] as needed for maintenance.” *Id.*

21. Mercer acknowledged receiving the March 27, 2002 letter in a letter dated March 28, 2002. Mercer did not question Lynda’s roster nor the designation of Dennis as having two separate functions, one as part of the team resident management and the other in his own right as maintenance supervisor. McGee Exhibit 25. Mercer essentially acknowledged Dennis’ employment status as an employee separate from his status as part of the team resident manager. On December 12, 2002, Mercer gave Dennis an unsolicited bonus in recognition of Dennis good work “*as a part time employee*, apart from his status as a ‘partner’ in the on-site management team.” McGee Exhibit 16 (emphasis added).

22. Every two weeks, Lynda prepared a payroll summary, listing each employee and his or her hours. As a part-time employee, Dennis prepared his own time sheet each week detailing the hours worked and the jobs he worked on. A copy of the payroll summary was regularly sent to Mercer for his review. At no time did he question Dennis’ assignments or the amount of Dennis’ pay. Indeed, Mercer wanted to maximize the use of all employees, including Dennis, to minimize the expense of outside contractors. Indeed, on May 17, 2002, Mercer inquired of Lynda “Has Denny pretty much determined how much he wants to do and carved out his niche?” McGee Exhibit 21.

23. Throughout the balance of 2002 and 2003, Dennis continued to work pursuant to this arrangement, working approximately 10 hours each week on resident management duties and spending 15 to 20 hours each week doing his maintenance supervisor functions. He did not work any hours or take any jobs that could otherwise be covered by Kain and Stensrud. This included work on USA and other properties managed by Mercer’s property management entity. Dennis received W-2s reporting his income in his separate employment position for tax years 2002, 2003, and 2004. He had never received a W-2 prior to taking on the separate employment in 2002.

24. On September 7, 2004, Mercer, for reasons unrelated to Dennis, decided that he must discharge Lynda from her position and Dennis from both of his positions. Dennis did not quit his employment. The sole basis for Lynda’s discharge related to the way she had transferred funds from a general account to a petty cash account. The sole basis for Dennis’ discharge from both positions was his marriage to Lynda. Mercer did not allege any wrongdoing on Dennis’ part. In discharging Lynda and Dennis, Mercer stated “This is your notice of termination of your employment

here, which of course includes your capacity as the resident manager team, that includes your husband Denny; moreover, *his further employment as a vendor to the property* is no longer sanctioned.” McGee Exhibit 10 (emphasis added).

25. At the time of discharge, Dennis was part of the resident management team of USA, but he also held a separate employment status with Mercer as mechanical maintenance supervisor. Furthermore, at the time of discharge Mercer did not assert that no more work existed for Dennis or that it was more cost effective to have Kain or Stensrud do Dennis’ work. Mercer never complained that Dennis was working more hours than he should be nor did he ever complain about the quality of Dennis’ work. Both Kain and Stensrud recognized that Dennis did good work and Kain acknowledged at hearing (and the hearing examiner so finds) that Dennis never took work away from the other employees. Mercer produced no credible evidence at hearing to show that in fact Dennis’ work load was diminishing or that it was more cost effective to have others do Dennis’ work. As a matter of fact, the hearing examiner finds any such excuse for Dennis’ discharge to be false.

26. As part of his position as maintenance supervisor, Dennis received health insurance through his employment with Mercer, but only through his status as part of the resident management team of USA.

27. During 2002, Dennis worked 826.5 hours in his separate capacity maintenance supervisor for Mercer’s property management enterprise. Exhibits 39 and 46. He received a W-2 that year from Mercer showing that he earned \$17,071.42. Exhibit 45. In 2003, he worked 961 hours in his capacity as maintenance supervisor. Exhibits 40 and 46. He received a W-2 that year from Mercer showing that he earned \$19,795.68. Exhibit 44. In 2004, he worked 817.5 hours prior to his discharge. Exhibit 41 and 46. He received a W-2 that year from Mercer showing that he earned \$16,350.00. Exhibit 43.

28. Before and after his discharge, Dennis also earned income working as a consultant to his former employer during an annual Smurfit-Stone shutdown, known as an outage, in October. An entity known as Industrial Technology Corporation (ITC) employed him for this work. ITC apparently helped design and execute these annual outages in which equipment was inspected and tested for safety purposes. Dennis was paid \$50.00 per hour for this work. During 2005, he worked on various Smurfit-Stone projects in his consulting capacity. These stints occurred in March 2005, October 2005, (the annual outage), as well as work on a 7 or 8 day project on a steam and air leak survey at the Smurfit-Stone plant and work for 2 days on an upgrade for pollution control at the plant known as the MACT 1 project. During

2004 and 2005, Dennis could have done this work in addition to his work for Mercer.

29. After his discharge, Dennis looked for employment that was similar to the employment he had with Mercer. He applied for similar positions, but was unsuccessful in obtaining any of them. He also checked for work at the Montana Job Service in Missoula, but found nothing.

30. In 2005, Dennis managed to put together a job proposal to work as a consultant at the Smurfit-Stone plant that involved training plant employees in safety issues. This program will provide employment for Dennis in 2006 that he could not have taken had he still been employed in his maintenance supervisor capacity with Mercer. In 2004, Dennis earned \$26,150.00 in his consulting capacity with ITC. Mercer Exhibit 155. Dennis' Form 1099 wages for 2005 from ITC totaled \$19,950.00. During 2005, he also earned \$4,000.00 doing remodeling work for Sharon Stevenson.

31. Dennis does not wish to work full-time in the future and in fact that is part of the reason he left full-time employment at Smurfit-Stone. As of April, 2006, Dennis will have reestablished his position in the employment market and Mercer's discriminatory conduct will no longer affect Dennis' earnings.

IV. Opinion¹

Dennis asserts that he was discriminated against on the basis of his marriage to Lynda when he was discharged from his position as maintenance supervisor because Lynda was fired. He does not contend that being discharged from his resident management team duties (which were separate from his employment as maintenance supervisor) constituted any type of illegal discrimination. Dennis also contends that he is entitled to an award of back pay and front pay, which should include loss of his health insurance benefit. He has presented no evidence of and has not asked for damages for emotional distress.

Mercer counters that Dennis was never an employee except as part of the resident management team of USA. Mercer further contends that in any event, this is a mixed motive case and no award of damages is permissible. Finally, Mercer

¹ Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

argues that even if discrimination occurred, Dennis is not entitled to front pay because he has failed to mitigate his damages.

The substantial evidence in this case shows that Mercer employed Dennis separately from his resident management position and that he discriminated against Dennis, firing him solely because of his marriage to Lynda. In addition, Dennis is entitled to an award of back pay to rectify the unlawful discrimination, but that back pay does not include an award for the lost benefit of health insurance.

A. Mercer Employed Dennis as Maintenance Supervisor And That Employment Was Separate from Dennis' Position as Part of the Resident Team Management of USA.

Mercer's first line of defense to the charge of discrimination in this case is his contention that he never employed Dennis as an employee outside of Dennis' role as part of the resident management team of USA. That assertion is plainly belied by the facts of this case. The facts clearly demonstrate that Mercer knew Dennis held a separate employment position as maintenance supervisor with Mercer's property management enterprise. Perhaps most telling are Mercer's own words such as when he authorized a bonus for Dennis "***as a part time employee***, apart from his status as a 'partner' in the on-site management team." McGee Exhibit 16 (emphasis added). Equally compelling are the words he used to describe discharging both Lynda and Dennis for Lynda's perceived accounting errors. He did not simply state that Dennis was discharged from his role as part of the management team. He specifically noted that he was discharging Dennis not only from his duties as part of the management team, but also that "***his further employment as a vendor to the property*** is no longer sanctioned." McGee Exhibit 10 (emphasis added). The evidence is overwhelming that Mercer knew of and sanctioned Dennis' separate employment as a mechanical supervisor for Mercer's property management entity.

B. Mercer Discriminated Against Dennis By Firing Him From His Position As Maintenance Supervisor Just Because He Was Married To Lynda.

1. Dennis has Established A Prima Facie Case of Discrimination.

Montana law prohibits discrimination in employment based upon marital status. Mont. Code Ann. §49-2-303(1)(a). Discrimination in employment based on marital status includes employment discrimination based upon the identity of the spouse. *E.g.*, *Thompson v. Bd. of Trustees*, 192 Mont. 266, 269-70, 627 P.2d 1229, 1231 (1981); **and** *Van Haele v. Hysham School District*, No. 9301005671 (4/1/96). If Mercer separately employed Dennis and then discharged Dennis from that separate

employment because of his marriage to Lynda, Mercer violated the Montana Human Rights Act.

The parties have both argued that this is a case of indirect evidence of discrimination. When there is no direct evidence of discrimination, the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) indirect evidence standard applies. *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 912 P.2d 787. *McDonnell Douglas* applies a 3-tier burden-shifting analysis. *Laudert v. R.C.S.O.*, 218 MT 2000, ¶22, 301 Mont. 114, ¶ 22, 7 P.3d 386, ¶ 22. Title VII, Federal Civil Rights Act 1964, 42 U.S.C. § 2000e, *et seq.*, mirrors the Montana Human Rights Act prohibitions against discrimination. *E.g., Has The Pipe v. Park County*, 2005 ML 1044, ¶ 66. The principals articulated in federal cases applying Title VII cases are useful in interpreting and applying the Montana Human Rights Act.

Dennis must first must produce evidence that is sufficient to convince a reasonable fact finder that all of the elements of a *prima facie* case exist in this matter. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). He must show (1) that he is a member of a protected class; (2) that he was qualified for continue employment; and (3) that he was denied continued employment in circumstances which give rise to a reasonable inference that he was treated differently because of his membership in the protected class. *Vortex Fishing Systems v. Foss*, 2001 MT 312, ¶ 17, 308 Mont. 8, ¶ 17, 38 P.3d 836, ¶ 17. *See also*, Admin. R. Mont. 24.9.610(2)(a).

Mercer does not contest that the first two of the three elements have been met in this case. He argues that the third has not. But it clearly has. There is more than a reasonable inference here that Dennis was discharged from his separate position as maintenance supervisor solely because of his marriage to Lynda. Dennis did his work well. He did not take work from either Kain or Stensrud. Mercer never lodged any complaint about Dennis' work. Dennis was discharged at the same time as Lynda by the same document. That document listed no reason for discharging Dennis except his marriage to Lynda. Dennis established a *prima facie* case of discrimination.

2. Mercer Failed to Present Any Legitimate Basis to Rebut Dennis' Prima Facie Case, on Either "Legitimate Business Reasons" or "Mixed Motive" Bases.

Since Dennis proved his *prima facie* case of discrimination, the burden shifts to Mercer, who must then offer evidence that is sufficient, if believed, to support a finding that he discharged Dennis based on a factor other than his marriage to Lynda. *St. Mary's*, *op. cit.* at 506-07; *Heiat*, 275 Mont. at 328, 912 P.2d at 791 (*quoting Tx. Dpt. Comm. Aff. v. Burdine*, 450 U.S. 248, 252-53 (1981)).

Mercer has suggested several reasons why his conduct was motivated by legitimate business decisions. Boiled to their essence, the reasons are these: (1) he did not know Dennis was an employee and (2) he did not need Dennis' services. Mercer also suggest that this is a mixed motive case that precludes Dennis from recovery of damages.

Mercer failed to prove his first reason. Mercer certainly knew and agreed that Dennis was employed as separate employee and further treated Dennis as a separate employee beginning in 2002.

Likewise, Mercer has not proved his second reason—Dennis' services were not superfluous and Mercer's argument in this regard cannot be believed. Dennis' and Kain's testimony showed that Dennis provided a service that in fact was not covered by either Kain or Stensrud and was not provided more cost effectively by an outside contractor.

Moreover, Mercer's testimony in this case was not credible because he "flip flopped" on both the basis for the discharge and whether a discharge even occurred. A fact finder may properly find that the presumption for speaking the truth has been overcome where there is evidence that a witness has made inconsistent statements. Mont. Code Ann. § 26-1-302. To say the least, Mercer has made several inconsistent statements in this case with respect to material issues. Those inconsistent statements cannot be ignored in considering his credibility as a witness.

At the time of Dennis' discharge, Mercer offered no basis for discharging Dennis independent of Dennis' marriage to Lynda. In his response to Dennis' unemployment insurance claim, he never raised performance problems with Dennis' work nor did he suggest that Dennis' services were no longer needed. *See* McGee Exhibit 52. Since that time, he has raised a plethora of reasons for the discharge unrelated to Dennis' marital status.

In his responses to the Human Rights Bureau's investigation, Mercer first conceded that McGee had been terminated. He later back pedaled, stating in his August 12, 2005 letter to the HRB that Dennis was not fired and "nothing I have said can be fairly tortured to contradict that fact." *See* McGee Exhibit 3. In the face of the plain language of the termination letter, Mercer's August 12, 2005 statement to HRB could not be further from the truth.

Mercer's inconsistent statements rendered his entire testimony incredible. Because his testimony was incredible, he presented no substantial evidence of

legitimate reasons for Dennis' dismissal. He thus failed to rebut Dennis' prima facie showing of discrimination. Accordingly, Dennis has proven by a preponderance of the evidence that Mercer discharged him from his separate employment in violation of Montana Code Annotated §49-2-303(1)(a).

If Mercer had carried his burden of offering evidence of legitimate business reasons for his adverse action against Dennis, Dennis would then have the burden of proving Mercer's proffered legitimate reasons were not his true reasons, but were a pretext for discrimination. Admin. R. Mont. 24.9.610(3). "The appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has 'use[d] the factor reasonably in light of the employer's stated purpose as well as its other practices.'" *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) (*quoting Kouba v. Allstate Ins.*, 691 F.2d 873, 876-77 (9th Cir. 1982)). Mercer did not carry his burden, and the evidence, taken as a whole, does not establish his "legitimate business reasons" defense.

The argument that this is a mixed motive case was, for similar reasons, not persuasive. A mixed motive case arises when the charging party proves illegal discrimination "but the respondent proves that the same action would have been taken in the absence of the unlawful discrimination . . ." Admin. R. Mont. 24.9.611. *See also, Laudert, supra*, ¶ 25. Neither Mercer nor Dennis' work colleagues ever found Dennis' work to be unsatisfactory or in the nature of "make work." Dennis completed necessary work for Mercer's property management company and was an integral part of Mercer's overarching scheme to reduce the overhead costs of property management by utilizing Dennis' skills wherever possible to eliminate the need for outside contractors. The sheer amount of time that Mercer allowed this arrangement to proceed—almost two years without ever interposing an objection—severely undercut any argument that Mercer in fact felt that the arrangement was not beneficial to the property management company and that in any event he would have released Dennis from his position. Mercer's management style regarding profit and loss, including every facet of cost overhead, was very detailed and "hands-on." Had Dennis' additional employment been either unnecessary or cost ineffective for the property management enterprise, Mercer would undoubtedly have stopped it long before he discharged Dennis.

In addition, as noted above, Mercer's testimony in this case is simply not credible. Thus, the substantial evidence of record does not support the mixed motive defense in this case, and the hearing examiner rejects the defense.

C. Damages.

The department may order any reasonable measure to rectify any harm McGee suffered as a result of illegal discrimination. Mont. Code Ann. §§ 49-2-506(1)(b). The purpose of awarding damages in an employment discrimination case is to make the victim whole. *E.g.*, *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *see also Dolan v. School District No. 10* (1981), 195 Mont. 340, 636 P.2d 825, 830; *accord*, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405.

In an employment discrimination case, a charging party who has proved discrimination has a presumptive entitlement to an award of back pay. *Dolan, supra*. Back pay awards should redress the full economic injury the charging party suffered to date because of the unlawful discrimination. *Rasimas v. Mich. Dpt. Ment. Health* (6th Cir. 1983), 714 F.2d 614, 626. Back pay is computed from the date of the discriminatory act until the date of the final judgment. *EEOC v. Monarch Tool Co.*, 737 F.2d 1444, 1451-53 (6th Cir. 1980).

A charging party must make reasonable efforts to mitigate damages by seeking comparable, alternative employment. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982) The burden of proving a lack of reasonable diligence is upon the respondent. *P.W. Berry, supra*.

The charging party may also recover for losses in future earnings, if and only if the evidence establishes that future losses are likely to result from the discriminatory acts. *Martinell v. Montana Power Co.* (1994), 268 Mont. 292, 886 P.2d 421, 439. Front pay is an amount granted for probable future losses in earnings, salary and benefits to make the victim of discrimination whole when reinstatement is not feasible; front pay is only temporary until the charging party can reestablish a "rightful place" in the job market. *Sellers v. Delgado Comm. College*, 839 F.2d 1132 (5th Cir. 1988), *Shore v. Federal Expr. Co.*, 777 F.2d 1155, 1158 (6th Cir. 1985); *see also, Hearing Aid Institute v. Rasmussen*, (1993), 258 Mont. 367, 852 P.2 628. Prejudgment interest on lost income is also a proper part of the damages award. *P.W. Berry, op. cit.*, 779 P.2d at 523; *Foss v. J.B. Junk* (1987), HR No. SE84-2345.

With respect to back pay, the preponderant evidence establishes that Dennis worked the hours he claimed to have worked in 2002, 2003 and 2004. Not only Dennis, but indeed Kain testified that Dennis never took hours away from him or Stensrud. Thus, Dennis' hours were not simply "make work." They were legitimate hours and, absent other factors demonstrating a lack of diligence or appropriate offset, provide a reasonable basis for calculating back pay damages. The evidence

regarding Dennis' additional work in consulting for ITC during 2004 and 2005 does not establish an appropriate offset. Dennis was able to do his consulting work and to do his work for USA. Likewise, the respondent has failed to show preponderantly that Dennis failed to mitigate his damages during those time periods by looking for appropriate work. Dennis' testimony establishes this point and shows that he applied for jobs and searched for jobs at the Montana Job Service. Thus, Dennis should be compensated for his lost wages, a total of \$30,409.60 (\$380.12 per week x 80 weeks beginning after the week of his last day of work, September 7, 2004). Prejudgment interest on this amount at 10% per annum amounts to \$2,857.10.²

The front pay that Dennis seeks is a different story. Unquestionably, Mercer would never permit Dennis to go back to work for the property maintenance enterprise. Reinstatement is not a viable alternative. However, as Dennis himself testified, in 2005 he was able to obtain consulting work (that began in 2006) for Industrial Technology Corporation consulting for Smurfit-Stone, his former employer, in the area of safety training. He would not have been able to do this consulting work if he had kept his employment with Mercer. Dennis specifically stated at hearing "I don't think I would have ever got a project like this if I was still working at Union Square." That project pays him \$50.00 per hour. Dennis' Form 1099 wages for 2005 from ITC alone totaled \$19,950.00. He also had income of \$4,000.00 from completing a remodeling project for Sharon Stevenson. Based on Dennis' testimony about his consulting projects, the impediment that continued employment at USA would have presented to obtaining those consulting projects, and the earnings shown in 2005, it is apparent that as of April, 2006, Dennis has reestablished his "rightful place" in the market and that front pay is not warranted.

The insurance benefit accorded to Dennis did not come through his separate employment. He received this benefit only as a result of his marriage to Lynda and his part in the resident management team. The loss of his separate employment was not the causative factor in the loss of his health insurance benefit. Dennis is not, therefore, entitled to damages resulting from the loss of the health benefit.

²The hearing examiner calculated interest on the amount of lost wages by determining the daily value of interest on the monthly income lost by the unlawful discharge (10% per annum divided by 365 days = .00027% x \$1647.18 (\$380.12 x 52 weeks divided by 12 months = monthly income of \$1,647.18) = \$.44 per day) and then calculating the number of days that have elapsed between the month of lost income and the date of the judgment in this matter, May 19, 2006. This process was applied to each of the months of lost income, and then the interest value for each of these separate months was added together to arrive at the total amount of interest due on the lost income, \$2,857.10.

V. Conclusions of Law

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. § 49-2-509(7).
2. Mercer unlawfully discriminated against Dennis McGee by discharging him from his separate employment as maintenance supervisor solely because he was married to Lynda McGee in violation of Mont. Code Ann. § 49-2-301(1)(a).
3. Pursuant to Mont. Code Ann. § 49-2-506(1)(b), Mercer must pay Dennis McGee the sum of \$30,409.60 in damages and \$2,857.10 in pre-judgment interest on those damages through May 19, 2006.
4. The circumstances of the illegal discrimination mandate imposition of particularized affirmative relief to eliminate the risk of continued violations of the Human Rights Act. Mont. Code Ann. § 49-2-506(1).

VI. Order

1. Judgment is found in favor of Dennis McGee and against Thomas Mercer d/b/a Union Square Apartments as Mercer illegally discriminated against Dennis because of his marital status.
2. Within 120 days of this order, Thomas Mercer must attend four hours of training, conducted by a professional trainer in the field of personnel relations and/or civil rights law, on the subject of discrimination and terms and conditions of employment, with prior approval of the training by the Human Rights Bureau. Upon completion of the training, Mercer shall obtain a signed statement of the trainer indicating the content of the training, the date it occurred and that Mercer attended for the entire period. Mercer must submit the statement of the trainer to the Human Rights Bureau within two weeks after the training is completed.
3. Thomas Mercer d/b/a Union Square Apartments Lodge is enjoined from taking any adverse employment action against any employee based on marital status.
4. Thomas Mercer d/b/a Union Square Apartments must pay Dennis McGee the sum of \$33,266.70 representing \$30,409.60 in damages and \$2,857.10 in pre-judgment interest on those unpaid wages.

Dated: May 19, 2006.

/s/ GREGORY L. HANCHETT

Gregory L. Hanchett, Hearing Examiner
Montana Department of Labor and Industry